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The President

Notice of July 17, 2012—The Continuation of the National Emergency With Respect to the Former Liberian Regime of Charles Taylor

Correction

In Presidential document 2012–17703 beginning on page 42415 in the issue of Wednesday, July 18, 2012, make the following correction:

On page 42415, the date following ''Notice of'' should read ''July 17, 2012''. Also, in the third paragraph of the main text, the words ''*Federal Register*'' should appear in italics.

[FR Doc. C1–2012–17703
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Presidential Documents

Executive Order 13621 of July 26, 2012

White House Initiative on Educational Excellence for African Americans

By the authority vested in me as President by the Constitution and the laws of the United States of America, to restore the country to its role as the global leader in education, to strengthen the Nation by improving educational outcomes for African Americans of all ages, and to help ensure that all African Americans receive an education that properly prepares them for college, productive careers, and satisfying lives, it is hereby ordered as follows:

Section 1. *Policy.* Over the course of America's history, African American men and women have strengthened our Nation, including by leading reforms, overcoming obstacles, and breaking down barriers. In the less than 60 years since the *Brown* v. *Board of Education* decision put America on a path toward equal educational opportunity, America's educational system has undergone a remarkable transformation, and many African American children who attended the substandard segregated schools of the 1950s have grown up to see their children attend integrated elementary and secondary schools, colleges, and universities.

However, substantial obstacles to equal educational opportunity still remain in America's educational system. African Americans lack equal access to highly effective teachers and principals, safe schools, and challenging college-preparatory classes, and they disproportionately experience school discipline and referrals to special education. African American student achievement not only lags behind that of their domestic peers by an average of two grade levels, but also behind students in almost every other developed nation. Over a third of African American students do not graduate from high school on time with a regular high school diploma, and only four percent of African American high school graduates interested in college are college-ready across a range of subjects. An even greater number of African American males do not graduate with a regular high school diploma, and African American males also experience disparate rates of incarceration.

Significantly improving the educational outcomes of African Americans will provide substantial benefits for our country by, among other things, increasing college completion rates, productivity, employment rates, and the number of African American teachers. Enhanced educational outcomes lead to more productive careers, improved economic opportunity, and greater social well-being for all Americans. Complementing the role of Historically Black Colleges and Universities (HBCUs) in preparing generations of African American students for successful careers, and the work of my Administration's separate White House Initiative on Historically Black Colleges and Universities, this new Initiative's focus on improving all the sequential levels of education will produce a more effective educational continuum for all African American students.

To reach the ambitious education goals we have set for our Nation, as well as to ensure equality of access and opportunity for all, we must provide the support that will enable African American students to improve their level of educational achievement through rigorous and well-rounded academic and support services that will prepare them for college, a career, and a lifetime of learning.

Sec. 2. *White House Initiative on Educational Excellence for African Americans.* (a) *Establishment.* There is hereby established the White House Initiative on Educational Excellence for African Americans (Initiative), to be housed in the Department of Education (Department). There shall be an Executive Director of the Initiative, to be appointed by the Secretary of Education (Secretary). The Initiative shall be supported by the Interagency Working Group established under subsection (c) of this section and advised by the Commission established under section 3 of this order.

(b) *Mission and Functions.*

(1) The Initiative will help to restore the United States to its role as the global leader in education; strengthen the Nation by improving educational outcomes for African Americans of all ages; and help ensure that African Americans receive a complete and competitive education that prepares them for college, a satisfying career, and productive citizenship.

(2) The Initiative will complement and reinforce the Historically Black Colleges and Universities Initiative established by Executive Order 13532 of February 26, 2010, and together, they both will support enhanced educational outcomes for African Americans at every level of the American education system, including early childhood education; elementary, secondary, and postsecondary education; career and technical education; and adult education.

(3) To help expand educational opportunities, improve educational outcomes, and deliver a complete and competitive education for all African Americans, the Initiative shall, consistent with applicable law, promote, encourage, and undertake efforts designed to meet the following objectives:

(i) increasing general understanding of the causes of the educational challenges faced by African American students, whether they are in urban, suburban, or rural learning environments;

(ii) increasing the percentage of African American children who enter kindergarten ready for success by improving their access to high-quality programs and services that enable early learning and development of children from birth through age 5;

(iii) decreasing the disproportionate number of referrals of African American children from general education to special education by addressing the root causes of the referrals and eradicating discriminatory referrals;

(iv) implementing successful and innovative education reform strategies and practices in America's public schools to ensure that African American students receive a rigorous and well-rounded education in safe and healthy environments, and have access to high-level, rigorous course work and support services that will prepare them for college, a career, and civic participation;

(v) ensuring that all African American students have comparable access to the resources necessary to obtain a high-quality education, including effective teachers and school leaders, in part by supporting efforts to improve the recruitment, preparation, development, and retention of successful African American teachers and school leaders and other effective teachers and school leaders responsible for the education of African American students;

(vi) reducing the dropout rate of African American students and helping African American students graduate from high school prepared for college and a career, in part by promoting a positive school climate that does not rely on methods that result in disparate use of disciplinary tools, and by supporting successful and innovative dropout prevention and recovery strategies that better engage African American youths in their learning, help them catch up academically, and provide those who have left the educational system with pathways to reentry;

(vii) increasing college access and success for African American students and providing support to help ensure that a greater percentage

of African Americans complete college and contribute to the goal of having America again lead the world in the proportion of adults who are college graduates by 2020, in part through strategies to strengthen the capacity of institutions of higher education that serve large numbers of African American students, including community colleges, HBCUs, Predominantly Black Institutions (PBIs), and other institutions; and

(viii) enhancing the educational and life opportunities of African Americans by fostering positive family and community engagement in education; reducing racial isolation and resegregation of elementary and secondary schools to promote understanding and tolerance among all Americans; improving the quality of, and expanding access to, adult education, literacy, and career and technical education; and increasing opportunities for education and career advancement in the fields of science, technology, engineering, and mathematics.

(4) In working to fulfill its mission and objectives, the Initiative shall, consistent with applicable law:

(i) identify evidence-based best practices that can provide African American students a rigorous and well-rounded education in safe and healthy environments, as well as access to support services, which will prepare them for college, a career, and civic participation;

(ii) develop a national network of individuals, organizations, and communities to share and implement best practices related to the education of African Americans, including those identified as most at risk;

(iii) help ensure that Federal programs and initiatives administered by the Department and other agencies are serving and meeting the educational needs of African Americans, including by encouraging agencies to incorporate best practices into appropriate discretionary programs where permitted by law;

(iv) work closely with the Executive Office of the President on key Administration priorities related to the education of African Americans;

(v) increase the participation of the African American community, including institutions that serve that community, in the Department's programs and in education-related programs at other agencies;

(vi) advise the officials of the Department and other agencies on issues related to the educational attainment of African Americans;

(vii) advise the Secretary on the development, implementation, and coordination of educational programs and initiatives at the Department and other agencies that are designed to improve educational opportunities and outcomes for African Americans of all ages; and

(viii) encourage and develop partnerships with public, private, philanthropic, and nonprofit stakeholders to improve African Americans' readiness for school, college, and career, as well as their college persistence and completion.

(5) The Initiative shall periodically publish reports on its activities. The Secretary and the Executive Director of the Initiative, in consultation with the Working Group and the Chair of the Commission established under subsection (c) of this section and section 3 of this order, respectively, may develop and submit to the President recommendations designed to advance and promote educational opportunities and attainment for African Americans.

(c) *Interagency Working Group.*

(1) There is established the Federal Interagency Working Group on Educational Excellence for African Americans (Working Group), which shall be convened and chaired by the Initiative's Executive Director and that shall support the efforts of the Initiative described in subsection (b) of this section.

(2) The Working Group shall consist of senior officials from the Department, the White House Domestic Policy Council, the Department of Justice,

the Department of Labor, the Department of Health and Human Services, the National Science Foundation, the Department of Defense, and such additional agencies and offices as the President may subsequently designate. Senior officials shall be designated by the heads of their respective agencies and offices.

(3) The Initiative's Executive Director may establish subgroups of the Working Group to focus on different aspects of the educational system (such as early childhood education, K–12 education, higher education (including HBCUs and PBIs), career and technical education, adult education, or correctional education and reengagement) or educational challenges facing particular populations of African Americans (such as young men, disconnected or out-of-school youth, individuals with disabilities, children identified as gifted and talented, single-parent households, or adults already in the workforce).

(d) *Administration.* The Department shall provide funding and administrative support for the Initiative and the Working Group, to the extent permitted by law and within existing appropriations. To the extent permitted by law, other agencies and offices represented on the Working Group may detail personnel to the Initiative, to assist the Department in meeting the objectives of this order.

(e) *Collaboration Among White House Initiatives.* The Initiative may collaborate with the White House Initiatives on American Indian and Alaska Native Education, Educational Excellence for Hispanics, Asian-American and Pacific Islanders, and (consistent with section 3(c) of this order) Historically Black Colleges and Universities, whenever appropriate in light of their shared objectives.

Sec. 3. *President's Advisory Commission on Educational Excellence for African Americans.* (a) *Establishment.* There is established in the Department the President's Advisory Commission on Educational Excellence for African Americans (Commission).

(b) *Commission Mission and Scope.* The Commission shall advise the President and the Secretary on matters pertaining to the educational attainment of the African American community, including:

(1) the development, implementation, and coordination of educational programs and initiatives at the Department and other agencies to improve educational opportunities and outcomes for African Americans of all ages;

(2) efforts to increase the participation of the African American community and institutions that serve the African American community in the Department's programs and in education programs at other agencies;

(3) efforts to engage the philanthropic, business, nonprofit, and education communities in a national dialogue on the mission and objectives of this order; and

(4) the establishment of partnerships with public, private, philanthropic, and nonprofit stakeholders to meet the mission and policy objectives of this order.

The Commission shall meet periodically, but at least twice a year.

(c) *Commission Membership and Chair.*

(1) The Commission shall consist of not more than 25 members appointed by the President. The President shall designate one member of the Commission to serve as Chair. The Executive Director of the Initiative shall also serve as the Executive Director of the Commission and administer the work of the Commission. The Chair of the Commission shall work with the Executive Director to convene regular meetings of the Commission, determine its agenda, and direct its work, consistent with this order.

(2) The Commission may include individuals with relevant experience or subject-matter expertise that the President deems appropriate, as well as individuals who may serve as representatives of a variety of sectors, including the education sector (early childhood education, elementary

and secondary education, higher education (including HBCUs and PBIs), career and technical education, and adult education), labor organizations, research institutions, the military, corporate and financial institutions, public and private philanthropic organizations, and nonprofit and community-based organizations at the national, State, regional, or local levels.

(3) In addition to the 25 members appointed by the President, the Commission shall also include two members from the President's Board of Advisors on Historically Black Colleges and Universities (Board), designated by the President. In turn, the Board will henceforth include two members from the Commission, designated by the President. This reciprocal arrangement will foster direct communication and vital consultations that will benefit both bodies.

(4) The Executive Director of the Commission and the Executive Director of the Board shall convene at least one annual joint meeting between the Commission and the Board for the purpose of sharing information and forging collaborative courses of action designed to fulfill their respective missions. Such meetings shall be in addition to other prescribed meetings of the Commission or Board.

(5) The Executive Director of the Commission shall be a non-voting, ex officio member of the Board and shall be the Commission's liaison to the Board; and the Executive Director of the Board shall be a non-voting, ex officio member of the Commission and shall be the Board's liaison to the Commission.

(d) *Commission Administration*. The Department shall provide funding and administrative support for the Commission, to the extent permitted by law and within existing appropriations. Members of the Commission shall serve without compensation but shall be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5701–5707). Insofar as the Federal Advisory Committee Act, as amended (5 U.S.C. App.) (the ''Act''), may apply to the administration of the Commission, any functions of the President under the Act, except that of reporting to the Congress, shall be performed by the Secretary, in accordance with the guidelines issued by the Administrator of General Services.

Sec. 4. *General Provisions.* (a) The heads of agencies shall assist and provide information to the Initiative as may be necessary to carry out the functions of the Initiative, consistent with applicable law.

(b) Nothing in this order shall be construed to impair or otherwise affect:

(1) the authority granted by law to an executive department, agency, or the head thereof; or

(2) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,
Washington, July 26, 2012.

[FR Doc. 2012–18868
Filed 7–31–12; 8:45 am]
Billing code 3295–F2–P

Presidential Documents

Proclamation 8844 of July 27, 2012

National Korean War Veterans Armistice Day, 2012

By the President of the United States of America

A Proclamation

Sixty-two years ago, the Communist invasion of the Republic of Korea summoned a generation of Americans to serve. From the landings at Inchon to the Pusan Perimeter, from Heartbreak Ridge to Chosin Reservoir, our forces fought with immeasurable courage in one of the defining moments of the Cold War. Today, on the 59th anniversary of the Military Armistice Agreement signed at Panmunjom, we honor all who served in the Korean War, and we pay lasting tribute to the brave men and women who gave their lives for our Nation.

Through 3 years of combat, American service members and allied forces overcame some of the most unforgiving conditions in modern warfare. They weathered bitter winters and punishing heat. They fought on with courage and distinction—often outgunned and outmanned. Many Americans suffered wounds that would never fully heal. Still more we count among the captured and the missing, and our resolve to account for Americans who did not come home will never waver. Most of all, we honor the tens of thousands of Americans who gave their lives defending a country they had never known and a people they had never met. Their legacy lives on not only in the hearts of the American people, but in a Republic of Korea that is free and prosperous; an alliance that is stronger than ever before; and a world that is safer for their service.

Shortly after the Military Armistice Agreement was signed, President Dwight D. Eisenhower noted that ''with special feelings of sorrow—and of solemn gratitude—we think of those who were called upon to lay down their lives in that far-off land to prove once again that only courage and sacrifice can keep freedom alive upon the earth.'' Nearly six decades later, we renew that call to honor and reflect. Now and forever, let us keep faith with our Korean War veterans by upholding the ideals they fought to protect, and by supporting them with the care and respect they so deeply deserve.

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 July 27, 2012, as National Korean War Veterans Armistice Day. I call upon all Americans to observe this day with appropriate ceremonies and activities that honor our distinguished Korean War veterans.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-seventh day of July, in the year of our Lord two thousand twelve, and of the Independence of the United States of America the two hundred and thirty-seventh.

[FR Doc. 2012–18869
Filed 7–31–12; 8:45 am]
Billing code 3295–F2–P

Rules and Regulations

Federal Register

Vol. 77, No. 148

Wednesday, August 1, 2012

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

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

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Part 12

[CBP Dec. 12–13]

RIN 1515–AD90

Extension of Import Restrictions on Archaeological Objects and Ecclesiastical and Ritual Ethnological Materials From Cyprus; Correction

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule; correction; correcting amendment.

SUMMARY: On July 13, 2012, U.S. Customs and Border Protection (CBP) published in the **Federal Register** a final rule reflecting an extension of import restrictions on certain archaeological and ethnological materials from Cyprus and announcing that the Designated List of materials covered by the restrictions has been revised. The Designated List and the regulatory text in that document contain language which is inadvertently not consistent with the rest of the document as to the historical period that the import restrictions cover for ecclesiastical and ritual ethnological materials from Cyprus. This document corrects the inconsistent language to clarify that ecclesiastical and ritual ethnological materials from Cyprus representing the Byzantine and Post Byzantine periods, dating from approximately the 4th century A.D. to 1850 A.D., are subject to the import restrictions.

DATES: *Effective Date:* The corrections set forth in this document are effective on August 1, 2012.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, (202) 325–0268.

SUPPLEMENTARY INFORMATION:

Background

On July 13, 2012, CBP published in the **Federal Register** (77 FR 41266), as CBP Decision Number 12–13, a final rule reflecting an extension of import restrictions on certain archaeological and ethnological materials from Cyprus and announcing that the Designated List of materials covered by the restrictions (also published with CBP Dec. 12–13) has been revised to reflect that the ethnological articles previously covered under the list through the Byzantine period (through approximately the 15th century A.D.) are also covered if dating through the Post-Byzantine period (to 1850 A.D.). The Designated List contains a list of certain archaeological materials and a list of certain ethnological materials. The revisions were limited to the list of ethnological materials.

The rule also announced an amendment to the list of ethnological materials to clarify that certain mosaics of stone and wall paintings (referred to as ''wall hangings'' in CBP Dec. 12–13) include those depicting images of Saints along with those depicting images of Christ, Archangels, and the Apostles. The restrictions were extended for a five-year period (through July 16, 2017) pursuant to determinations of the State Department under the terms of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

In CBP Dec. 12–13, the title of the Designated List was erroneously abbreviated where the Department of State Web site is listed. This document corrects the omission and clarifies that the covered ecclesiastical and ritual ethnological materials are those dating to the Byzantine and Post-Byzantine periods. In the list of ethnological materials, CBP inadvertently retained references to the Byzantine period. As the list was revised to cover listed ethnological materials if dating to the Post-Byzantine period as well, references to the Byzantine period in the list are inconsistent and misleading. This document corrects the oversight and removes all references to the Byzantine period in the list. In addition, this document corrects the language in Amendatory Instruction number 2 of CBP Dec. 12–13 which imprecisely set forth in the amended regulation the end point of the time period applicable to the ethnological materials covered by the restrictions. This correction remedies an inconsistency with the time period which was correctly reflected in the heading of the list of ethnological materials found on page 41269 of the published document (in the first column).

Correction of Publication

Accordingly, the publication on July 13, 2012 of the final regulation (CBP Dec. 12–13), which was the subject of FR Doc. 2012–16989, is corrected as follows:

Preamble:

1. In the first column on page 41267, in the last paragraph that extends into the second column, first sentence, remove the words ''and Ecclesiastical and Ritual Ethnological Materials'' and add in their place the words ''and Byzantine and Post-Byzantine Period Ecclesiastical and Ritual Ethnological Materials'';

2. In the first column on page 41269:

a. Under the heading ''B. Lead,'' remove the words ''date to the Byzantine period and'', and

b. Under the heading ''II. Wood,'' in the first sentence, remove the words ''during the Byzantine period'';

3. In the second column on page 41269:

a. Under the heading ''V. Textiles—Ritual Garments,'' in the first sentence, remove the words ''from the Byzantine period'',

b. Under the heading ''A. Wall Mosaics,'' in the first sentence, remove the words ''Dating to the Byzantine period, wall mosaics'' and add in their place the words ''Wall mosaics'', and

c. Under the heading ''VII. Frescoes/Wall Paintings,'' in the first sentence, remove the words ''the Byzantine period''.

Correcting amendment:

§ 12.104g(a) [Amended]

■ 4. In § 12.104g(a), the table of the list of agreements imposing import

restrictions on described articles of cultural property of State Parties is amended in the entry for Cyprus by, in the column headed ''Cultural Property,'' removing the entry and adding in its place the following entry: ''Archaeological material of pre-Classical and Classical periods ranging approximately from the 8th millennium B.C. to 330 A.D. and ecclesiastical and ritual ethnological material representing the Byzantine and Post-Byzantine periods ranging from approximately the 4th century A.D. to 1850 A.D.''

Dated: July 26, 2012.

Harold M. Singer,

Director, Regulations and Disclosure Law Division, U.S. Customs and Border Protection.

Heidi Cohen,

Senior Counsel for Regulatory Affairs, Office of the Assistant General Counsel for General Law, Ethics & Regulation, Department of the Treasury.

[FR Doc. 2012–18670 Filed 7–31–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9597]

RIN 1545–BF34

Deductions for Entertainment Use of Business Aircraft

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the use of business aircraft for entertainment. These final regulations affect taxpayers that deduct expenses for entertainment, amusement, or recreation provided to specified individuals. The final regulations reflect statutory amendments under the American Jobs Creation Act of 2004 (AJCA) and the Gulf Opportunity Zone Act of 2005 (GOZA).

DATES: *Effective Date:* These regulations are effective August 1, 2012.

Applicability Date: For dates of applicability, see §§ 1.61–21(g)(14)(iii), 1.274–9(e), and 1.274–10(h).

FOR FURTHER INFORMATION CONTACT: Michael Nixon (section 274), (202) 622–4930; or Lynne A. Camillo (section 61), (202) 622–6040 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains final amendments to the Income Tax Regulations, 26 CFR part 1, relating to the disallowance under section 274 of the Internal Revenue Code (Code) of deductions for the use of business aircraft for entertainment.

On June 15, 2007, a notice of proposed rulemaking (REG–147171–05) regarding the use of business aircraft for entertainment was published in the **Federal Register** (72 FR 33169). Written and electronic comments responding to the notice of proposed rulemaking were received. A public hearing on the proposed regulations was held on October 25, 2007. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The comments and revisions are discussed in the preamble.

Explanation of Provisions and Summary of Comments

1. Determination of Costs

a. Application of Disallowance to Fixed Costs

The proposed regulations provide that expenses subject to disallowance under section 274(a) include variable costs such as fuel and landing fees, and fixed costs such as depreciation, hangar fees, pilot salaries, and other items not directly related to an individual flight. Commentators suggested that the final regulations should limit expenses subject to disallowance to the direct or variable costs of a flight and exclude fixed costs. The final regulations do not adopt this comment because section 274(e)(2) does not explicitly differentiate between fixed and variable expenses and because such an interpretation is contrary to Congressional intent.

b. Charter Rate Safe Harbor

The proposed regulations requested comments on whether, as an alternative to determining actual expenses, the final regulations should allow taxpayers to determine the amount of expenses paid or incurred for entertainment flights by reference to charter rates. The proposed regulations asked for specific comments on the availability of substantiated actual, published, undiscounted charter rates charged to the general public by companies that meet certain requirements.

Commentators generally endorsed the inclusion of a charter rate safe harbor in the final regulations. They suggested that the IRS establish rates either by conducting a survey of average charter rates by region or by authorizing representatives of the industry to create a charter rate reporting system. One commentator suggested that if the IRS does not establish charter rates, individual taxpayers should be allowed to determine charter rates. Commentators also stated that a charter rate safe harbor should include rates for rentals of small piston aircraft, which taxpayers use extensively for business but normally are not chartered.

The difficulty of determining accurate and reliable charter rates continues to be an impediment to establishing a charter rate safe harbor. Accordingly, the final regulations do not include these rules. However, the final regulations authorize the IRS to adopt charter rate or other safe harbors in future published guidance, see § 601.601(d).

c. Depreciation

The proposed regulations permit a taxpayer to elect to compute depreciation expenses on a straight-line basis for all of the taxpayer's aircraft and all taxable years for purposes of calculating expenses subject to disallowance, even if the taxpayer uses another method to compute depreciation for other purposes. The proposed regulations provide a transition rule for applying the straight-line election to aircraft placed in service in taxable years preceding the election, which requires the taxpayer to apply the straight-line method as if it had been applied from the year the aircraft was placed in service.

A commentator requested that the final regulations allow a separate election for each aircraft. The final regulations do not allow an aircraft-by-aircraft election. Requiring taxpayers to make the election for all aircraft appropriately balances the policies of promoting business investment through the allowance of additional first-year depreciation and denying a tax benefit for entertainment use of business aircraft.

The commentator also suggested that changing depreciation methods under the transition rule may result in disallowing more than 100 percent of the cost of the aircraft. In response to the comment, the final regulations clarify that, in any taxable year, the depreciation disallowance does not exceed the amount of otherwise allowable depreciation. Thus, the sum of the allowable depreciation and the depreciation disallowed will not exceed 100 percent of basis, regardless of the taxable year a taxpayer makes the straight-line election.

The final regulations provide examples illustrating how taxpayers determine depreciation and basis under the election.

d. Interest Expense

A commentator asked for clarification on whether interest is an expense that is subject to disallowance. In response to this comment, the final regulations clarify that interest is subject to disallowance if the underlying debt is secured by or properly allocable to an aircraft used for entertainment.

e. Aircraft Aggregation

The proposed regulations provide that a taxpayer may aggregate expenses for aircraft of similar cost profiles to calculate expenses subject to disallowance. The proposed regulations require that aircraft have the same engine type and number and suggest other factors relevant to whether aircraft are of a similar cost profile.

A commentator requested that the final regulations make the aircraft aggregation rules less restrictive. The commentator opined that taxpayers should be allowed to aggregate the expenses of all aircraft to alleviate the administrative burden of computing and allocating expenses to entertainment use of the aircraft. The commentator stated that, alternatively, the rules inappropriately require similar cost profiles to include the same number of engines and require an unduly detailed analysis of the aircraft characteristics.

The final regulations retain the aircraft aggregation rules. Aggregating the expenses of all aircraft regardless of cost characteristics would create unacceptable distortions in the amount of expenses allocated to the use of each aircraft. The rules are sufficiently broad and flexible for taxpayers to easily apply them.

2. Allocation of Costs to Flights

a. Primary Purpose Test

The proposed regulations provide two alternative methods for allocating the costs associated with the use of an aircraft to provide entertainment to specified individuals. The occupied seat hours or miles allocation method divides the total expenses for the year by the number of occupied seat hours or occupied seat miles to determine a per seat or per mile rate, and it applies the rate to the number of hours or miles of entertainment use. The flight-by-flight method allocates expenses to a flight and then to the passengers on the flight according to the entertainment or nonentertainment character of the travel.

Commentators suggested that the final regulations adopt a primary purpose test for identifying disallowed expenses. Under a primary purpose test, the primary purpose of a flight would determine whether any costs associated with specified individuals traveling for entertainment on that flight are disallowed. Generally, if the primary purpose of a flight is business, no more than the additional or incidental costs associated with specified individuals traveling for entertainment aboard that flight would be disallowed. Some commentators suggested that if the primary purpose of a flight is business, no costs should be allocated to entertainment. One commentator advocated that the final regulations include a primary purpose test as a safe harbor for smaller aircraft.

The final regulations do not adopt a primary purpose test. Section 274(e)(2) applies if a taxpayer provides entertainment, amusement, or recreation to a specified individual and does not depend on either the reason the taxpayer provides the entertainment or the overall use of the aircraft. Disregarding entertainment use by a specified individual is contrary to Congressional intent in amending section 274(e)(2) to disallow expenses allocable to entertainment use of aircraft by specified individuals.

b. Effect of Allocation Rules

Commentators suggested the passenger-by-passenger allocation of costs in the proposed regulations imposes an undue administrative burden on taxpayers. One commentator stated that the regulations result in excess disallowance and are unworkable due to their inconsistency with the primary purpose test. Another commentator said that determination of the character of each passenger's use could be difficult and asked for more examples illustrating when a use is entertainment.

The final regulations retain the occupied seat hours or miles and flight-by-flight allocation rules. Before the amendment of section 274(e)(2), taxpayers were required to maintain records of the character of the use of aircraft by employees to comply with the income inclusion rules of section 61 and § 1.61–21. Any additional administrative burden resulting from the requirement to identify, and allocate expenses to, entertainment use of aircraft is limited and is inherent in the statutory requirement to allocate expenses to entertainment use. The final regulations do not include additional examples of entertainment use because entertainment use is defined for purposes of section 274 in § 1.274–2(b)(1) and is therefore beyond the scope of this regulation.

3. Allocation of Disallowance to Expenses

The proposed regulations provide that the disallowance provisions are applied on a pro rata basis to all disallowed expenses. A commentator requested clarification of how an amount that is treated as compensation to or reimbursed by a specified individual is allocated to disallowed expenses. The commentator noted that it is necessary to determine the amount of disallowed expenses that represents depreciation to properly adjust an aircraft's basis.

In response to this comment, the final regulations clarify that any amounts disallowed and any amounts reimbursed or treated as compensation are applied to total expenses subject to disallowance on a pro rata basis. The final regulations include an example illustrating this rule.

4. Bona Fide Security Concerns

The proposed regulations do not exempt expenses for entertainment travel from disallowance under section 274 when there is a business need to use the aircraft to provide security pursuant to § 1.132–5(m). A commentator argued that the final regulations should provide that the excess cost of using a private aircraft for bona fide security concerns should not be subject to disallowance. Section 1.132–5(m) reduces the amount of income inclusion for the fringe benefit under circumstances in which a bona fide security concern exists, but does not convert an entertainment flight into a business flight. Because section 274(e) does not provide an exception to disallowance for expenses related to the use of a private aircraft for bona fide security concerns, the final regulations do not adopt this comment.

5. Aircraft as Entertainment Facilities

The proposed regulations do not address the use of aircraft as entertainment facilities, but requested comments on whether additional guidance on this question should be issued. Commentators suggested that the same rules in the proposed regulations should apply to the use of aircraft as entertainment facilities and requested that the final regulations clarify when and how the rules apply to entertainment facilities.

These regulations interpret section 274(e)(2). Section 274(e)(2) is an exception to the disallowance provisions of section 274(a). Expenses for entertainment facilities are disallowed under section 274(a)(1)(B). Therefore, the final regulations clarify that section 274(e)(2) and the associated regulations apply to expenses for

entertainment facilities as well as entertainment activities. However, the final regulations do not include specific rules for the use of aircraft as entertainment facilities, which are addressed elsewhere in the section 274 regulations.

6. Deadhead Flights

The proposed regulations provide that an aircraft flying without passengers en route to pick up, or after having discharged, passengers (deadhead flight) is generally treated as having the same number and character of passengers as the leg of the trip on which passengers are on board. A commentator suggested that the final regulations allow any reasonable method to determine expenses related to deadhead flights. The final regulations do not adopt this rule because it would be difficult to administer.

Another commentator asked that the final regulations provide examples including mathematical computations for expenses for deadhead flights. In response to this comment, the final regulations include examples illustrating the computation of expenses for a deadhead flight.

7. Leases to Third Parties

The proposed regulations provide that expenses allocable to a lease or charter of an aircraft to an unrelated third party in a bona-fide business transaction for the charter period are not subject to the expense disallowance. A commentator suggested that the rules for leases and charters to third parties should clarify that ''charter period'' includes ''lease period,'' that not only expenses but also flight hours or miles attributable to a charter period are removed from the seat/hour or seat/mile calculation, and that a taxpayer may use any reasonable method to allocate expenses to a charter period.

The seat hour or seat mile calculation is a method of allocating expenses to entertainment use. If expenses are not subject to the expense disallowance, then no allocation is required, and seat hours or miles attributable to a charter period are not included in that calculation. The final regulations change the term *charter period* to the term *lease or charter period.* The final regulations also clarify that whether a third party is unrelated to the taxpayer is determined under section 267(b) or 707(b).

8. Section 274(e)(8) Exception

A commentator asked for clarification on whether the proposed regulations modify the section 274(e)(8) exception for ''entertainment sold to customers.'' Another commentator asked for clarification on what constitutes ''adequate and full consideration'' for purposes of the section 274(e)(8) exception.

The proposed and final regulations, which provide guidance on the section 274(e)(2) exception, state that the section 274(a) disallowance for the use of a taxpayer-provided aircraft for entertainment does not apply to expenses that meet the exceptions of section 274(e). As stated in § 1.274–2(f)(2)(ix), section 274(e)(8) applies only to taxpayers that are in the trade or business of providing entertainment to customers, and only to entertainment sold to customers. However, the final regulations do not provide additional rules on the section 274(e)(8) exception, which is outside the scope of the regulations.

9. Travel on Regularly Scheduled Commercial Airlines

A commentator requested that the final regulations include an exception for entertainment flights by employees of commercial passenger or cargo airlines on flights operated by their employers. The commentator also noted that identifying entertainment use by specified individuals on these flights and allocating expenses to this use would be extremely burdensome. While the final regulations do not provide a general exception to the disallowance rules for taxpayers that are commercial passenger or cargo airlines because a general exception is not supported by the statute, the final regulations provide a special rule for specified individuals on regularly scheduled flights of taxpayers that are commercial passenger airlines. This rule treats expenses of entertainment flights by specified individuals in the same manner as expenses of entertainment flights by non-specified individuals under certain circumstances.

10. Charitable Contribution Deduction

A commentator suggested that the final regulations should include rules on charitable contribution deductions for the fixed costs of using aircraft for charitable purposes. These rules are outside the scope of the regulations; therefore, the final regulations do not adopt this comment.

11. Income Inclusion and Compensation

Section 274(e)(2) and the proposed regulations provide, in general, that expenses are not disallowed to the extent of the amount a taxpayer treats as compensation to, or includes in the income of, a specified individual. A commentator requested that the final regulations include a ''safe harbor deduction'' of the amount of compensation claimed for the specified individual. The final regulations do not adopt this comment because section 274(e)(2) already operates as a safe harbor deduction to the extent of amounts treated as compensation and income, up to the amount of expenses properly allocable to that entertainment use.

The proposed regulations additionally provide, in effect, that expenses are not disallowed to the extent of the amount a specified individual reimburses the taxpayer. A commentator asked that the final regulations include examples of how these rules apply when an employee pays for a flight and that the regulations specify that the taxpayer has income in that circumstance. The final regulations retain examples from the proposed regulations that illustrate the amount of expenses disallowed when amounts are treated as compensation or when an employee reimburses the taxpayer. The circumstances under which the taxpayer has income from reimbursements is beyond the scope of these regulations.

Effective/Applicability Date

The final regulations apply to taxable years beginning after August 1, 2012.

Effect on Other Documents

Notice 2005–45 (2005–1 CB 1228) is obsoleted as of August 1, 2012.

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. Section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final 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 authors of these regulations are Michael Nixon of the Office of Associate Chief Counsel (Income Tax and Accounting) and Lynne A. Camillo of the Office of

Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and 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 is amended by adding entries in numerical order to read, in part, as follows:

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

Section 1.274–9 also issued under 26 U.S.C. 274(o).* * *

Section 1.274–10 also issued under 26 U.S.C. 274(o).* * *

■ **Par. 2.** Section 1.61–21 is amended by revising paragraphs (g)(14)(i) and (ii) and adding paragraph (g)(14)(iii) to read as follows:

§ 1.61–21 Taxation of fringe benefits.

* * * * *

(g) * * *

(14) * * *

(i) *Use by employer.* Except as otherwise provided in paragraph (g)(13) or paragraph (g)(14)(iii) of this section or in § 1.132–5(m)(4), if the non-commercial flight valuation rule of this paragraph (g) is used by an employer to value any flight provided in a calendar year, the rule must be used to value all flights provided to all employees in the calendar year.

(ii) *Use by employee.* Except as otherwise provided in paragraph (g)(13) or (g)(14)(iii) of this section or in § 1.132–5(m)(4), if the non-commercial flight valuation rule of this paragraph (g) is used by an employee to value a flight provided by an employer in a calendar year, the rule must be used to value all flights provided to the employee by that employer in the calendar year.

(iii) *Exception for entertainment flights provided to specified individuals after October 22, 2004.* Notwithstanding the provisions of paragraph (g)(14)(i) of this section, an employer may use the general valuation rules of paragraph (b) of this section to value the entertainment use of an aircraft provided after October 22, 2004, to a specified individual. An employer who uses the general valuation rules of paragraph (b) of this section to value any entertainment use of an aircraft by a specified individual in a calendar year must use the general valuation rules of paragraph (b) of this section to value all entertainment use of aircraft provided to all specified individuals during that calendar year.

(A) *Specified individuals defined.* For purposes of paragraph (g)(14)(iii) of this section, *specified individual* is defined in section 274(e)(2)(B) and § 1.274–9(b).

(B) *Entertainment defined.* For purposes of paragraph (g)(14)(iii) of this section, *entertainment* is defined in § 1.274–2(b)(1).

* * * * *

■ **Par. 3.** Section 1.274–9 is added to read as follows:

§ 1.274–9 Entertainment provided to specified individuals.

(a) *In general.* Paragraphs (e)(2) and (e)(9) of section 274 provide exceptions to the disallowance of section 274(a) for expenses for entertainment, amusement, or recreation activities, or for an entertainment facility. In the case of a specified individual (as defined in paragraph (b) of this section), the exceptions of paragraphs (e)(2) and (e)(9) of section 274 apply only to the extent that the expenses do not exceed the amount of the expenses treated as compensation (under section 274(e)(2)) or as income (under section 274(e)(9)) to the specified individual. The amount disallowed is reduced by any amount that the specified individual reimburses a taxpayer for the entertainment.

(b) *Specified individual defined.* (1) A specified individual is an individual who is subject to section 16(a) of the Securities Act of 1934 in relation to the taxpayer, or an individual who would be subject to section 16(a) if the taxpayer were an issuer of equity securities referred to in that section. Thus, for example, a specified individual is an officer, director, or more than 10 percent owner of a corporation taxed under subchapter C or subchapter S or a personal service corporation. A specified individual includes every individual who—

(i) Is the direct or indirect beneficial owner of more than 10 percent of any class of any registered equity (other than an exempted security);

(ii) Is a director or officer of the issuer of the security;

(iii) Would be the direct or indirect beneficial owner of more than 10 percent of any class of a registered security if the taxpayer were an issuer of equity securities; or

(iv) Is comparable to an officer or director of an issuer of equity securities.

(2) For partnership purposes, a specified individual includes any partner that holds more than a 10 percent equity interest in the partnership, or any general partner, officer, or managing partner of a partnership.

(3) For purposes of this section, *officer* has the same meaning as in 17 CFR § 240.16a–1(f).

(4) A specified individual includes a director or officer of a tax-exempt entity.

(5) A specified individual of a taxpayer includes a specified individual of a party related to the taxpayer within the meaning of section 267(b) or section 707(b).

(c) *Specified individual treated as recipient of entertainment provided to others.* For purposes of section 274(a), a specified individual is treated as the recipient of entertainment provided to another individual because of the relationship of the other individual to the specified individual if the entertainment is a fringe benefit to the specified individual under section 61(a)(1) (without regard to any exclusions from gross income). Thus, expenses allocable to entertainment provided to the other individual are attributed to the specified individual for purposes of determining the amount of disallowed expenses.

(d) *Entertainment use of aircraft by specified individuals.* For rules relating to entertainment use of aircraft by specified individuals, see § 1.274–10.

(e) *Effective/applicability date.* This section applies to taxable years beginning after August 1, 2012.

■ **Par. 4.** Section 1.274–10 is added to read as follows:

§ 1.274–10 Special rules for aircraft used for entertainment.

(a) *Use of an aircraft for entertainment*—(1) *In general.* Section 274(a) disallows a deduction for certain expenses for entertainment, amusement, or recreation activities, or for an entertainment facility. Under section 274(a) and this section, no deduction otherwise allowable under chapter 1 is allowed for expenses for the use of a taxpayer-provided aircraft for entertainment, except as provided in paragraph (a)(2) of this section.

(2) *Exceptions*—(i) *In general.* Paragraph (a)(1) of this section does not apply to deductions for expenses for business entertainment air travel or to deductions for expenses that meet the exceptions of section 274(e), § 1.274–2(f), and this section. Section 274(e)(2) and (e)(9) provides certain exceptions to the disallowance of section 274(a) for expenses for goods, services, and facilities for entertainment, recreation, or amusement.

(ii) *Expenses treated as compensation*—(A) *Employees who are not specified individuals.* Section

274(a), § 1.274–2(a) through (d), and paragraph (a)(1) of this section, in accordance with section 274(e)(2)(A), do not apply to expenses for entertainment air travel provided to an employee who is not a specified individual to the extent that a taxpayer—

(*1*) Properly treats the expenses relating to the recipient of entertainment as compensation to an employee under chapter 1 and as wages to the employee for purposes of chapter 24; and

(*2*) Treats the proper amount as compensation to the employee under § 1.61–21.

(B) *Persons who are not employees and are not specified individuals.* Section 274(a), § 1.274–2(a) through (d), and paragraph (a)(1) of this section, in accordance with section 274(e)(9), do not apply to expenses for entertainment air travel provided to a person who is not an employee and is not a specified individual to the extent that the expenses are includible in the income of that person. This exception does not apply to any amount paid or incurred by the taxpayer that is required to be included in any information return filed by the taxpayer under part III of subchapter A of chapter 61 and is not so included.

(C) *Specified individuals.* Section 274(a), § 1.274–2(a) through (d), and paragraph (a)(1) of this section, in accordance with section 274(e)(2)(B), do not apply to expenses for entertainment air travel of a specified individual to the extent that the amount of the expenses do not exceed the sum of—

(*1*) The amount treated as compensation to or included in the income of the specified individual in the manner specified under paragraph (a)(2)(ii)(A)(1) of this section (if the specified individual is an employee) or under paragraph (a)(2)(ii)(B) of this section (if the specified individual is not an employee); and

(*2*) Any amount the specified individual reimburses the taxpayer.

(iii) *Travel on regularly scheduled commercial airlines.* Section 274(a), § 1.274–2(a) through (d), and paragraph (a)(1) of this section do not apply to expenses for entertainment air travel that a taxpayer that is a commercial passenger airline provides to specified individuals of the taxpayer on the taxpayer's regularly scheduled flights on which at least 90 percent of the seats are available for sale to the public to the extent the expenses are includible in the income of the recipient of the entertainment in the manner specified under paragraph (a)(2)(ii)(A)(1) of this section (if the specified individual is an employee) or under paragraph (a)(2)(ii)(B) of this section (if the specified individual is not an employee).

(b) *Definitions.* The definitions in this paragraph (b) apply for purposes of this section.

(1) *Entertainment.* For the definition of *entertainment* for purposes of this section, see § 1.274–2(b)(1). Entertainment does not include personal travel that is not for entertainment purposes. For example, travel to attend a family member's funeral is not entertainment.

(2) *Entertainment air travel. Entertainment air travel* is any travel aboard a taxpayer-provided aircraft for entertainment purposes.

(3) *Business entertainment air travel. Business entertainment air travel* is any entertainment air travel aboard a taxpayer-provided aircraft that is directly related to the active conduct of the taxpayer's trade or business or related to an expenditure directly preceding or following a substantial and bona fide business discussion and associated with the active conduct of the taxpayer's trade or business. See § 1.274–2(a)(1)(i) and (ii). Air travel is not business entertainment air travel merely because a taxpayer-provided aircraft is used for the travel as a result of a bona fide security concern under § 1.132–5(m).

(4) *Taxpayer-provided aircraft.* A *taxpayer-provided aircraft* is any aircraft owned by, leased to, or chartered to, a taxpayer or any party related to the taxpayer (within the meaning of section 267(b) or section 707(b)).

(5) *Specified individual.* For rules relating to the definition of a specified individual, see § 1.274–9.

(c) *Amount disallowed.* Except as otherwise provided, the amount disallowed under this section for an entertainment flight by a specified individual is the amount of expenses allocable to the entertainment flight of the specified individual under paragraph (e)(2), (e)(3), or (f)(3) of this section, reduced (but not below zero) by the amount the taxpayer treats as compensation or reports as income under paragraph (a)(2)(ii)(C)(1) of this section to the specified individual, plus any amount the specified individual reimburses the taxpayer.

(d) *Expenses subject to disallowance under this section*—(1) *Definition of expenses.* In determining the amount of expenses subject to disallowance under this section, a taxpayer must include all of the expenses of operating the aircraft, including all fixed and variable expenses the taxpayer deducts in the taxable year. These expenses include, but are not limited to, salaries for pilots, maintenance personnel, and other personnel assigned to the aircraft; meal and lodging expenses of flight personnel; take-off and landing fees; costs for maintenance flights; costs of on-board refreshments, amenities and gifts; hangar fees (at home or away); management fees; costs of fuel, tires, maintenance, insurance, registration, certificate of title, inspection, and depreciation; interest on debt secured by or properly allocated (within the meaning of § 1.163–8T) to an aircraft; and all costs paid or incurred for aircraft leased or chartered to the taxpayer.

(2) *Leases or charters to third parties.* Expenses allocable to a lease or charter of a taxpayer's aircraft to an unrelated (as determined under section 267(b) or 707(b)) third-party in a bona-fide business transaction for adequate and full consideration are excluded from the definition of expenses in paragraph (d)(1) of this section. Only expenses allocable to the lease or charter period are excluded under this paragraph (d)(2).

(3) *Straight-line method permitted for determining depreciation disallowance under this section*—(i) *In general.* In lieu of the amount of depreciation deducted in the taxable year, solely for purposes of paragraph (d)(1) of this section, a taxpayer may elect to treat as its depreciation deduction the amount that would result from using the straight-line method of depreciation over the class life (as defined by section 168(i)(1) and using the applicable convention under section 168(d)) of an aircraft, even if the taxpayer uses a different methodology to calculate depreciation for the aircraft under other sections of the Internal Revenue Code (for example, section 168). If the property qualifies for the additional first-year depreciation deduction provided by, for example, section 168(k), 168(n), 1400L(b), or 1400N(d), depreciation for purposes of this straight-line election is determined on the unadjusted depreciable basis (as defined in § 1.168(b)–1(a)(3)) of the property. However, the amount of depreciation disallowed as a result of this paragraph (d)(3) for any taxable year cannot exceed a taxpayer's allowable depreciation for that taxable year. For purposes of this section, a taxpayer that elects to use the straight-line method and class life under this paragraph (d)(3) for any aircraft it operates must use that methodology for all depreciable aircraft it operates and must continue to use the methodology for the entire period the taxpayer uses any depreciable aircraft.

(ii) *Aircraft placed in service in earlier taxable years.* The amount of depreciation for purposes of this paragraph (d)(3) for aircraft placed in service in taxable years before the

taxable year of the election is determined by applying the straight-line method of depreciation to the unadjusted depreciable basis (or, for property acquired in an exchange to which section 1031 applies, the basis of the aircraft as determined under section 1031(d)) and over the class life (using the applicable convention under section 168(d)) of the aircraft as though the taxpayer used that methodology from the year the aircraft was placed in service.

(iii) *Manner of making and revoking election.* A taxpayer makes the election under this paragraph (d)(3) by filing an income tax return for the taxable year that determines the taxpayer's expenses for purposes of paragraph (d)(1) of this section by computing depreciation under this paragraph (d)(3). A taxpayer may revoke an election only for compelling circumstances upon consent of the Commissioner by private letter ruling.

(4) *Aggregation of aircraft*—(i) *In general.* A taxpayer may aggregate the expenses of aircraft of similar cost profiles for purposes of calculating disallowed expenses under paragraph (c) of this section.

(ii) *Similar cost profiles.* Aircraft are of similar cost profiles if their operating costs per mile or per hour of flight are comparable. Aircraft must have the same engine type (jet or propeller) and the same number of engines to have similar cost profiles. Other factors to be considered in determining whether aircraft have similar cost profiles include, but are not limited to, maximum take-off weight, payload, passenger capacity, fuel consumption rate, age, maintenance costs, and depreciable basis.

(5) *Authority for establishing safe harbors for determining expenses.* The Commissioner may establish in published guidance, see § 601.601(d)(2) of this chapter, one or more safe harbor methods under which a taxpayer may determine the amount of expenses paid or incurred for entertainment flights.

(e) *Allocation of expenses*—(1) *General rule.* For purposes of determining the expenses allocated to entertainment air travel of a specified individual under paragraph (a)(2)(ii)(C) of this section, a taxpayer must use either the occupied seat hours or miles method of paragraph (e)(2) of this section or the flight-by-flight method of paragraph (e)(3) of this section. A taxpayer must use the chosen method for all flights of all aircraft for the taxable year.

(2) *Occupied seat hours or miles method*—(i) *In general.* The occupied seat hours or miles method determines the amount of expenses allocated to a particular entertainment flight of a specified individual based on the occupied seat hours or miles for an aircraft for the taxable year. Under this method, a taxpayer may choose to use either occupied seat hours or miles for the taxable year to determine the amount of expenses allocated to entertainment flights of specified individuals, but must use occupied seat hours or miles consistently for all flights of all aircraft for the taxable year.

(ii) *Computation under the occupied seat hours or miles method.* The amount of expenses allocated to an entertainment flight taken by a specified individual is computed under the occupied seat hours or miles method by determining—

(A) The total expenses for the year under paragraph (d) of this section for the aircraft or group of aircraft (if aggregated under paragraph (d)(4) of this section), as applicable;

(B) The number of occupied seat hours or miles for the taxable year for the aircraft or group of aircraft by totaling the occupied seat hours or miles of all flights in the taxable year flown by the aircraft or group of aircraft, as applicable. The occupied seat hours or miles for a flight is the number of hours or miles flown for the flight multiplied by the number of seats occupied on that flight. For example, a flight of 6 hours with three passengers results in 18 occupied seat hours;

(C) The cost per occupied seat hour or mile for the aircraft or group of aircraft, as applicable, by dividing the total expenses under paragraph (e)(2)(ii)(A) of this section by the total number of occupied seat hours or miles under paragraph (e)(2)(ii)(B) of this section; and

(D) The amount of expenses allocated to an entertainment flight taken by a specified individual by multiplying the number of hours or miles of the flight by the cost per occupied hour or mile for that aircraft or group of aircraft, as applicable, as determined under paragraph (e)(2)(ii)(C) of this section.

(iii) *Allocation of expenses of multi-leg trips involving both business and entertainment legs.* A taxpayer that uses the occupied seat hours or miles allocation method must allocate the expenses of a trip by a specified individual that involves at least one segment for business and one segment for entertainment between the business travel and the entertainment travel unless none of the expenses for the entertainment segment are disallowed. The entertainment cost of a multi-leg trip is the total cost of the flights (by occupied seat hours or miles) minus the cost of the flights that would have been taken without the entertainment segment or segments.

(iv) *Examples.* The following examples illustrate the provisions of this paragraph (e)(2):

Example 1. (i) A taxpayer-provided aircraft is used for Flights 1, 2, and 3, of 5 hours, 5 hours, and 4 hours, respectively, during the Taxpayer's taxable year. Each flight carries four passengers. On Flight 1, none of the passengers is a specified individual. On Flight 2, passengers A and B are specified individuals traveling for entertainment purposes and passengers C and D are not specified individuals. For Flight 2, Taxpayer treats $1,200 as compensation to A, and B reimburses Taxpayer $500. On Flight 3, all four passengers (A, B, E, and F) are specified individuals traveling for entertainment purposes. For Flight 3, Taxpayer treats $1,300 each as compensation to A, B, E, and F. Taxpayer incurs $56,000 in expenses for the operation of the aircraft for the taxable year. The aircraft is operated for 56 occupied seat hours for the period (four passengers times 5 hours (20 occupied seat hours) for Flight 1, plus four passengers times 5 hours (20 occupied seat hours) for Flight 2, plus four passengers times 4 hours (16 occupied seat hours) for Flight 3. The cost per occupied seat hour is $1,000 ($56,000/56 hours).

(ii) For purposes of determining the amount disallowed (to the extent not treated as compensation or reimbursed) for entertainment provided to specified individuals, $5,000 ($1,000 × 5 hours) each is allocable to A and B for Flight 2, and $4,000 ($1,000 × 4 hours) each is allocable to A, B, E, and F for Flight 3.

(iii) For Flight 2, because Taxpayer treats $1,200 as compensation to A, and B reimburses Taxpayer $500, Taxpayer may deduct $1,700 of the cost of Flight 2 allocable to A and B. The deduction for the remaining $8,300 cost allocable to entertainment provided to A and B on Flight 2 is disallowed (for A, $5,000 less the $1,200 treated as compensation, and for B, $5,000 less the $500 reimbursed).

(iv) For Flight 3, because Taxpayer treats $1,300 each as compensation to A, B, E, and F, Taxpayer may deduct $5,200 of the cost of Flight 3. The deduction for the remaining $10,800 cost allocable to entertainment provided to A, B, E, and F on Flight 3 is disallowed ($4,000 less the $1,300 treated as compensation to each specified individual).

Example 2. (i) G, a specified individual, is the sole passenger on an aircraft that makes three flights. First, G travels on a two-hour flight from City A to City B for business purposes. G then travels on a three-hour flight from City B to City C for entertainment purposes, and returns from City C to City A on a four-hour flight. G's flights have resulted in nine occupied seat hours (two for the first segment, plus three for the second segment, plus four for the third segment). If G had returned directly to City A from City B, the flights would have resulted in four occupied seat hours.

(ii) Under paragraph (e)(2)(iii) of this section, five occupied seat hours are

allocable to G's entertainment (nine total occupied seat hours minus the four occupied seat hours that would have resulted if the travel had been a roundtrip business trip without the entertainment segment). If Taxpayer's cost per occupied seat hour for the year is $1,000, $5,000 is allocated to G's entertainment use of the aircraft ($1,000 × five occupied seat hours). The amount disallowed is $5,000 minus the total of any amount the Taxpayer treats as compensation to G plus any amount that G reimburses Taxpayer.

(3) *Flight-by-flight method*—(i) *In general.* The flight-by-flight method determines the amount of expenses allocated to a particular entertainment flight of a specified individual on a flight-by-flight basis by allocating expenses to individual flights and then to a specified individual traveling for entertainment purposes on that flight.

(ii) *Allocation of expenses.* A taxpayer using the flight-by-flight method must combine all expenses (as defined in paragraph (d)(1) of this section) for the taxable year for the aircraft or group of aircraft (if aggregated under paragraph (d)(4) of this section), as applicable, and divide the total amount of expenses by the number of flight hours or miles for the taxable year for that aircraft or group of aircraft, as applicable, to determine the cost per hour or mile. Expenses are allocated to each flight by multiplying the number of miles for the flight by the cost per mile or the number of hours for the flight by the cost per hour. The expenses for the flight then are allocated to the passengers on the flight per capita. Thus, if five passengers are traveling on a flight, and the total expense allocated to the flight is $10,000, the expense allocable to each passenger is $2,000.

(f) *Special rules*—(1) *Determination of basis.* (i) If any deduction for depreciation is disallowed under this section, the rules of § 1.274–7 apply. In that case, the basis of an aircraft is not reduced for the amount of depreciation disallowed under this section.

(ii) The provisions of this paragraph (f)(1) are illustrated by the following examples:

Example 1. (i) B Co. is a calendar-year taxpayer that owns an aircraft not used in commercial or contract carrying of passengers or freight. The aircraft is placed in service on July 1 of Year 1 and has an unadjusted depreciable basis of $1,000,000. The class life of the aircraft for depreciation purposes is 6 years. For determining depreciation under section 168, B Co. uses the optional depreciation table that corresponds with the general depreciation system, the 200 percent declining balance method of depreciation, a 5-year recovery period, and the half-year convention. For determining the depreciation disallowance for each year under paragraph (d)(3) of this section, B Co. elects to use the straight-line method of depreciation and the class life of 6 years and, therefore, uses the optional depreciation table for purposes of section 168 that corresponds with the straight-line method of depreciation, a recovery period of 6 years, and the half-year convention. In each year, the aircraft entertainment use subject to disallowance under this section is 10 percent of the total use.

(ii) B Co. calculates the depreciation and basis of the aircraft as follows:

	200 Percent declining balance depreciation amount	Straight line depreciation amount	Depreciation disallowance under section 274	Depreciation deduction	§ 1.274–7 Basis of aircraft	Suspended basis.
Year 1	200,000	83,300	8,330. (.10 × 83,300)	191,670 (200,000 minus 8,330).	808,330 (1,000,000 minus 191,670).	8,330.
Year 2	320,000	166,700	16,670 (.10 × 166,700).	303,330 (320,000 minus 16,670).	505,000 (808,330 minus 303,330).	25,000 (8,300 plus 16,670).
Year 3	192,000	166,700	16,670 (.10 × 166,700).	175,330 (192,000 minus 16,670).	329,670 (505,000 minus 175,330).	41,670 (25,000 plus 16,670).
Year 4	115,200	166,700	16,670 (.10 × 166,700).	98,530 (115,200 minus 16,670).	231,140 (329,670 minus 98,530).	58,340 (41,670 plus 16,670).
Year 5	115,200	166,600	16,660 (.10 × 166,600).	98,540 (115,200 minus 16,660).	132,600 (231,140 minus 98,540).	75,000 (58,340 plus 16,660).
Year 6	57,600	166,700	16,670 (.10 × 166,700).	40,930 (57,600 minus 16,670).	91,670 (132,600 minus 40,930).	91,670 (75,000 plus 16,670).
Year 7	.....	83,300	8,330 (.10 × 83,300) ..	.....	91,670	91,670.

(iii) In Year 7, there is no further deduction for depreciation of the aircraft, therefore, under paragraph (d)(3) of this section, no depreciation expense is disallowed. Under § 1.274–7 and this paragraph (f)(1), basis is not reduced for disallowed depreciation. Therefore, at the end of Year 7, the basis of the aircraft for purposes of § 1.274–7 is $91,670, which is the total amount of disallowed depreciation in Years 1 through 6. B Co.'s deductions for depreciation total $908,330, which added to $91,670 equals $1,000,000.

Example 2. (i) The facts are the same as in *Example 1,* except that B Co. does not elect to use the straight-line method of depreciation under paragraph (d)(3) of this section until Year 3.

(ii) B Co. calculates the depreciation and basis of the aircraft as follows:

	200 Percent declining balance depreciation amount	Straight line depreciation amount	Depreciation disallowance under section 274	Depreciation deduction	§ 1.274 Basis of aircraft	Suspended basis.
Year 1	200,000	.....	20,000 (.10 × 200,000).	180,000	820,000 (1,000,000 minus 180,000).	20,000.
Year 2	320,000	.....	32,000 (.10 × 320,000).	288,000 (320,000 minus 32,000).	532,000 (820,000 minus 288,000).	52,000 (20,000 plus 32,000).
Year 3	192,000	166,700	16,670 (.10 × 166,700).	175,330 (192,000 minus 16,670).	356,670 (532,000 minus 175,330).	68,670 (52,000 plus 16,670).
Year 4	115,200	166,700	16,670 (.10 × 166,700).	98,530 (115,200 minus 16,670).	258,140 (356,670 minus 98,530).	85,340 (68,670 plus 16,670).
Year 5	115,200	166,600	16,660 (.10 × 166,600).	98,540 (115,200 minus 16,660).	159,600 (258,140 minus 98,540).	102,000 (85,340 plus 16,660).

	200 Percent declining balance depreciation amount	Straight line depreciation amount	Depreciation disallowance under section 274	Depreciation deduction	§ 1.274 Basis of aircraft	Suspended basis.
Year 6	57,600	166,700	16,670 (.10 × 166,700).	40,930 (57,600 minus 16,670).	118,670 (159,600 minus 40,930).	118,670 (102,000 plus 16,670).
Year 7	.....	83,300	8,330 (.10 × 83,300) ..	0	118,670	118,670.

(iii) In Year 7, there is no further deduction for depreciation of the aircraft, therefore, under paragraph (d)(3) of this section, no depreciation expense is disallowed. Under § 1.274–7 and this paragraph (f)(1), basis is not reduced for disallowed depreciation. Therefore, at the end of Year 7, the basis of the aircraft for purposes of § 1.274–7 is $118,670, which is the total amount of disallowed depreciation in Years 1 through 6. B Co.'s deductions for depreciation total $881,330, which added to $118,670 equals $1,000,000.

(2) *Pro rata disallowance.* (i) The amount of disallowed expenses, and any amounts reimbursed or treated as compensation, under this section are applied on a pro rata basis to all of the categories of expenses subject to disallowance under this section.

(ii) The provisions of this paragraph (f)(2) are illustrated by the following example:

Example. (i) C Co. owns an aircraft that it uses for business and other purposes. The expenses of operating the aircraft in the current year total $1,000,000. This amount includes $250,000 for depreciation (25 percent of total expenses).

(ii) In the same year, the aircraft entertainment use subject to disallowance under this section is 20 percent of the total use and C Co. treats $80,000 as compensation to specified individuals. Thus, the amount of the disallowance under this section is $120,000 ($1,000,000 × 20 percent ($200,000) less $80,000).

(iii) Under paragraph (f)(2) of this section, C Co. may calculate the amount by which a category of expense, such as depreciation, is disallowed by multiplying the total disallowance of $120,000 by the ratio of the amount of the expense to total expenses. Thus, $30,000 of the $120,000 total disallowed expenses is depreciation ($250,000/$1,000,000 (25 percent) × $120,000).

(iv) The result is the same if C Co. separately calculates the amount of depreciation in total disallowed expenses and in the amount treated as compensation and nets the result. Depreciation is 25 percent of total expenses, thus, the amount of depreciation in disallowed expenses is $50,000 (25 percent × $200,000 total disallowed expenses) and the amount of depreciation treated as compensation is $20,000 (25 percent × $80,000). Disallowed depreciation is $50,000 less $20,000, or $30,000.

(3) *Deadhead flights.* (i) For purposes of this section, an aircraft returning without passengers after discharging passengers or flying without passengers to pick up passengers (deadheading) is treated as having the same number and character of passengers as the leg of the trip on which passengers are aboard for purposes of allocating expenses under paragraphs (e)(2) or (e)(3) of this section. For example, when an aircraft travels from point A to point B and then back to point A, and one of the legs is a deadhead flight, for determination of disallowed expenses, the aircraft is treated as having made both legs of the trip with the same passengers aboard for the same purposes.

(ii) When a deadhead flight does not occur within a roundtrip flight, but occurs between two unrelated flights involving more than two destinations (such as an occupied flight from point A to point B, followed by a deadhead flight from point B to point C, and then an occupied flight from point C to point A), the allocation of passengers and expenses to the deadhead flight occurring between the two occupied trips must be based solely on the number of passengers on board for the two occupied legs of the flight, the character of the travel of the passengers on board (entertainment or nonentertainment) and the length in hours or miles of the two occupied legs of the flight.

(iii) The provisions of this paragraph (f)(3) are illustrated by the following examples:

Example 1. (i) Aircraft flies from City A to City B, a 6-hour trip, with 12 passengers aboard. Eight of the passengers are traveling for business and four of the passengers are specified individuals traveling for entertainment purposes. The aircraft flies empty (deadheads) from City B to City C, a 4-hour trip. At City C it picks up 12 passengers, six of whom are traveling for business and six of whom are specified individuals traveling for entertainment purposes, for a 2-hour trip to City A. The taxpayer uses the occupied seat hour method of allocating expenses.

(ii) The two legs of the trip on which the aircraft is occupied comprise 96 occupied seat hours (12 passengers × 6 hours (72) for the first leg plus 12 passengers × 2 hours (24) for the third leg). Sixty occupied seat hours are for business (8 passengers × 6 hours (48) for the first leg plus 6 passengers × 2 (12) hours for the third leg) and 36 occupied seat hours are for entertainment purposes (4 passengers × 6 hours (24) for the first leg plus 6 passengers × 2 (12) hours for the third leg). Dividing the 36 occupied seat entertainment hours by 96 total occupied seat hours, 37.5 percent of the total occupied seat hours of the two occupied flights are for entertainment.

(iii) The 4-hour deadhead leg comprises one-third of the total flight time of 12 hours. Therefore, the deadhead flight is deemed to have provided one-third of the total 96 occupied seat hours, or 32 occupied seat hours (96 × ⅓ = 32). Of the 32 deemed occupied seat hours, 37.5 percent, or 12 deemed occupied seat hours, are treated as entertainment under paragraph (f)(3)(ii) of this section. The 32 deemed occupied seat hours for the deadhead flight are included in the calculation under paragraph (e)(2)(ii)(B) of this section and expenses are allocated under paragraph (e)(2)(ii)(D) of this section to the 12 deemed occupied seat hours treated as entertainment.

Example 2. (i) The facts are the same as for *Example 1,* but the taxpayer uses the flight-by-flight method of allocation.

(ii) Of the 24 passengers on the occupied flights, 10 passengers, or 41.7 percent, are traveling for entertainment purposes. If the annual cost per flight hour calculated under paragraph (e)(3)(ii) of this section is $1,000, $4,000 is allocated to the 4-hour deadhead leg. Under paragraph (f)(3)(ii) of this section, 41.7 percent of the $4,000, or $1,667, is treated as an expense for entertainment. The calculation of the cost per mile or hour for the year under paragraph (e)(3)(ii) of this section includes the expenses and number of miles or hours flown for the deadhead leg.

(g) *Effective/applicability date.* This section applies to taxable years beginning after August 1, 2012.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

Approved: July 25, 2012.

Emily S. McMahon,

Acting Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0426]

RIN 1625–AA00

Safety Zone, Atlantic Intracoastal Waterway; North Topsail Beach, NC

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone on the waters of the Atlantic Intracoastal Waterway at North Topsail Beach, North Carolina. The safety zone is necessary to provide for the safety of mariners on navigable waters during maintenance of the NC 210 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 252.3, at North Topsail Beach, North Carolina. The safety zone will temporarily restrict vessel movement.

DATES: This rule is effective from September 1, 2012 until December 12, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2012–0426]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email CWO4 Joseph M. Edge, U.S. Coast Guard Sector North Carolina; telephone 252–247–4525, email *Joseph.M.Edge@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

On June 15, 2012 a Notice of Proposed Rule Making (NPRM) was published in 77 FR 35898. We received no comments on the proposed rule. No public meeting was requested, and none was held.

B. Basis and Purpose

North Carolina Department of Transportation has awarded a contract to T.A. Loving Company of Goldsboro, NC to perform bridge maintenance on the NC 210 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 252.3, at North Topsail Beach, North Carolina. The contract provides for replacing the fender system to commence on September 12, 2012 with a completion date of December 12, 2012. The contractor will utilize a 115 foot deck barge with a 30 foot beam as a work platform and for equipment staging. This safety zone will provide a safety buffer to transiting vessels as bridge repairs present potential hazards to mariners and property due to reduction of horizontal clearance. During this period the Coast Guard will require a one hour notification to the work supervisor at the NC 210 Fixed Bridge at the Atlantic Intracoastal Waterway crossing, mile 252.3, North Topsail Beach, North Carolina. The notification requirement will be applicable during the maintenance period for vessels requiring a horizontal clearance of greater than 50 feet.

C. Discussion of Comments, Changes and the Final Rule

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

The temporary safety zone will encompass the waters directly under the NC 210 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 252.3, at North Topsail Beach, North Carolina (34°30′01″ N/077°25′47″ W). All vessels transiting this section of the waterway requiring a horizontal clearance of greater than 50 feet will be required to make a one hour advanced notification to the work supervisor at the NC 210 Fixed Bridge while the safety zone is in effect. This zone will be in effect and enforced from 8 a.m. September 1, 2012 through 8 p.m. December 12, 2012.

D. 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.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. This rule does restrict traffic from transiting a portion of the Atlantic Intracoastal Waterway; it imposes a one hour notification to ensure the waterway is clear of impediment to allow passage to vessels requiring a horizontal clearance of greater than 50 feet.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule would affect the following entities, some of which may be small entities: the owners or operators of commercial tug and barge companies, recreational and commercial fishing vessels intending to transit the specified portion of Atlantic Intracoastal Waterway from 8 a.m. September 1, 2012 through 8 p.m. December 12, 2012.

This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. Although the safety zone will apply to this section of the Atlantic Intracoastal Waterway, vessel traffic will be able to request passage by providing a one hour advanced notification. Before the effective period, the Coast Guard will issue maritime advisories widely available to the users of the waterway.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INTFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. 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 determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a temporary safety zone. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

■ 2. Add § 165.T05–0426 to read as follows:

§ 165.T05–0426 Safety Zone; Atlantic Intracoastal Waterway, North Topsail Beach, NC.

(a) *Regulated Area.* The following area is a safety zone: This zone includes the waters directly under and 100 yards either side of the NC 210 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 252.3, at North Topsail Beach, North Carolina (34°30′01″ N/ 077°25′47″ W).

(b) *Regulations.* The general safety zone regulations found in 33 CFR 165.23 apply to the safety zone created by this temporary section, § 165.T05–0426. In addition the following regulations apply:

(1) All vessels and persons are prohibited from entering this zone, except as authorized by the Coast Guard Captain of the Port North Carolina.

(2) All vessels requiring greater than 50 feet horizontal clearance are prohibited from entering this zone, except as authorized by the Coast Guard Captain of the Port North Carolina. All other vessels are required to transit the zone at no wake speeds.

(3) All vessels requiring greater than 50 feet horizontal clearance to safely transit through the NC 210 Fixed Bridge crossing the Atlantic Intracoastal Waterway, mile 252.3, at North Topsail Beach, North Carolina must contact the work supervisor tender on VHF–FM marine band radio channels 13 and 16 one hour in advance of intended transit.

(4) All Coast Guard assets enforcing this safety zone can be contacted on VHF–FM marine band radio channels 13 and 16.

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

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

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

(c) *Definitions.* (1) Captain of the Port North Carolina means the Commander, Coast Guard Sector North Carolina or any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port to act on his behalf.

(2) Designated representative means any Coast Guard commissioned, warrant, or petty officer who has been authorized by the Captain of the Port North Carolina to assist in enforcing the safety zone described in paragraph (a) of this section.

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

(e) *Enforcement period.* This section will be enforced from 8 a.m. September 1, 2012 through 8 p.m. December 12, 2012 unless cancelled earlier by the Captain of the Port.

Dated: July 16, 2012.

A. Popiel,

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

[FR Doc. 2012–18716 Filed 7–31–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2012–0491]

RIN 1625–AA00

Safety Zone, Barrel Recovery, Lake Superior; Duluth, MN

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone surrounding Tug Champion (O.N. 55 6Z93)/Barge Kokosing (O.N. 1144055) while they conduct recovery and testing of barrels suspected to contain munitions waste materials which were dumped in the 1960's in a portion of Lake Superior approximately between Stoney Point and Brighton Beach, Duluth, MN. This safety zone is precautionary to protect recreational vessels and marine traffic from any unknown hazards as well as provide a safe work zone for contractor operations.

DATES: This rule will be effective from July 30, 2012 to August 20, 2012.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2012–0491]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Judson Coleman, Chief of Waterways Management, U.S. Coast Guard Marine Safety Unit Duluth; telephone number (218) 720–5286, extension 111, email at *Judson.A.Coleman@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR **Federal Register**
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because the final details for this event were not known to the Coast Guard until there was insufficient time remaining before the event to publish an NPRM. Thus, delaying the effective date of this rule to wait for a comment period to run would be both impracticable and contrary to the public interest because it would inhibit the Coast Guard's ability to protect vessels from the hazards associated with recovery of possible munitions waste, which are discussed further below.

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**. For the same reasons discussed in the preceding paragraph, waiting for a 30 day notice period to run would also be impracticable and contrary to the public interest.

B. Basis and Purpose

From July 30, 2012 to August 20, 2012, the Tug Champion (O.N. 55 6Z93)/Barge Kokosing (O.N. 1144055) will recover and test barrels suspected to contain munitions waste materials dumped offshore in a portion of Lake Superior approximately 50 years ago.

C. Discussion of the Final Rule

The following area is a temporary safety zone: All waters within a 700 foot radius of the Tug Champion (O.N. 55 6Z93)/Barge Kokosing (O.N. 1144055)as it conducts recovery and testing of barrels suspected of containing munitions waste materials in the area between Stoney Point and Brighton Beach, up to approximately 4 miles offshore on Lake Superior, Duluth, MN. This safety zone will be in effect and enforced 24 hours a day from on or around July 30, 2012 to August 20, 2012.

This rule is deemed necessary in order to protect vessels transiting Lake Superior in close proximity to the Tug Champion (O.N. 55 6Z93)/Barge Kokosing (O.N. 1144055) from exposure to possible unknown hazards as it conducts recovery and testing of barrels containing munitions parts and product line debris. This zone does not have specific coordinates because the Tug Champion (O.N. 55 6Z93)/Barge Kokosing (O.N. 1144055)will be recovering barrels in several locations over the course of the effective period and a safety zone encompassing the entire recovery area would have a negative impact on recreational vessel traffic.

D. Regulatory Analyses

We developed this rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 14 of these statutes or executive orders.

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented

by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. This rule will have minimal impact on economic interests due to the safety zone being outside commercial shipping lanes, having little impact on recreational vessel traffic and being in effect for a limited period of time.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. 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.

(1) This rule would affect the following entities, some of which might be small entities: the owners or operators of recreational vessels intending to transit or anchor in a portion of Lake Superior between Stoney Point and Brighton Beach from July 20, 2012 to August 30, 2012.

(2) This safety zone would not have a significant economic impact on a substantial number of small entities for the following reasons. This safety zone would be activated, and thus subject to enforcement, in areas where vessel traffic is low and not subject to commercial traffic. Recreational vessel traffic could pass safely around the safety zone due to its relatively small size. This safety zone will be announced in the Local Notice to Mariners and via Broadcast Notice to Mariners before activation of the zone and throughout the enforcement period.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section, above.

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.

4. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section so that the Coast Guard may consider the degree to which it may accommodate such activities while also providing for the safety and security of people, places and vessels.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. 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 determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves establishing a safety zone surrounding Tug Champion (O.N. 55 6Z93)/Barge Kokosing (O.N. 1144055) as it conducts recovery and testing of barrels containing munitions parts and product line debris. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead

to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 2. Add § 165.T09–0491 to read as follows:

§ 165.T09–0491 Safety zone; Barrel recover, Lake Superior, Duluth, MN.

(a) *Location.* The following area is a temporary safety zone: All waters of Lake Superior within a 700 foot radius of a Tug Champion (O.N. 55 6Z93)/ Barge Kokosing (O.N. 1144055), including but not limited to up to four miles offshore from approximately Brighton Beach to Stoney Point on Lake Superior, Duluth, MN.

(b) *Effective and enforcement period.* This rule will be in effect and enforced 24 hours a day on or around July 30, 2012 to August 20, 2012.

(c) *Regulations.* (1) In accordance with the general regulations in section 165.23, entry into, transiting or anchoring within the safety zone is prohibited unless authorized by the Captain of the Port, Marine Safety Unit Duluth, or his/her designated representative.

(2) This safety zone is closed to all vessel traffic.

Dated: July 19, 2012.

K.R. Bryan,

Commander, U.S. Coast Guard, Captain of the Port, Marine Safety Unit Duluth.

[FR Doc. 2012–18717 Filed 7–31–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2012–0402; FRL9705–8

Approval and Promulgation of Implementation Plans; South Carolina 110(a)(1) and (2) Infrastructure Requirements for the 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve the State Implementation Plan (SIP) submissions, submitted by the State of South Carolina, through the South Carolina Department of Health and Environmental Control (SC DHEC), as demonstrating that the State meets the SIP requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA or the Act) for the 1997 annual and 2006 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standards (NAAQS). Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an ''infrastructure'' SIP. South Carolina certified that the South Carolina SIP contains provisions that ensure the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in South Carolina (hereafter referred to as ''infrastructure submission''). South Carolina's infrastructure submissions, provided to EPA on March 14, 2008, and September 18, 2009, certification submissions (as clarified in a letter on November 9, 2009), and the State's April 3, 2012, SIP revision address all the required infrastructure elements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS.

DATES: *Effective Date:* This rule will be effective August 31, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2012–0238. All documents in the docket are listed on the *www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, i.e., Confidential Business Information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 a.m. excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303–8960. The telephone number is (404) 562–9043. Mr. Lakeman can be reached via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background
II. This Action
III. Final Action
IV. Statutory and Executive Order Reviews

I. Background

Upon promulgation of a new or revised NAAQS, sections 110(a)(1) and (2) of the CAA require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance for that new NAAQS. On July 18, 1997 (62 FR 36852), EPA promulgated a new annual $PM_{2.5}$ NAAQS and on October 17, 2006 (71 FR 61144), EPA promulgated a new 24-hour NAAQS. On June 6, 2012, EPA proposed in two separate actions to approve South Carolina's March 14, 2008, September 18, 2009, and April 3, 2012, infrastructure submissions for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. *See* 77 FR 33372 and 77 FR 33380. The March 14, 2008 and September 18, 2009, infrastructure submission for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS addressed elements 110(a)(2)(A)–(H), (J)–(M), except for sections 110(a)(2)(C)—the nonattainment area requirements; 110(a)(2)(D)(i)—the interstate transport requirements; 110(a)(2)(E)(ii)—board requirements; [1] and 110(a)(2)(G)—

[1] EPA is clarifying through today's final rulemaking that South Carolina's April 13, 2012, SIP revision proposed that existing State statute meet the requirements of 128.

emergency powers. See EPA's June 6, 2012, proposed rulemakings at 77 FR 33372 for more detail. The April 3, 2012, SIP revision addressed elements 110(a)(2)(E)(ii) and 110(a)(2)(G). See EPA's June 6, 2012, proposed rulemakings at 77 FR 33380 for more detail. A summary of the background for today's final action is provided below.

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. The data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS, states typically have met the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous PM NAAQS.

More specifically, section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for ''infrastructure'' SIP requirements related to a newly established or revised NAAQS. As already mentioned, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this final rulemaking are listed below [2] and in EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8–Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards.''

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.[3]
- 110(a)(2)(D): Interstate transport.[4]
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.[5]
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

II. This Action

EPA is taking final action to approve South Carolina's infrastructure submissions as demonstrating that the State meets the applicable requirements of sections 110(a)(1) and (2) of the CAA for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. Section 110(a) of the CAA requires that each state adopt and submit a SIP for the implementation, maintenance, and enforcement of each NAAQS promulgated by the EPA, which is commonly referred to as an ''infrastructure'' SIP. South Carolina certified that the South Carolina SIP contains provisions that ensure the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in South Carolina.

EPA received no adverse comments on its June 6, 2012, proposed approval of South Carolina's March 14, 2008, September 18, 2009, and April 3, 2012, infrastructure submissions. Additionally, on June 23, 2012, EPA published a final rulemaking action approving revisions to South Carolina's New Source Review (NSR) requirements relating to the $PM_{2.5}$ standard. *See* 76 FR 36875. EPA is not taking action today on South Carolina's NSR program, as these requirements are already approved in South Carolina's SIP.

South Carolina's infrastructure submissions, provided to EPA on March 14, 2008, and September 18, 2009, as certification submissions (as clarified in a letter on November 9, 2009), and the State's April 3, 2012, SIP revision addressed all the required infrastructure elements for the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS. EPA has determined that South Carolina's March 14, 2008, September 18, 2009, and April 3, 2012, submissions are consistent with section 110 of the CAA.

III. Final Action

As already described, SC DHEC has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to EPA's October 2, 2007, guidance to ensure that 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS are implemented, enforced, and maintained in the State. EPA is taking final action to approve South Carolina's March 14, 2008, September 18, 2009, and April 3, 2012, submissions for 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS because these submissions are consistent with section 110 of the CAA. Today's action is not approving any specific rule, but rather making a determination that South Carolina's already approved SIP meets certain CAA requirements.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office

[2] Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) Submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's final rulemaking does not address infrastructure elements related to section 110(a)(2)(I) but does provide detail on how South Carolina's SIP addresses 110(a)(2)(C).

[3] This rulemaking only addresses requirements for this element as they relate to attainment areas.

[4] Today's final rule does not address element 110(a)(2)(D)(i) (Interstate Transport) for the 1997 and 2006 $PM_{2.5}$ NAAQS. Interstate transport requirements were formerly addressed by South Carolina consistent with the Clean Air Interstate Rule (CAIR). On December 23, 2008, CAIR was remanded by the D.C. Circuit Court of Appeals, without vacatur, back to EPA. *See North Carolina* v. *EPA,* 531 F.3d 896 (D.C. Cir. 2008). Prior to this remand, EPA took final action to approve South Carolina's SIP revision, which was submitted to comply with CAIR. *See* 72 FR 57209 (October 9, 2007). In so doing, South Carolina's CAIR SIP revision addressed the interstate transport provisions in Section 110(a)(2)(D)(i) for the 1997 $PM_{2.5}$ NAAQS. Concerning the 2006 p.m.$_{2.5}$ NAAQS, EPA has finalized a new rule to address the interstate transport of NO_X and SO_X in the eastern United States. *See* 76 FR 48208 (August 8, 2011) (''the Transport Rule''). EPA's action on element 110(a)(2)(D)(i) will be addressed in a separate action.

[5] This requirement was inadvertently omitted from EPA's October 2, 2007, memorandum entitled ''Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards,'' but as mentioned above is not relevant to today's final rulemaking.

of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

EPA has determined that this final rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because there are no ''substantial direct effects'' on an Indian Tribe as a result of this action. The Catawba Indian Nation Reservation is located within the South Carolina portion of the bi-state Charlotte nonattainment area. Pursuant to the Catawba Indian Claims Settlement Act, S.C. Code Ann. 27–16–120, ''all state and local environmental laws and regulations apply to the Catawba Indian Nation and Reservation and are fully enforceable by all relevant state and local agencies and authorities.'' Thus, the South Carolina SIP applies to the Catawba Reservation. EPA has also preliminarily determined that these revisions will not impose any substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by October 1, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Dated: July 16, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

Therefore, 40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

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

Subpart PP—South Carolina

■ 2. Amend § 52.2120 in paragraph (e) by adding three new entries for ''110(a)(1) and (2) Infrastructure Requirements for the 1997 Fine Particulate Matter National Ambient Air Quality Standards,'' ''110(a)(1) and (2) Infrastructure Requirements for the 2006 Fine Particulate Matter National Ambient Air Quality Standards,'' and ''110(a)(1) and (2) Infrastructure Requirements for 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards Elements 110(a)(1) and (2) (E)(ii) and (G)'' at the end of the table to read as follows:

§ 52.2120 Identification of plan.

* * * * *

(e) * * *

EPA-APPROVED SOUTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA approval date	Explanation
* * *	*	* *	*
110(a)(1) and (2) Infrastructure Requirements for 1997 Fine Particulate Matter National Ambient Air Quality Standards.	4/14/2008	8/1/2012 [Insert citation of publication].	
110(a)(1) and (2) Infrastructure Requirements for 2006 Fine Particulate Matter National Ambient Air Quality Standards.	9/18/2009	8/1/2012 [Insert citation of publication].	
110(a)(1) and (2) Infrastructure Requirements for 1997 and 2006 Fine Particulate Matter National Ambient Air Quality Standards Elements 110(a)(1) and (2) (E)(ii) and (G).	4/3/2012	8/1/2012 [Insert citation of publication].	

[FR Doc. 2012–18519 Filed 7–31–12; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2012–0031; FRL–9352–6]

2-Methyl-1,3-propanediol; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of 2-methyl-1,3-propanediol (CAS Reg. No. 2163–42–0) when used as an inert ingredient component of food contact sanitizing solutions applied to all food contact surfaces in public eating places, dairy-processing equipment, and food-processing equipment and utensils. Lyondell Chemical Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting establishment of an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of 2-methyl-1,3-propanediol.

DATES: This regulation is effective August 1, 2012. Objections and requests for hearings must be received on or before October 1, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2012–0031, is available either electronically through *http://www.regulations.gov* or in hard copy at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in EPA West, Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: David Lieu, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–0079; email address: *lieu.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2012–0031 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before October 1, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2012–0031, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), Mail Code: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Petition for Exemption

In the **Federal Register** of May 2, 2012 (77 FR 25954) (FRL–9346–1), EPA issued a notice pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP 1E7946) by Lyondell Chemical Company, 1221 McKinney Street, Houston, Texas 77010. The petition requested that 40 CFR 180.940(a) be amended by establishing an exemption from the requirement of a tolerance for residues of 2-methyl-1,3-propanediol (CAS Reg. No. 2163–42–0) when used as a component of food contact sanitizing solutions applied to all food contact surfaces in public eating places, dairy-processing equipment, and food-processing equipment and utensils. That notice referenced a summary of the petition prepared by Lyondell Chemical Company, the petitioner, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of

ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings, but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue.* * *''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for 2-methyl-1,3-propanediol including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with 2-methyl-1,3-propanediol follows.

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered their validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. Specific information on the studies received and the nature of the adverse effects caused by 2-methyl-1,3-propanediol as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies are discussed in the final rule published in the **Federal Register** of August 20, 2010 (75 FR 51388) (FRL–8838–3).

B. Toxicological Points of Departure/ Levels of Concern

There was no hazard identified in repeat dose toxicity and reproductive/ developmental studies with 2-methyl-1,3-propanediol at the limit dose of 1,000 milligram/kilogram/day (mg/kg/ day) to either parental animals or their offspring. Thus, due to its low potential hazard and lack of a hazard endpoint, the Agency has determined that a quantitative risk assessment using safety factors applied to a point of departure protective of an identified hazard endpoint is not appropriate for 2-methyl-1,3-propanediol.

2-Methyl-1,3-propanediol was not mutagenic in an *in vitro* chromosome aberration test, bacterial gene mutation test, and mammalian cell gene mutation assay and based on the available information, it is not anticipated to be carcinogenic. Specific information on the studies received and the nature of the adverse effects caused by 2-methyl-1,3-propanediol are discussed in the final rule published in the **Federal Register** of August 20, 2010 (75 FR 51388) and can be found at *http://www.regulations.gov* in the document ''Decision Document for Petition Number 2E6484; 2-methyl-1,3-propanediol [CAS Reg No. 2163–42–0], requesting the establishment of an inert ingredient exemption from the requirement of a tolerance'' in docket ID number EPA–HQ–OPP–2002–0185.

C. Exposure Assessment

No hazard endpoint of concern was identified for the acute and chronic dietary assessment (food and drinking water), or for the short, intermediate, and long term residential assessments (via all exposure routes), therefore, acute and chronic dietary and short-, intermediate-, and long-term residential exposure assessments were not performed.

D. Cumulative Effects From Substances With a Common Mechanism of Toxicity

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

EPA has not found 2-methyl-1,3-propanediol to share a common mechanism of toxicity with any other substances, and 2-methyl-1,3-propanediol does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that 2-methyl-1,3-propanediol does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/ cumulative.*

E. Safety Factor for Infants and Children

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

additional safety factor when reliable data available to EPA support the choice of a different factor.

The toxicity database for 2-methyl-1,3-propanediol is adequate for FQPA assessment and the potential exposure is adequately characterized given the low toxicity of the chemical. No hazard was identified and there is no residual uncertainty regarding prenatal and/or postnatal toxicity. No acute or subchronic neurotoxicity studies are available, but there were no clinical signs of neurotoxicity or any systemic toxicity observed in the available database at doses up to 1,000 mg/kg/day. No developmental or reproductive effects were seen in the available studies at doses up to and including 1,000 mg/kg/day.

Based on this information, there is no concern, at this time, for increased sensitivity to infants and children to 2-methyl-1,3-propanediol when used as a component of food contact sanitizing solutions applied to all food contact surfaces and a safety factor analysis has not been used to assess risk. For the same reason, EPA has determined that an additional safety factor is not needed to protect the safety of infants and children.

F. Aggregate Risks and Determination of Safety

Given the lack of concern for hazard posed by 2-methyl-1,3-propanediol, EPA concludes that there are no dietary or aggregate dietary/non-dietary risks of concern as a result of exposure to 2-methyl-1,3-propnaediol in food and water or from residential exposure. Residues of concern are not anticipated for dietary exposure (food and drinking water) or for residential exposure from the use of 2-methyl-1,3-propanediol as an inert ingredient in pesticide products. As discussed in this unit, EPA expects aggregate exposure to 2-methyl-1,3-propanediol to pose no appreciable dietary risk given that the data show a lack of any systemic toxicity or adverse developmental/reproductive effects at doses up to 1,000 mg/kg/day.

Taking into consideration all available information on 2-methyl-1,3-propanediol, EPA has determined that there is a reasonable certainty that no harm to any population subgroup will result from aggregate exposure to 2-methyl-1,3-propanediol under reasonable foreseeable circumstances. Therefore, the establishment of an exemption from tolerance under 40 CFR 180.940(a) for residues of 2-methyl-1,3-propanediol when used as a component of food contact sanitizing solutions applied to all food contact surface in public eating places, dairy-processing equipment, and food-processing equipment and utensils, is safe under FFDCA section 408.

V. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

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

The Codex has not established a MRL for 2-methyl-1,3-propanediol.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.940(a) for residues of 2-methyl-1,3-propanediol (CAS Reg. No. 2163–42–0) when used as a component of food contact sanitizing solutions applied to all food contact surfaces in public eating places, dairy-processing equipment, and food-processing equipment and utensils.

VII. Statutory and Executive Order Reviews

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

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

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

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

VIII. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report to each House of the Congress and to the Comptroller

General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this final rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 18, 2012.

G. Jeffery Herndon,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. In § 180.940(a), the table is amended by adding alphabetically the following inert ingredient after the entry for ''Magnesium oxide'' to read as follows:

§ 180.940 Tolerance exemptions for active and inert ingredients for use in antimicrobial formulations (Food contact surface sanitizing solutions).

* * * * *

(a) * * *

Pesticide chemical	CAS Reg. No.	Limits
* * * *	* *	*
2-Methyl-1,3-propanediol	2163–42–0	None.
* * * *	* *	*

* * * * *

[FR Doc. 2012–18506 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2011–0477; FRL–9354–7]

Pyrimethanil; Pesticide Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes tolerances for residues of pyrimethanil in or on multiple commodities which are identified and discussed later in this document. Interregional Research Project Number 4 (IR–4) requested these tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA).

DATES: This regulation is effective August 1, 2012. Objections and requests for hearings must be received on or before October 1, 2012, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**.)

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2011–0477, is available at *http://www.regulations.gov* or at the OPP Docket in the Environmental Protection Agency Docket Center (EPA/DC), located in EPA West, Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Andrew Ertman, Registration Division (7509P) Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 308–9367; email address: *ertman.andrew@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

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

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

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2011–0477 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before October 1, 2012. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing that does not contain any CBI for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit a copy of

your non-CBI objection or hearing request, identified by docket ID number EPA–HQ–OPP–2011–0477, by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

• *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), Mail Code: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.

• *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Summary of Petitioned-For Tolerance

In the **Federal Register** of July 20, 2011 (76 FR 43231) (FRL–8880–1), EPA issued a notice pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP 1E7861) by IR–4,500 College Road East, Suite 201W, Princeton, NJ 08540. The petition requested that 40 CFR 180.518 be amended by establishing tolerances for residues of the fungicide pyrimethanil (4,6-dimethyl-N-phenyl-2-pyrimidinamine) in or on the raw agricultural commodities onion, bulb, subgroup 03–07A at 0.1 parts per million (ppm), onion, green, subgroup 03–07B at 2.0 ppm, berry and small fruit, small fruit vine climbing subgroup, except fuzzy kiwifruit 13–07F at 5.0 ppm, berry and small fruit, low growing berry subgroup 13–07G at 3.0 ppm and ginseng at 2.5 ppm. That notice referenced a summary of the petition prepared by Bayer CropScience, the registrant, which is available in the docket, *http://www.regulations.gov.* There were no comments received in response to the notice of filing.

Based upon review of the data supporting the petition, EPA has modified the levels at which tolerances are being established for some of the commodities. The reason for this change is explained in Unit IV.C.

III. Aggregate Risk Assessment and Determination of Safety

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

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

A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Pyrimethanil is of low acute lethality by the oral, dermal, and inhalation routes. It is a slight eye irritant, is not irritating to the skin, and it is not a dermal sensitizer. A single oral dose of 1,000 milligrams/kilogram (mg/kg) produced a number of acute signs of neurotoxicity, including ataxia, dilated pupils, and decreases in motor activity, hind limb grip strength, and body temperature. However, there was no evidence of neurotoxicity with repeated dosing in a subchronic neurotoxicity study in rats. Exposure to pyrimethanil in oral toxicity studies primarily resulted in decreased body weights and body-weight gain, often accompanied by decreases in food consumption. The major target organs of repeated oral exposure were the liver and the thyroid. No reproductive toxicity was observed, and developmental effects (e.g., decreased fetal weight, retarded ossification, extra ribs) were observed only at maternally toxic doses. Special short-term exposure studies demonstrated increased liver uridine diphosphate glucuronosyl transferase (UDPGT) activity leading to decreases in thyroid hormones (T3, T4) and compensatory increases in thyroid stimulating hormone (TSH) in adult rats. Thyroid adenomas were seen in rats following long-term exposure, and it was concluded that they were mediated via disruption of the thyroid/pituitary axis. There were no concerns for mutagenicity.

The EPA has classified pyrimethanil as ''Not Likely To Be Carcinogenic To Humans At Doses That Do Not Alter Rat Thyroid Hormone Homeostasis.'' This decision was based on the following:

1. There were treatment-related increases in thyroid follicular cell tumors in male and female Sprague-Dawley rats at doses which were considered adequate to assess carcinogenicity.

2. There were no treatment-related tumors were seen in male or female CD–1 mice at doses which were considered adequate to assess carcinogenicity.

3. There is no mutagenicity concern and there is no evidence for thyroid carcinogenesis mediated through a mutagenic mode of action.

4. The non-neoplastic toxicological evidence (i.e., thyroid growth, thyroid hormonal changes) indicated that pyrimethanil was inducing a disruption in the thyroid-pituitary hormonal status. The overall weight-of-evidence was considered sufficient to indicate that Pyrimethanil induced thyroid follicular tumors through an antithyroid mode of action.

5. Rats are substantially more sensitive than humans to the development of thyroid follicular cell tumors in response to thyroid hormone imbalance. EPA determined that quantification of carcinogenic risk is not required since the thyroid tumors arise through a non-linear mode of action and the no observed adverse effect level (NOAEL) (17 mg/kg/day) established for deriving the chronic reference dose (cRfD) is not expected to alter thyroid hormone homeostasis nor result in thyroid tumor formation.

Specific information on the studies received and the nature of the adverse effects caused by pyrimethanil as well as the NOAEL and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at *http://www.regulations.gov* in the document titled ''Pyrimethanil Human-Health Risk Assessment for Proposed Uses on

Ginseng, Bulb Onion Subgroups 3–07A and B, and Small Berry Subgroups 13–07F and G,'' pp. 32–34 in docket ID number EPA–HQ–OPP–2011–0477.

B. Toxicological Points of Departure/ Levels of Concern

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

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

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

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute dietary (Females 13–49 years of age).	NOAEL = 45 mg/kg/day .... UF_A = 10X UF_H = 10X FQPA SF = 1X	Acute RfD = 0.45 mg/kg/day. aPAD = 0.45 mg/kg/day	Developmental Toxicity—Rabbit: LOAEL = 300 mg/kg/day based on increases in fetuses with 13 thoracic vertebrae and 13 pairs of ribs.
Acute dietary (General population including infants and children).	NOAEL = 100 mg/kg/day .. UF_A = 10X UF_H = 10X FQPA SF = 1X	Acute RfD = 1 mg/kg/day .. aPAD = 1 mg/kg/day	Acute Neurotoxicity—Rat: LOAEL = 1,000 mg/kg/day based on decreased motor activity, ataxia, decreased body temperature, hind limb grip strength, and dilated pupils.
Chronic dietar (All populations).	NOAEL= 17 mg/kg/day ..... UF_A = 10X UF_H = 10X FQPA SF = 1X	Chronic RfD = 0.17 mg/kg/day. cPAD = 0.17 mg/kg/day	Chronic Toxicity—Rat: LOAEL = 221 mg/kg/day based on decreased body-weight gains; increased serum cholesterol and GGT, increased relative liver/body weight ratios, necropsy and histopathological findings in the liver and thyroid.

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population-adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF_A = extrapolation from animal to human (interspecies). UF_H = potential variation in sensitivity among members of the human population (intraspecies).

C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to pyrimethanil, EPA considered exposure under the petitioned-for tolerances as well as all existing pyrimethanil tolerances in 40 CFR 180.518. EPA assessed dietary exposures from pyrimethanil in food as follows:

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

Such effects were identified for pyrimethanil. In estimating acute dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 1994–1996 and 1998 Nationwide Continuing Surveys of Food Intake by Individuals (CSFII). As to residue levels in food, EPA assumed default processing factors (as necessary), empirical processing factors for orange and apple juice, tolerance level residues and 100 percent crop treated (PCT) for all commodities.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption data from the USDA 1994–1996 and 1998 CSFII. As to residue levels in food, EPA assumed default processing factors (as necessary), empirical processing factors for orange and apple juice, tolerance level residues and 100 PCT for all commodities.

iii. *Cancer.* EPA determines whether quantitative cancer exposure and risk assessments are appropriate for a food-use pesticide based on the weight of the evidence from cancer studies and other relevant data. Cancer risk is quantified using a linear or nonlinear approach. If sufficient information on the carcinogenic mode of action is available, a threshold or nonlinear approach is used and a cancer RfD is calculated based on an earlier noncancer key event. If carcinogenic mode of action data are not available, or if the mode of action data determines a mutagenic mode of action, a default linear cancer slope factor approach is utilized. Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk to pyrimethanil. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii.

iv. *Anticipated residue and PCT information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for pyrimethanil. Tolerance-level residues and 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for pyrimethanil in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of pyrimethanil. Further information regarding EPA drinking water models used in pesticide exposure assessment

can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models the estimated drinking water concentrations (EDWCs) of pyrimethanil for acute exposures are estimated to be 86.5 parts per billion (ppb) for surface water and 4.8 ppb for ground water. For chronic exposures for non-cancer assessments, they are estimated to be 29.4 ppb for surface water and 4.8 ppb for ground water.

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

For acute dietary risk assessment, the water concentration value of 86.5 ppb was used to assess the contribution to drinking water.

For chronic dietary risk assessment, the water concentration of value 29.4 ppb was used to assess the contribution to drinking water.

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

Pyrimethanil is not registered for any specific use patterns that would result in residential exposure.

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

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

D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The prenatal and postnatal toxicology database for pyrimethanil includes rat and rabbit developmental toxicity studies and a 2–generation reproduction toxicity study in rats. As discussed in Unit III. A., there was no evidence of increased quantitative or qualitative susceptibility of fetuses or offspring following exposure to pyrimethanil in these studies.

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

i. The toxicology database for pyrimethanil is complete.

ii A guideline immunotoxicity study has been submitted, and there is no evidence for immunotoxicity due to pyrimethanil treatment. Evidence of neurotoxicity was observed at a very high dose (the limit dose) in the acute neurotoxicity study in rats. However, the study has a clear NOAEL, which is being utilized as the POD for the acute dietary exposure scenario, and there was no evidence of neurotoxicity observed in the subchronic neurotoxicity study in rats up to the highest dose tested in that study (430 mg/k/day). A developmental neurotoxicity (DNT) study is not required.

iii. There is no evidence that pyrimethanil results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. Thyroid has been shown to be one of the target organs in adult animals for pyrimethanil-induced toxicity thus raising a potential concern for thyroid toxicity in the young. EPA, however, concluded that there is no concern for thyroid toxicity in the young based on the following weight of evidence considerations: the effects seen on the thyroid and the liver in the database, while treatment-related, are not severe in nature; and in each of the studies that show an effect on thyroid hormone levels, as well as in all studies chosen for PODs selection, there is a wide dose spread (~10-fold difference between NOAELs and LOAELs) which provides a measure of protection for any potential effects linked to decreased thyroid hormone levels in offspring.

v. There are no residual uncertainties with respect to exposure data. The dietary food exposure assessment utilizes tolerance-level residues (established or recommended) and 100 PCT for all proposed/established commodities. By using these assumptions, the acute and chronic exposures/risks will not be underestimated. The dietary drinking water assessment utilizes water concentration values generated by models and associated modeling parameters that are designed to provide conservative, health-protective, high-end estimates of water concentrations that will not likely be exceeded. These assessments will not underestimate the exposure and risks posed by pyrimethanil.

E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to pyrimethanil will occupy 35% of the aPAD for all infants <1 year old, the population group receiving the greatest exposure.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to pyrimethanil from food and water will utilize 64% of the cPAD for children 1–2 years old, the population group receiving the greatest exposure. There are no residential uses for pyrimethanil.

3. *Short-and intermediate-term risk.* Short-term and intermediate-term aggregate exposure takes into account short-and intermediate-term residential exposure plus chronic exposure to food

and water (considered to be a background exposure level). A short-and intermediate-term adverse effect was identified; however, pyrimethanil is not registered for any use patterns that would result in short- and/or intermediate-term residential exposure. Short-and intermediate-term risk is assessed based on short-and intermediate-term residential exposure plus chronic dietary exposure. Because there is no short-and intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-and intermediate-term risk), no further assessment of short-and intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short-and intermediate-term risk for pyrimethanil.

4. *Aggregate cancer risk for U.S. population.* The Agency determined that the thyroid tumors seen in rat studies arise through a non-linear mode of action and the NOAEL (17 mg/kg/day) established for deriving the cRfD is not expected to alter thyroid hormone homeostasis nor result in thyroid tumor formation. Thus, the chronic risk assessment addresses any cancer risk.

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

IV. Other Considerations

A. Analytical Enforcement Methodology

Adequate enforcement methodology high-performance liquid chromatography (HPLC) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

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

The Codex has established MRLs for pyrimethanil in or on strawberry at 3 ppm, bulb onions at 0.2 ppm, and spring onion at 3 ppm. These MRLs are the same as the tolerances established by this rule for pyrimethanil on the low growing berry subgroup 13–07G, the bulb onion subgroup 3–07A, and the green onion subgroup 3–07B in the United States.

The Codex has established an MRL for pyrimethanil in or on grapes at 4 ppm which is less than tolerance of 5.0 ppm set on the small vine climbing fruit subgroup 13–07F of which grape is a member. The reason for this is due to the fact that the European PHI is 21 days and the U.S. PHI is 7 days. Residues are thus higher in U.S. residue trials, necessitating a higher tolerance.

C. Revisions to Petitioned-For Tolerances

Using the Organization for Economic Co-operation and Development (OECD) tolerance calculation procedures for the residue data set indicates that the requested tolerance of 2.5 ppm for residues of pyrimethanil in/on ginseng is too high and that a tolerance of 1.5 ppm is appropriate. Also, the tolerance levels for the bulb onion subgroup 3–07A and green onion subgroup 3–07B were modified to harmonize with existing Codex Maximum Residue Levels (MRLs). Lastly, EPA has revised the tolerance expressions to clarify:

1. That, as provided in FFDCA section 408(a)(3), the tolerance covers metabolites and degradates of pyrimethanil not specifically mentioned; and

2. That compliance with the specified tolerance levels is to be determined by measuring only the specific compounds mentioned in the tolerance expression.

V. Conclusion

Therefore, tolerances are established for residues of pyrimethanil (4,6-dimethyl-*N*-phenyl-2-pyrimidinamine) in or on onion, bulb, subgroup 03–07A at 0.20 ppm; onion, green, subgroup 03–07B at 3.0 ppm; fruit, small, vine climbing subgroup 13–07F, except fuzzy kiwifruit 13–07F at 5.0 ppm; berry, low growing, subgroup 13–07G at 3.0 ppm and ginseng at 1.5 ppm.

Also, due to the tolerances established in this unit by this document, the following existing tolerances are removed as unnecessary; strawberry; grape; onion, bulb; and onion, green.

VI. Statutory and Executive Order Reviews

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

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

This final rule directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or tribal governments, on the relationship between the national government and the States or tribal governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination

with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this final rule. In addition, this final rule does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4).

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

VII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 18, 2012.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

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

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

■ 2. Section 180.518 is amended as follows:

■ a. Revising the introductory text to paragraph (a)(1);

■ b. Removing the entries for ''Grape''; ''Onion, bulb''; and ''Onion, green; and ''Strawberry'' from the table in paragraph (a)(1);

■ c. Alphabetically adding the following commodities to the table in paragraph (a)(1); and

■ d. Revising the introductory text for paragraphs (a)(2) and (3).

The amendments read as follows:

§ 180.518 Pyrimethanil; tolerances for residues.

(a) *General.* (1) Tolerances are established for residues of the fungicide pyrimethanil, including its metabolites and degradates, in or on the commodities in the following table Compliance with the tolerance levels specified in the following table is to be determined by measuring only pyrimethanil (4,6-dimethyl-*N*-phenyl-2-pyrimidinamine).

Commodity	Parts per million
* * * * *	
Berry, low growing, subgroup 13–07G	3.0
* * * * *	
Fruit, small, vine climbing, subgroup 13–07F, except fuzzy kiwifruit	5.0
* * * * *	
Ginseng	1.5
* * * * *	
Onion, bulb, subgroup 3–07A	2.0
Onion, green, subgroup 3–07B	3.0
* * * * *	

(2) Tolerances are established for residues of the fungicide pyrimethanil, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only the sum of pyrimethanil and its metabolite 4-[4,6-dimethyl-2-pyrimidinyl)amino]phenol, calculated as the stoichiometric equivalent of pyrimethanil.

* * * * *

(3) Tolerances are established for residues of the fungicide pyrimethanil, including its metabolites and degradates, in or on the commodities in the following table. Compliance with the tolerance levels specified in the following table is to be determined by measuring only the sum of pyrimethanil and its metabolite 4,6-dimethyl-2-(phenylamino)-5-pyrimidinol, calculated as the stoichiometric equivalent of pyrimethanil.

* * * * *

[FR Doc. 2012–18388 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 90

[WP Docket No. 07–100; PS Docket No. 06–229; WT Docket No. 06–150; FCC 12–61]

4.9 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission adopts rule changes to three aspects of the technical provisions of part 90 of the Commission's rules pertaining to public safety operations. All of these changes are designed to correct typographical or other ministerial errors in these provisions. First, the Commission reinstates a rule provision that exempted 4940–4990 MHz (4.9 GHz) band applicants from certified frequency coordination. Next, the Commission corrects the bandwidth of Channel 14 in the 4.9 GHz band plan from five megahertz to one megahertz, and amends the band plan to list the center frequencies for each channel aggregation permitted in the rules. Finally, the Commission corrects minor errors in the Public Safety Pool Frequency Table and associated list of limitations. All of these changes are designed to correct typographical or other ministerial errors in these provisions. These changes affecting the 4.9 GHz band in particular will improve spectrum efficiency and clarify the rules so as to encourage greater use of the 4.9 GHz band.

DATES: Effective August 31, 2012.

FOR FURTHER INFORMATION CONTACT: Thomas Eng, Policy and Licensing Division, Public Safety and Homeland Security Bureau, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554, at (202) 418–0019, TTY (202) 418–7233, or via email at *Thomas.Eng@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Fourth Report and Order* in WP Docket No. 07–100; PS Docket No. 06–229; WT Docket No. 06–150; adopted and released on June 13, 2012. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., in person at 445 12th Street SW., Room CY–B402, Washington, DC 20554, via telephone at (202) 488–5300, via

facsimile at (202) 488–5563, or via email at *FCC@BCPIWEB.com.* Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities or by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530, TTY (202) 418–0432. This document is also available on the Commission's Web site at *http://www.fcc.gov.*

Introduction and Background

In this *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking* (*Fourth Report and Order* and *Fifth Further Notice,* respectively), we adopt rule changes to Part 90 of the Commission's rules pertaining to public safety operations in the 4940–4990 MHz (4.9 GHz) band to clarify, as well as correct certain provisions in the technical rules and several entries in the Public Safety Pool Frequency Table and associated list of limitations. In April 2009, the Commission released the *Report and Order and Further Notice of Proposed Rulemaking* (*Report and Order* and *Further Notice,* respectively) to ''encourag[e] public safety users to more fully utilize the 4.9 GHz band'' for broadband communications. In the *Report and Order,* the Commission amended part 90 of the Commission's rules to permit licensing in the 4.9 GHz band, on a primary basis, of permanent fixed links used to deliver broadband services. In the *Further Notice,* the Commission proposed (1) to reinstate a provision that had previously exempted 4.9 GHz band applicants from certified frequency coordination, (2) to require instead that applicants for 4.9 GHz primary permanent fixed stations complete the formalized licensee-to-licensee coordination process established in part 101 for fixed microwave stations, (3) to correct an error in the band plan for the 4.9 GHz band and clarify how channels may be aggregated, and (4) to correct additional errors in the Public Safety Pool Frequency Table and associated list of limitations.

The Commission received five comments and two reply comments in response to the *Further Notice.* None of the commenters raised any question about these proposals, with the exception of the proposed licensee-to-licensee coordination process, for which a majority of commenters proposed database and registration approaches as alternatives. By this *Fourth Report and Order,* we adopt the proposals from the *Further Notice* except for the licensee-to-licensee coordination process. In order to permit further comment on proposals for coordination, we further explore 4.9 GHz coordination in the *Fifth Further Notice.*

Fourth Report and Order

In this *Fourth Report and Order,* we adopt rule changes to three aspects of the technical provisions of part 90 of the Commission's rules pertaining to public safety operations. All of these changes are designed to correct typographical or other ministerial errors in these provisions. First, we reinstate a rule provision, formerly codified at § 90.175(j)(17) of the Commission's rules but inadvertently deleted in 2004, that exempted 4.9 GHz band applicants from certified frequency coordination. Next, we correct the bandwidth of Channel 14 in the 4.9 GHz band plan from five megahertz to one megahertz, and amend the band plan to list the center frequencies for each channel aggregation permitted in the rules. Finally, we correct minor errors in the Public Safety Pool Frequency Table and associated list of limitations. These changes will improve spectrum efficiency and clarify provisions of the rules so as to encourage greater use of the 4.9 GHz band. Their costs are negligible, because they would impose no apparent investment or expenditure requirements on any affected entities to achieve compliance.

4.9 GHz General Exemption From Certified Frequency Coordination

In the *Further Notice,* the Commission sought comment on its proposal to amend § 90.175(j) of the Commission's rules to restore an exemption for applications for 4.9 GHz band frequencies from certified frequency coordination requirements. The rationale for this exemption had been that all of these frequencies are subject to shared use and thus already require cooperation and coordination under the Commission's rules. The Commission tentatively concluded that an unrelated rulemaking had overwritten this exemption in 2004 by ministerial error.

Harris Corporation (Harris) and the National Public Safety Telecommunications Council (NPSTC) filed comments in support of restoring the exemption. Harris states that ''[c]ertification of coordination is unnecessary given local government's interest in maximizing use and avoiding interference among its various public safety agencies.'' Harris further notes that ''as more public safety communications planning (particularly with regard to interoperable communications like that envisioned for the 4.9 GHz band) is done at the state level, there is inherently more state and local-government coordination amongst public safety agencies.'' As the Commission observed in the *Further Notice,* the omission has been in effect for a substantial period of time, and some entities may be operating under the assumption that formal coordination from a certified frequency coordinator is required for 4.9 GHz applications. Given the inadvertent nature of the deletion of this provision from the rules, and the lack of comments objecting to its reinstatement, we reinstate the provision exempting 4.9 GHz band applicants from certified frequency coordination requirements. For the reasons identified by Harris, clarifying our existing rule has clear benefits, and we do not currently believe that the benefits associated with unintended certified frequency coordination procedures outweigh their costs to public safety entities. Notwithstanding the exemption from certified frequency coordination requirements, however, we continue to believe, as we noted in the *Further Notice,* that ''additional measures are required to minimize the potential for interference.'' Accordingly, we explore possible additional coordination requirements in the *Fifth Further Notice,* including those advanced by commenters in response to the *Further Notice.*

4.9 GHz Band Plan Correction and Clarification

The Commission also sought comment on a proposal to correct the bandwidth for channel number 14 in § 90.1213 of the Commission's rules from five megahertz to one megahertz. The original designation of five megahertz bandwidth to channel 14 in the Commission's rules appears to have been a ministerial error, as it renders the band plan assymetrical and is the only channel in the band plan that has bandwidth overlap with the adjacent channels. In the *Further Notice,* the Commission noted that this correction would eliminate bandwidth overlap with adjacent channels, improve spectrum efficiency, restore symmetry to the band plan, and reflect the correct allocation between one-megahertz and five-megahertz channels that the Commission had actually specified in the *4.9 GHz Third Report and Order.* The Commission further proposed to grandfather existing licensees to minimize the effect of this clarification on existing operations. Also, for the purpose of clarifying channel centers for various channel aggregations, the Commission sought comment on a proposal to amend the table in § 90.1213 to list the center frequencies that should be requested on applications, for every possible channel aggregation permitted

in the rules. NPSTC expressed support for this proposal, and no parties opposed it.

Because the Commission's proposed clarification for § 90.1213 would correct a discrepancy in the codification of the rule, and the amended table will help 4.9 GHz applicants specify on their applications the correct center frequency for any given channel aggregation as permitted in the rules, we adopt these two changes to the 4.9 GHz band plan. We grandfather any existing licensees that are authorized for greater than one megahertz bandwidth on channel 14 or for non-standard center frequencies. This will relieve existing licensees from burdens and costs that would be required to comply with these changes. Since the 4.9 GHz band is lightly used today relative to other public safety bands, we do not believe that grandfathering will cause significant problems, which could include cases of mutual bandwidth overlap interference between existing licensees on channel 14 with five megahertz bandwidth and licensees on adjacent channels.

Public Safety Pool Corrections

The Commission also sought comment on a proposal to implement three amendments to correct ministerial errors in the Public Safety Pool Frequency Table and associated list of limitations, each of which would clarify our rules and eliminate the potential for confusion. As none of these three amendments was opposed, we thus adopt each of them. None of the changes will restrict or limit licensee operation beyond what is currently authorized by our rules, and thus we find no need to grandfather incumbent licensees from the effect of any of them.

First, in the § 90.20(d)(66)(i) table of frequency pairs, the Commission proposed to correct the mobile-only frequency for Channel MED–4 from 463.075 MHz to 468.075 MHz. We confirm our tentative conclusion that the current rule reflects a typographical error. The error is evidenced by the absence of any rule change to explain it and the fact that all other mobile only frequencies in this table are in the 468 MHz range while the listed frequency at issue here (463.075 MHz) already appears in the ''Frequencies base and mobile (megahertz)'' column of the table.

Second, in the § 90.20(c)(3) table of Public Safety Pool frequencies, the Commission proposed to replace limitation 38 with limitation 10 on nine medical service frequencies. In 2005, the Commission issued an order that, inter alia, replaced limitation 38 with limitation 10 in the Public Safety Pool Frequency Table because the two limitations were identical. Today, limitation 38 is ''reserved'' and thus devoid of any actual regulation, but the Commission never has completed the limitation replacement in the table of frequencies. Today's action will correct this oversight.

Third, the Commission proposed to amend § 90.20(c)(3) by replacing the text in the limitation column ''O='xl'≤72'' for the 1427 to 1432 MHz band with the numeral ''72.'' As explained in the *Further Notice,* this correction will clarify our intention to apply limitation 72 to this band.

After further scrutiny of the Public Safety Pool Frequency Table, we identified another typographical error in the table not previously identified in the *Further Notice.* In the original 2007 *Notice of Proposed Rulemaking and Order* in WP Docket No. 07–100, the Commission made ''certain minor editorial amendments to part 90 to correct errors or omissions of publication, eliminate duplicative language, or conform language among rule sections.'' Among these changes, the Commission deleted ''obsolete references to § 90.20(d)(60) and (61).'' However, when the Commission deleted limitations 60 and 61 for frequencies 453.03125 and 453.04375 MHz in the Public Safety Pool Frequency Table, the Commission also changed limitation number 59 to 49 on these frequencies without explanation. These additional changes were the result of typographical errors. Limitation 49 states that ''[t]his frequency may be assigned only for forest firefighting and conservation activities in accordance with the provisions of § 90.265,'' but frequencies 453.03125 and 453.04375 MHz do not appear in that section. In contrast, limitation 59 states that ''[t]he continuous carrier mode of operation may be used for telemetry transmission on this frequency.'' The telemetry focus of limitation 59 is consistent with limitation 62, which also applies to these frequencies. We take this opportunity to correct these errors and change limitation number 49 back to 59 on these frequencies. Because we are merely correcting a typographical error to restore the original language of the rule, we find for good cause that prior notice and comment on the correction are unnecessary.

Procedural Matters

Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, see 5 U.S.C. 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) and Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The FRFA is set forth in Appendix C and the IRFA is set forth in Appendix E of the *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking.* The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking,* including this FRFA and IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). See 5 U.S.C. 603(a).

Paperwork Reduction Act Analysis

This *Fourth Report and Order* does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, the *Fourth Report and Order* does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

Congressional Review Act

The Commission will send a copy of the *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking* to Congress and the Government Accountability Office pursuant to the Congressional Review Act (''CRA''), see 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

Accordingly, *we order,* pursuant to sections 1, 4(i), 301, 302, 303, 316, and 403 of the Communications Act of 1934, 47 U.S.C. 151, 154(i), 301, 302, 303, 316, and 403, that this *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking* is *hereby adopted.*

We further order and *amend* part 90 of the Commission's rules as specified in Appendix B, effective thirty days after publication of the *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking* in the **Federal Register**.

We further order that the Commission's Consumer and Governmental Affairs Bureau, Reference Center, *shall send* a copy of this *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking,* including the Final and Initial Regulatory Flexibility Analyses, to the

Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 90

Communications equipment; Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 90 as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), and 332(c)(7).

■ 2. Section 90.20 is amended as follows:

■ a. In paragraph (c)(3), Public Safety Pool Frequency Table, revise entries ''453.03125,'' ''453.04375,'' ''462.950,'' ''467.950,'' ''467.95625,'' ''467.9625,'' ''467.96875,'' ''467.975,'' ''467.98125,'' ''467.9875,'' ''467.99375'' and ''1,427 to 1,432'';

■ b. In paragraph (d)(66)(i), revise entry ''463.075''.

The revisions read as follows:

§ 90.20 Public Safety Pool.

* * * * *

(c) * * *

(3) * * *

PUBLIC SAFETY POOL FREQUENCY TABLE

Frequency or band	Class of station(s)	Limitations	Coordinator
* * *	* * *	*	*
Megahertz			
* * *	* * *	*	*
453.03125	Base or mobile	44, 59, 62, 84	PM
* * *	* * *	*	*
453.04375	.....do	44, 59, 62, 84	PM
* * *	* * *	*	*
462.950	.....do	10, 65	PM
* * *	* * *	*	*
467.950	.....do	10, 65	PM
467.95625	.....do	10, 44, 65	PM
467.9625	.....do	10, 27, 65	PM
467.96875	.....do	10, 44, 65	PM
467.975	.....do	10, 65	PM
467.98125	.....do	10, 44, 65	PM
467.9875	.....do	10, 27, 65	PM
467.99375	.....do	10, 44, 65	PM
* * *	* * *	*	*
1,427 to 1,432	Base, mobile or operational fixed	72	
* * *	* * *	*	*

* * * * *

(d) * * *

(66) * * *

(i) * * *

Frequencies base and mobile (megahertz)	Mobile only (MHz)	Channel name
* * *	* * *	*
463.075	468.075	MED–4
* * *	* * *	*

* * * * *

■ 3. Section 90.175 is amended by adding paragraph (j)(22) to read as follows:

§ 90.175 Frequency coordinator requirements.

* * * * *

(j) * * *

(22) Applications for frequencies in the 4940–4990 MHz band. See § 90.1209 of this chapter for further information.

■ 4. Section 90.1213 is revised to read as follows:

§ 90.1213 Band plan.

(a) The following channel center frequencies are permitted to be aggregated for channel bandwidths of 5, 10, 15 or 20 MHz as described in paragraph (b) of this section. Channel numbers 1 through 5 and 14 through 18 are 1 MHz bandwidth channels, and channel numbers 6 through 13 are 5 MHz bandwidth channels.

Center frequency (MHz)	Bandwidth (MHz)	Channel Nos.
4940.5	1	1
4941.5	1	2
4942.5	1	3
4943.5	1	4
4944.5	1	5
4947.5	1	6
4952.5	1	7
4957.5	1	8
4962.5	1	9

Center frequency (MHz)	Bandwidth (MHz)	Channel Nos.
4967.5	1	10
4972.5	1	11
4977.5	1	12
4982.5	1	13
4985.5	1	14
4986.5	1	15
4987.5	1	16
4988.5	1	17
4989.5	1	18

(b) The following tables list center frequencies to be licensed for aggregated channels only. A license may contain any combination of bandwidths from aggregated channels provided that the bandwidths do not overlap. The bandwidth edges (lower and upper frequencies) are provided to aid in planning.

(1) 5 MHz bandwidth aggregation:

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4942.5	1 to 5*	4940	4945
4947.5	6	4945	4950
4952.5	7	4950	4955
4957.5	8	4955	4960
4962.5	9	4960	4965
4967.5	10	4965	4970
4972.5	11	4970	4975
4977.5	12	4975	4980
4982.5	13	4980	4985
4987.5	14 to 18*	4985	4990

*Licensees should avoid using these channels in aggregations unless all other channels are blocked.

(2) 10 MHz bandwidth aggregation:

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4945	1 to 6*	4940	4950
4950	6 & 7	4945	4955
4955	7 & 8	4950	4960
4960	8 & 9	4955	4965
4965	9 & 10	4960	4970
4970	10 & 11	4965	4975
4975	11 & 12	4970	4980
4980	12 & 13	4975	4985
4985	13 to 18*	4980	4990

*Licensees should avoid using these channels in aggregations unless all other channels are blocked.

(3) 15 MHz bandwidth aggregation:

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4947.5	1 to 7*	4940	4955
4952.5	6 to 8	4945	4960
4957.5	7 to 9	4950	4965
4962.5	8 to 10	4955	4970
4967.5	9 to 11	4960	4975
4972.5	10 to 12	4965	4980
4977.5	11 to 13	4970	4985
4982.5	12 to 18*	4975	4990

*Licensees should avoid using these channels in aggregations unless all other channels are blocked.

(4) 20 MHz bandwidth aggregation:

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4950	1 to 8*	4940	4960

Center frequency (MHz)	Channel Nos. employed	Lower frequency (MHz)	Upper frequency (MHz)
4955	6 to 9	4945	4965
4960	7 to 10	4950	4970
4965	8 to 11	4955	4975
4970	9 to 12	4960	4980
4975	10 to 13	4965	4985
4980	11 to 18 *	4970	4990

* Licensees should avoid using these channels in aggregations unless all other channels are blocked.

[FR Doc. 2012–18575 Filed 7–31–12; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 120312181–2279–01]

RIN 0648–BC00

Fisheries off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Trawl Rationalization Program

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

ACTION: Temporary rule; emergency action.

SUMMARY: This action delays some and revises other portions of the Pacific Coast Groundfish Fishery Trawl Rationalization Program (program) regulations. These changes are necessary to enable the National Marine Fisheries Service (NMFS) to implement new regulations for the program to comply with a court order requiring NMFS to reconsider the initial allocation of Pacific whiting (whiting) to the shorebased Individual Fishing Quota (IFQ) fishery and the at-sea mothership fishery. The rule affects the transfer of Quota Share (QS) and Incidental Bycatch Quota (IBQ) between QS accounts in the shorebased individual IFQ fishery, and severability in the mothership fishery, both of which will be delayed until NMFS can implement any necessary new allocation regulations required by the court's order.

DATES: This rule is effective September 1, 2012 through January 28, 2013.

FOR FURTHER INFORMATION CONTACT: Ariel Jacobs, 206–526–4491; (fax) 206–526–6736; *Ariel.Jacobs@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

This final rule delays or revises several provisions of the Pacific coast trawl rationalization program, based on decisions issued by the U.S. District Court for the Northern District of California in the case *Pacific Dawn* v. *Bryson,* No. C10–4829 TEH (2012), requiring NMFS and the Council to reconsider the initial allocation of Pacific whiting. Background on this rule was provided in the proposed rule, published on May 21, 2012 (77 FR 29955), and is not repeated here. This action:

(1) Delays the ability to transfer QS and IBQ between QS accounts in the shorebased IFQ fishery in order to avoid complications that would occur if QS permit owners in the shorebased IFQ fishery were allowed to transfer QS percentages prior to completion of the whiting allocation reconsideration;

(2) Delays the requirement to divest excess quota share amounts for the shorebased IFQ fishery and the at-sea mothership fishery so that QS permit owners will have sufficient time to plan and arrange sales of excess QS, as originally recommended by the Council for this provision of the trawl rationalization program;

(3) Delays the ability to change MS/CV endorsement and catch history assignments from one limited entry trawl permit to another in order to avoid complications if permit owners are allowed to transfer ownership of catch history assignments before completion of the reconsideration takes place; and

(4) Modifies the issuance provisions for quota pounds (QP) for the beginning of fishing year 2013 to preserve NMFS' ability to deposit the appropriate final amounts into IFQ accounts based on any recalculation of QS allocations. In the meantime, NMFS will deposit into accounts an interim amount of QP based on the shorebased trawl allocation, as reduced by the amount of QP for whiting trips for whiting, and for species caught incidentally in the whiting fishery (including lingcod, Pacific cod, canary, bocaccio, cowcod, yelloweye, Pacific ocean perch, widow, English sole, darkblotched, sablefish N. of 36°N lat., yellowtail N. of 40°10′ N. lat., shortspine N. of 34°27′ N. lat., minor slope rockfish N. of 40°10′ N. lat., minor slope rockfish S. of 40°10′ N. lat., minor shelf rockfish N. of 40°10′ N. lat., minor shelf rockfish S. of 40°10′ N. lat., and other flatfish). The remainder of the interim QP will be deposited in accounts at the start of the whiting primary season.

NMFS is also advising the at-sea mothership fishery that the response to the court order may impact processor obligations and cooperative (coop) formation if whiting catch history assignments are recalculated, and announces further details on the process for the affected public to review and correct, if necessary, their landings and delivery data through 2010, since this data may be used for reallocation.

Potential Impact on Processor Obligations and Coop Formation

NMFS will announce any changes to the amount of catch history assignments associated with MS/CV-endorsed limited entry trawl permits by April 1, 2013. The mothership sector has until March 31, 2013, to submit their coop permit applications to NMFS for that fishing year. The coop permit application includes a list of the catch history amounts associated with specific MS/CV-endorsed limited entry permits and which MS permit those amounts are obligated to. In addition, MS/CV-endorsed permit owners must obligate their associated catch history assignment to an MS permit by September 1 of the prior year. Because both of these requirements may happen before NMFS makes its determination on the 2013 catch history assignments associated with MS/CV-endorsed permits, participants in the mothership fishery should be aware that this proposal may potentially impact their processor obligations, coop formation, and coop permit application. NMFS does not anticipate a need for regulatory changes to address these potential impacts, and will work with any MS coop permit applicants if there are changes in catch history assignments from that noted in the 2013 coop permit

application. For example, in the initial administrative determination for any 2013 MS coop permit application, NMFS will notify the coop manager of any changes in catch history assignments for MS/CV-endorsed permits associated with that coop.

Process To Review, and If Necessary, Correct Data

In the proposed rule, NMFS laid out a detailed process for reviewing and correcting landings data. Since publishing the proposed rule, several confidentiality issues have arisen with regard to state landings data. When NMFS resolves these issues, we will notify the public of the process for reviewing and correcting all landings data.

NMFS also considered whether to allow limited entry permit transfers (i.e., changes in permit ownership) for all limited entry trawl endorsed permits, except for those with a catcher/processor endorsement, for a period of time during the reconsideration. This allowance would simplify reissuance of QS permits in the shorebased IFQ fishery, or of catch history assignments on MS/CV-endorsed limited entry trawl permits in the at-sea mothership fishery. After assessing this step, NMFS has determined that it is not necessary because the reallocation rule likely will have no planned application process. The initial allocation had a lengthy application process that necessitated not allowing limited entry permit (LEP) transfers while NMFS reviewed applications. For any revised reallocation, NMFS likely will issue an initial administrative determination (IAD), but not an application; these details will be developed as part of the reallocation rulemaking. Accordingly, there is no need to freeze LEP transfers. If NMFS reissues QS permits and/or catch history assignments on MS/CV-endorsed limited entry trawl permits, NMFS likely will issue those permits or catch history assignments to the QS account owner of record with NMFS at the time of reissuance. However, these details will be developed as part of the reallocation rulemaking.

Comments and Responses

NMFS solicited public comment on the proposed rule (77 FR 29955, May 21, 2012). The comment period for these notices ended June 29, 2012. NMFS received two letters of comments on the proposed rule, only one of which was substantive. The comment period was open during the June 2012 Council meeting. Comments presented to the Council are part of the record and were considered by the Council during its deliberation. In reviewing the proposed rule, NMFS considered the record as a whole.

Comment 1. NMFS received one comment from the Pacific Fishery Management Council concurring with the primary issues covered in the proposed rule. They also requested that the moratorium on the transfer of widow rockfish QS be extended to December 31, 2014, or the date when the Council completes its consideration (including resolution of appeals) and NMFS implements changes to the widow rockfish QS allocations.

Response: NMFS acknowledges this comment; however, NMFS cannot extend the moratorium on the transfer of widow rockfish QS beyond the 365 days allowed by the statute for this emergency action. Extending that moratorium needs to be done in a separate rulemaking.

Classification

Pursuant to section 305(c)(1) of the MSA, the NMFS Assistant Administrator has determined that this final rule is consistent with the Pacific Coast Groundfish FMP, other provisions of the MSA, and other applicable law, subject to further consideration after public comment. As stated in the proposed rule, NMFS is using its emergency action authority under MSA 305(c)(1) for this rule. NMFS finds that an emergency exists that can only be addressed through this emergency action. Due to the court's order in *Pacific Dawn,* several existing provisions of trawl regulations must be delayed while NMFS and the Council reconsider the initial allocation of Pacific whiting. However, there is insufficient time to go through the standard FMP Council process prior to the required effective date of this rule. If NMFS does not take this action, then NMFS will not be able to implement the following rulemaking (RAW 2) that is required by the court's order. Accordingly, NMFS finds an emergency exists that can only be remedied through this emergency action.

The Council prepared a final environmental impact statement (EIS) for Amendment 20 and Amendment 21 to the Pacific Coast Groundfish FMP; a notice of availability for each of these final EISs was published on June 25, 2010 (75 FR 36386). The Amendment 20 and 21 EISs and the draft EA are available on the Council's Web site at *http://www.pcouncil.org/* or on NMFS' Web site at *http://www.nwr.noaa.gov/Groundfish-Halibut/Groundfish-Fishery-Management/Trawl-Program/index.cfm.* The regulatory changes in this final rule were categorically excluded from the requirement to prepare a NEPA analysis.

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

When an agency proposes regulations, the Regulatory Flexibility Act (RFA) requires the agency to prepare and make available for public comment an Initial Regulatory Flexibility Analysis (IRFA) that describes the impact on small businesses, non-profit enterprises, local governments, and other small entities. The IRFA is to aid the agency in considering all reasonable regulatory alternatives that would minimize the economic impact on affected small entities. After the public comment period, the agency prepares a Final Regulatory Flexibility Analysis (FRFA) that takes into consideration any new information and public comments. This FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments, NMFS' responses to those comments, and a summary of the analyses completed to support the action.

NMFS published the proposed rule on May, 21, 2012 (78 FR 2995), with a comment period through June 29, 2012. An IRFA was prepared and summarized in the ''Classification'' section of the preamble to the proposed rule. Analytical requirements for the FRFA are described in Regulatory Flexibility Act, section 304(a)(1) through (5), and summarized below. The FRFA must contain: (1) A succinct statement of the need for, and objectives of, the rule; (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; (3) a description and an estimate of the number of small entities to which the rule will apply, or an explanation of why no such estimate is available; (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency

which affect the impact on small entities was rejected.

NMFS is postponing the ability of QS permit owners to trade QS, as well as ability of MS/CV to trade their endorsements and catch history assignments separately from their limited entry permits. This postponement of QS trading is necessary because for many affected parties, their QS allocations (especially for bycatch species) are composed of whiting-trip calculations and non-whiting trip calculations, which NMFS and the Council are currently reconsidering. QS and IBQ trading has been prohibited for all species/species categories until January 1, 2013. By postponing these activities while NMFS and the Council reconsider the initial whiting allocations and implement any changes that result, NMFS seeks to minimize confusion and disruption in the fishery from trading quota shares that have not yet been firmly established by regulation. For example, as discussed above, if QS trading is not delayed, QS permit owners would be transferring QS amounts that potentially could change (increase or decrease) after the reconsideration. This situation would undermine business relationships and create confusion among buyers and sellers. As discussed above, RAW 2 will implement any revised allocations of QS and MS/CV history assignments. RAW 2 is expected to be effective by April 1, 2013 in time for the first whiting season opener off California, and before the major June 15 coastwide season opener. Similarly, NMFS is also delaying MS/CV's ability to transfer endorsement and associated catch history assignments from one limited entry trawl permit to another. However, the MS/CVs retain the ability to sell or trade a limited entry permit with the endorsement and catch history. All other MS/CV regulations remain unchanged. NMFS intends to announce any changes to the amount of catch history assignments associated with MS/CV-endorsed limited entry trawl permits by April 1, 2013, prior to the May 15 start date for the whiting mothership fishery.

Note that NMFS is not postponing fishing. To accommodate non-whiting fisheries that begin at the beginning of the year, NMFS will provide QP to QS holders, but hold back sufficient QPs for whiting and all other incidentally caught species from the annual allocation of QPs to QS accounts made on or about January 1, 2013 to allocate the appropriate final amounts based on any recalculation of the whiting QS allocations. The process of ''holding'' back sufficient QP is similar to the current process of starting the year with an interim low estimate of the annual whiting trawl allocation and then in the spring of each year adjusting the QP in the QS accounts with any additional QP, based on the final whiting trawl allocation. The final whiting trawl allocation is typically not established until early May, to incorporate the latest stock assessment information, review tribal allocation requests, and receive Council recommendations. In 2012, this process was modified to include the processes of the U.S-Canada Pacific Whiting Treaty.

The Small Business Administration has established size criteria to define small entities under the RFA for all major industry sectors in the US, including fish harvesting and fish processing businesses. Under these criteria, a business involved in fish harvesting is a small entity if it is independently owned and operated and not dominant in its field of operation (including its affiliates), and if it has combined annual receipts not in excess of $4.0 million for all its affiliated operations worldwide. A seafood processor is a small entity if it is independently owned and operated, not dominant in its field of operation, and employs 500 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A business involved in both the harvesting and processing of seafood products is a small entity if it meets the $4.0 million criterion for fish harvesting operations. A wholesale business servicing the fishing industry is a small entity if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. For marinas and charter/party boats, a small entity is one with annual receipts not in excess of $7.0 million.

These regulations directly affect holders of QS and CHA, which include both large and small entities. Quota shares were initially allocated to 166 limited entry trawl permit holders (permits held by catcher processors did not receive QS, while one limited entry trawl permit did not apply to receive QS) and to 10 whiting processors. Thirty-six limited entry permits also have MS/CV endorsements and catch history assignments. Because many of these permits were owned by the same entity, these initial allocations were consolidated into 138 quota share permits/accounts. Of the 166 limited entry permits, 25 limited entry trawl permits are either owned or closely associated with a ''large'' shorebased processing company or with a non-profit organization who considers itself a ''large'' organization. Nine other permit owners indicated that they were ''large'' companies. Almost all of these large companies are associated with the shorebased and mothership whiting fisheries. The remaining 133 limited entry trawl permits are likely held by ''small'' companies. Of the 10 shorebased processing companies (whiting first receivers/processors) that received whiting QS, three are ''small'' entities. NMFS does not expect this rule to have any significant impacts on large or small entities.

There were no significant issues raised by the public comments in response to the IRFA.

There are no reporting or recordkeeping requirements with this final rule, but as described above, there is a process for fishermen and processors to review, and if necessary, correct the data that is used for future allocations of Pacific whiting.

There are no significant alternatives to this final rule that accomplish the stated objectives of applicable statutes and that minimize any of the significant economic impact of the proposed rule on small entities. These delays will be temporary in nature and will benefit both small and large entities. These delays will help smooth the transition to any changes in Pacific whiting allocations, and to reduce uncertainty for existing and potential new holders of these allocations.

No Federal rules have been identified that duplicate, overlap, or conflict with the alternatives. Public comment is hereby solicited, identifying such rules. A copy of this analysis is available from NMFS (see **ADDRESSES**).

NMFS issued Biological Opinions under the Endangered Species Act (ESA) on August 10, 1990, November 26, 1991, August 28, 1992, September 27, 1993, May 14, 1996, and December 15, 1999, pertaining to the effects of the Pacific Coast groundfish FMP fisheries on Chinook salmon (Puget Sound, Snake River spring/summer, Snake River fall, upper Columbia River spring, lower Columbia River, upper Willamette River, Sacramento River winter, Central Valley spring, California coastal), coho salmon (Central California coastal, southern Oregon/northern California coastal), chum salmon (Hood Canal summer, Columbia River), sockeye salmon (Snake River, Ozette Lake), and steelhead (upper, middle and lower Columbia River, Snake River Basin, upper Willamette River, central California coast, California Central Valley, south/central California, northern California, southern California). These biological opinions have concluded that implementing the FMP for the Pacific Coast groundfish

fishery is not expected to jeopardize the continued existence of any endangered or threatened species under the jurisdiction of NMFS, or result in the destruction or adverse modification of critical habitat.

NMFS issued a Supplemental Biological Opinion on March 11, 2006, concluding that neither the higher observed bycatch of Chinook in the 2005 whiting fishery nor new data regarding salmon bycatch in the groundfish bottom trawl fishery required a reconsideration of its prior ''no jeopardy'' conclusion. NMFS also reaffirmed its prior determination that implementation of the Pacific Coast Groundfish Fishery Management Plan (PCGFMP) is not likely to jeopardize the continued existence of any of the affected ESUs. Lower Columbia River coho (70 FR 37160, June 28, 2005) and Oregon Coastal coho (73 FR 7816, February 11, 2008) were recently relisted as threatened under the ESA. The 1999 biological opinion concluded that the bycatch of salmonids in the Pacific whiting fishery were almost entirely Chinook salmon, with little or no bycatch of coho, chum, sockeye, and steelhead.

On February 9, 2012, NMFS' Protected Resources Division issued a Biological Opinion (BO) pursuant to section 7(a)(2) of the Endangered Species Act (ESA) on the effects of the operation of the Pacific coast groundfish fishery in 2012. In this Opinion, NMFS concluded that the operation of the groundfish fishery is not likely to jeopardize the continued existence of green sturgeon (Acipenser medirostris), eulachon (Thaleichthys pacificus), humpback whales (Megaptera novaeangliae), Steller sea lions (Eumetopias jubatus), and leatherback sea turtles (Dennochelys coriacea). NMFS also concluded that the operation of the groundfish fishery is not likely to destroy or adversely modify designated critical habitat of green sturgeon or leatherback sea turtles. Furthermore, NMFS concluded that the operation of the groundfish fishery may affect, but is not likely to adversely affect the following species and designated critical habitat: Sei whales (Balaenoptera borealis); North Pacific Right whales (Eubalaena japonica); Blue whales (Balaenoptera musculus); Fin whales (Balaenoptera physalus); Sperm whales (Physter macrocephalus); Southern Resident killer whales (Orcinus orca); Guadalupe fur seals (Arctocephalus townsendi); Green sea turtles (Chelonia mydas); Olive ridley sea turtles (Lepidochelys olivacea); Loggerhead sea turtles (Carretta carretta); critical habitat of Southern Resident killer whales; and critical habitat of Steller sea lions. This rule does not modify any activities that would affect listed species; and thus the February 9, 2012, BO conclusions are applicable.

On August 25, 2011, NMFS' Sustainable Fisheries Division initiated consultation with U.S. Fish and Wildlife Service (USFWS) pursuant to section 7(a)(2) of the Endangered Species Act (ESA) on the effects of the operation of the Pacific coast groundfish fishery. The Biological Assessment (BA) on the effects of the groundfish fishery on endangered species was revised and re-submitted to USFWS on January 17, 2012. The BA concludes that the continued operation of the Pacific Coast Groundfish Fishery is likely to adversely affect short-tailed albatross; however, the level of take is not expected to reduce appreciably the likelihood of survival or significantly affect recovery of the species. The BA preliminarily concludes that continued operation of the Pacific Coast Groundfish Fishery is not likely to adversely affect California least terns, marbled murrelets, bull trout, and Northern or Southern sea otters. USFWS formally responded with a letter dated March 29, 2012 and advised NMFS that formal consultation has been initiated. Marine Mammal Protection Act (MMPA) impacts resulting from fishing activities in this final rule are discussed in the FEIS for the 2011–12 groundfish fishery specifications and management measures. As discussed above, NMFS issued a BO addressing impacts to ESA listed marine mammals. NMFS is currently working on the process leading to any necessary authorization of incidental taking under MMPA section 101(a)(5)(E).

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, and Indian fisheries.

Dated: July 27, 2012.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 660 is amended as follows:

PART 660—FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.140, revise paragraphs (d)(1)(ii)(A)(*1*) and (*2*), (d)(1)(ii)(B)(*1*) and (*2*), (d)(3)(ii)(B)(*2*) and (d)(4)(v) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(A) * * *

(*1*) In years where the groundfish harvest specifications are known by January 1, deposits to QS accounts for IFQ species will be made on or about January 1. For 2013, NMFS will issue QP in two parts. On or about January 1, 2013, NMFS will deposit QP based on the shorebased trawl allocation as reduced by the amount of QP for whiting trips as specified at paragraph (d)(8)(iv)(A)(*10*) of this section for the initial issuance allocations of QS between whiting and non-whiting trips. In the spring of 2013, after NMFS has made a determination on the QS for QS permit owners, NMFS will deposit additional QP to the QS account, as appropriate.

(*2*) In years where the groundfish harvest specifications are not known by January 1, NMFS will issue QP in two parts. On or about January 1, NMFS will deposit QP based on the shorebased trawl allocation multiplied by the lower end of the range of potential harvest specifications for that year. For 2013, that amount will be further reduced by the amount of QP for whiting trips as specified at paragraph (d)(8)(iv)(A)(*10*) of this section for the initial issuance allocations of QS between whiting and non-whiting trips. After the final harvest specifications are established later in the year, NMFS will deposit additional QP to the QS account. For 2013, this will occur in the spring after NMFS has made a determination on the QS for QS permit owners.

(B) * * *

(*1*) In years where the Pacific whiting harvest specification is known by January 1, deposits to QS accounts for Pacific whiting will be made on or about January 1. For 2013, NMFS will issue QP in two parts. On or about January 1, 2013, NMFS will deposit QP based on the shorebased trawl allocation as reduced by the amount of QP for whiting trips as specified at paragraph (d)(8)(iv)(A)(*10*) of this section for the initial issuance allocations of QS between whiting and non-whiting trips. In the spring of 2013, after NMFS has made a determination on the QS for QS permit owners, NMFS will deposit additional QP to the QS account, as appropriate.

(*2*) In years where the Pacific whiting harvest specification is not known by January 1, NMFS will issue Pacific whiting QP in two parts. On or about January 1, NMFS will deposit Pacific whiting QP based on the shorebased trawl allocation multiplied by the lower end of the range of potential harvest specifications for Pacific whiting for that year. For 2013, that amount will be further reduced by the amount of QP for whiting trips as specified at paragraph (d)(8)(iv)(A)(*10*) of this section for the initial issuance allocations of QS between whiting and non-whiting trips. After the final Pacific whiting harvest specifications are established later in the year, NMFS will deposit additional QP to QS accounts. For 2013, this will occur in the spring after NMFS has made a determination on the QS for QS permit owners.

* * * * *

(3) * * *

(ii) * * *

(B) * * *

(*2*) *Transfer of QS or IBQ between QS accounts.* QS or IBQ cannot be transferred to another QS permit owner, except under U.S. court order or authorization and as approved by NMFS. QS or IBQ may not be transferred to a vessel account.

* * * * *

(4) * * *

(v) *Divestiture.* Accumulation limits will be calculated by first calculating the aggregate non-whiting QS limit and then the individual species QS or IBQ control limits. For QS permit owners (including any person who has ownership interest in the owner named on the permit) that are found to exceed the accumulation limits during the initial issuance of QS permits, an adjustment period will be provided after which they will have to completely divest their QS or IBQ in excess of the accumulation limits. QS or IBQ will be issued for amounts in excess of accumulation limits only for owners of limited entry permits as of November 8, 2008, if such ownership has been registered with NMFS by November 30, 2008. The owner of any permit acquired after November 8, 2008, or if acquired earlier, not registered with NMFS by November 30, 2008, will only be eligible to receive an initial allocation for that permit of those QS or IBQ that are within the accumulation limits; any QS or IBQ in excess of the accumulation limits will be redistributed to the remainder of the initial recipients of QS or IBQ in proportion to each recipient's initial allocation of QS or IBQ for each species. Any person that qualifies for an initial allocation of QS or IBQ in excess of the accumulation limits will be allowed to receive that allocation, but must divest themselves of the excess QS or IBQ during the first two years once QS transfers are allowed (the divestiture period). Holders of QS or IBQ in excess of the control limits may receive and use the QP or IBQ pounds associated with that excess, up to the time their divestiture is completed. Once the divestiture period is completed, any QS or IBQ held by a person (including any person who has ownership interest in the owner named on the permit) in excess of the accumulation limits will be revoked and redistributed to the remainder of the QS or IBQ owners in proportion to the QS or IBQ holdings in the immediately following year. No compensation will be due for any revoked shares.

* * * * *

■ 3. In § 660.150,

■ a. Revise paragraph (g)(2)(iv)(B); and

■ b. Remove and reserve paragraph (g)(2)(iv)(C) to read as follows:

§ 660.150 Mothership (MS) Coop Program.

* * * * *

(g) * * *

(2) * * *

(iv) * * *

(B) *Application.* NMFS is not accepting applications for a change in MS/CV endorsement registration at this time.

(C) *[Reserved]*

* * * * *

[FR Doc. 2012–18780 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 77, No. 148
Wednesday, August 1, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0801; Directorate Identifier 2012–NM–106–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model 737–200 and –200C series airplanes. This proposed AD was prompted by a report of elevator vibration and bearing swage failures. This proposed AD would require, for certain airplanes, repetitive inspections for any discrepancies (such as a gap or a loose spacer) of the aft attach lugs for the elevator tab control mechanism, and replacement if necessary, and for other airplanes, contacting the FAA for inspection or repair instructions and doing the work specified in those instructions. We are proposing this AD to detect and correct discrepancies in the aft attach lugs for the elevator tab control mechanism, which could result in elevator and tab vibration. Consequent structural failure of the elevator or horizontal stabilizer could result in loss of structural integrity and loss of airplane control.

DATES: We must receive comments on this proposed AD by September 17, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; 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, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 917–6490; fax: (425) 917–6590; email: *Kelly.McGuckin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0801; Directorate Identifier 2012–NM–106–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received a report of elevator vibration and bearing swage failures on Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes. Some Model 737–200 and –200C series airplanes have a similar design. Boeing did a design review and also reviewed the service history and found two incidents on Model 737–200 series airplanes of unrestrained elevator tab vibration with similar damage to that seen on the affected Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes, although it has not been confirmed to be caused by the same issue. Discrepancies in the aft attach lugs for the elevator tab control mechanism, if not detected and corrected, could result in elevator and tab vibration. Consequent structural failure of the elevator or horizontal stabilizer could result in loss of structural integrity and loss of airplane control.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin 737–27A1302, dated April 24, 2012. For certain airplanes, that service bulletin describes procedures for a detailed inspection for any discrepancies (such as a gap or a loose spacer) of the aft attach lugs for the elevator tab control mechanism, and replacement of the mechanism, if necessary. Replacing the mechanism includes inspecting the mechanism being installed prior to and after installation for any discrepancies. For certain other airplanes, that service bulletin specifies contacting the manufacturer for inspection, change, or repair instructions, and doing the work specified in those instructions.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of the same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.'' The proposed AD would also require sending the initial inspection results to Boeing. This required inspection report will help determine if additional action is needed. Based on the results of these reports, we might determine that further corrective action is warranted.

Related Rulemaking

We issued AD 2010–17–19, Amendment 39–16413 (75 FR 52242, August 25, 2010), to address the identified unsafe condition on Model 737–600, –700, –700C, –800, –900, and –900ER series airplanes.

Differences Between the Proposed AD and the Service Information

Although the service bulletin specifies that, for Group 1 airplanes, operators may contact the manufacturer for certain inspection procedures and disposition of repair or replacement conditions, this proposed AD would require operators do those actions using a method approved by the Manager, Seattle Aircraft Certification Office, FAA.

Costs of Compliance

We estimate that this proposed AD affects 200 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection for Group 2 airplanes.	7 work-hours × $85 per hour = $595 per inspection cycle.	$0	$595 per inspection cycle.	$119,000 per inspection cycle.

For Group 1 airplanes, we do not have definitive data that would enable us to provide cost estimates for the action specified in this proposed AD.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Replacement of a mechanism	7 work-hours × $85 per hour = $595	$29,289	$29,884

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2012–0801; Directorate Identifier 2012–NM–106–AD.

(a) Comments Due Date

We must receive comments by September 17, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model 737–200 and –200C series airplanes, as identified in Boeing Alert Service Bulletin 737–27A1302, dated April 24, 2012.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 27, Flight Controls.

(e) Unsafe Condition

This AD was prompted by a report of elevator vibration and bearing swage failures.

We are issuing this AD to detect and correct discrepancies in the aft attach lugs for the elevator tab control mechanism, which could result in elevator and tab vibration. Consequent structural failure of the elevator or horizontal stabilizer could result in loss of structural integrity and loss of airplane control.

(f) Compliance

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

(g) Group 1 Airplanes

For Group 1 airplanes as identified in Boeing Alert Service Bulletin 737–27A1302, dated April 24, 2012: Within 1,500 flight cycles or 2,000 flight hours after the effective date of this AD, whichever occurs first, inspect the left and right elevator tab control mechanisms, and repair or replace as applicable, in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA. For a repair method to be approved, the repair must meet the certification basis of the airplane, and the approval must specifically refer to this AD.

(h) Inspection for Group 2 Airplanes

For Group 2 airplanes as identified in Boeing Alert Service Bulletin 737–27A1302, dated April 24, 2012: Within 1,500 flight cycles or 2,000 flight hours after the effective date of this AD, whichever occurs first, do a detailed inspection for any discrepancies of the inboard and outboard aft attach lugs of the left and right elevator tab control mechanisms, in accordance with Boeing Alert Service Bulletin 737–27A1302, dated April 24, 2012. Repeat the detailed inspection thereafter at intervals not to exceed 1,500 flight cycles or 2,000 flight hours, whichever occurs first.

(i) Corrective Actions for Paragraph (h) of This AD

If any discrepancy is found during any inspection required by paragraph (h) of this AD, before further flight, replace the discrepant elevator tab control mechanism with a non-discrepant mechanism by doing the actions specified in paragraphs (i)(1) and (i)(2) of this AD.

(1) Do a detailed inspection for discrepancies of the replacement elevator tab control mechanism; and, if no discrepancy is found, before further flight, install the replacement elevator tab control mechanism; in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 737–27A1302, dated April 24, 2012. If any discrepancy is found in that mechanism, then that mechanism may not be installed.

(2) Repeat the inspection on the installed replacement elevator tab control mechanism in accordance with the requirements of paragraph (h) of this AD.

(j) Inspection Report

Submit a report of the findings (both positive and negative) of the initial inspection required by paragraph (h) of this AD to Boeing Commercial Airlines Group, Attention: Manager, Airline Support, email: *rse.boecom@boeing.com;* at the applicable time specified in paragraph (j)(1) or (j)(2) of this AD. The report must include the inspection results, a description of any discrepancies found, the airplane serial number, and the number of landings and flight hours on the airplane.

(1) If the inspection was done after the effective date of this AD: Submit the report within 30 days after the inspection.

(2) If the inspection was accomplished prior to the effective date of this AD: Submit the report within 30 days after the effective date of this AD.

(k) Parts Installation Limitations

As of the effective date of this AD, no person may install an elevator tab control mechanism assembly, part number 65–79425–2, –3, –4, –5, or –6, on any airplane, unless the assembly has been inspected in accordance with paragraph (i) of this AD both before and after installation.

(l) Paperwork Reduction Act Burden Statement

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(m) Alternative Methods of Compliance (AMOCs)

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

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

(n) Related Information

(1) For more information about this AD, contact Kelly McGuckin, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: (425) 917–6490; fax: (425) 917–6590; email: *Kelly.McGuckin@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, P.O. Box 3707, MC 2H–65, Seattle, WA 98124–2207; telephone 206–544–5000, extension 1; fax 206–766–5680; 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, WA. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on July 23, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–18614 Filed 7–31–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0728; Directorate Identifier 2012–NM–050–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model MD–90–30 airplanes. This proposed AD was prompted by reports of fatigue cracks found in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000. This proposed AD would require repetitive inspections for cracks in Stringer 11, and a splice repair if necessary; and repetitive post-repair inspections, and repair if necessary. We are proposing this AD to detect and correct such cracking, which could result in the wing structure not supporting the limit load condition, which could lead to loss of the structural integrity of the wing.

DATES: We must receive comments on this proposed AD by September 17, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* 202–493–2251.
- *Mail:* U.S. Department of Transportation, Docket Operations,

M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590.

• *Hand Delivery:* Deliver to Mail address above between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Roger Durbin, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5233; fax: (562) 627–5210; email: *roger.durbin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0728; Directorate Identifier 2012–NM–050–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received reports of fatigue cracks found in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000 on Model MD–80 airplanes. Model MD–90 airplanes share the same structure design as the MD–80, and are also susceptible to cracking. The cracking occurred at the end fastener of the wing bulkhead clip attachment to the stringer. If undetected, a crack in the stringer may grow until the stringer severs, initiating a crack in the wing lower skin. This condition, if not corrected, could result in the wing structure not supporting the limit load condition, which could lead to loss of the structural integrity of the wing.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin MD90–57A030, dated February 14, 2012. The service information describes procedures for repetitive in-tank eddy current high frequency (ETHF) inspections for cracks in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000 on the left and right wings, and a splice repair if necessary; and repetitive post-repair inspections, and repair if necessary.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of this same type design.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.

Differences Between the Proposed AD and the Service Information

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

• In accordance with a method that we approve; or

• Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 52 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	13 work-hours × $85 per hour = $1,105 per inspection cycle.	None	$1,105 per inspection cycle	$57,460 per inspection cycle.
Post-repair inspection.	13 work-hours × $85 per hour = $1,105.	None	$1,105	$57,460.

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Splice repair per wing	93 work-hours × $85 per hour = $7,905	$28,126	$36,031

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions of the post-repair inspection specified in this proposed AD.

Authority for this Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2012–0728; Directorate Identifier 2012–NM–050–AD.

(a) Comments Due Date

We must receive comments by September 17, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model MD–90–30 airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin MD90–57A030, dated February 14, 2012.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of fatigue cracks found in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000. We are issuing this AD to detect and correct such cracking, which could result in the wing structure not supporting the limit load condition, which could lead to loss of the structural integrity of the wing.

(f) Compliance

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

(g) Repetitive Inspections

Before the accumulation of 14,000 total flight cycles, or within 9,470 flight cycles after the effective date of this AD: Whichever occurs later, do an in-tank eddy current high frequency (ETHF) inspection for cracks in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000 of the left and right wings, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–57A030, dated February 14, 2012. If no cracking is found, repeat the inspection thereafter at intervals not to exceed 31,000 flight cycles.

(h) Splice Repair

If any cracking is found during the inspection required by paragraph (g) of this AD: Before further flight, do a splice repair, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–57A030, dated February 14, 2012.

(i) Post-Repair Inspection

Within 42,000 flight cycles after doing the splice repair specified in paragraph (h) of this AD: Do an ETHF inspection for cracks in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD90–57A030, dated February 14, 2012. Repeat the inspection thereafter at intervals not to exceed 31,000 flight cycles. If any crack is found: Before further flight, repair the crack using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(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, Los Angeles 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 54, and the approval must specifically refer to this AD.

(k) Related Information

(1) For more information about this AD, contact Roger Durbin, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5233; fax: (562) 627–5210; email: *roger.durbin@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington, on July 23, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–18616 Filed 7–31–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0727; Directorate Identifier 2012–NM–012–AD]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for certain The Boeing Company Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), DC–9–87 (MD–87), and MD–88 airplanes. This proposed AD was prompted by reports of fatigue cracks found in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000. This proposed AD would require repetitive inspections for cracks in Stringer 11, and a splice repair if necessary; and repetitive post-repair inspections, and repair if necessary. We are proposing this AD to detect and correct such cracking, which could result in the wing structure not supporting the limit load condition, which could lead to loss of structural integrity of the wing.

DATES: We must receive comments on this proposed AD by September 17, 2012.

ADDRESSES: You may send comments, using the procedures found in 14 CFR 11.43 and 11.45, by any of the following methods:

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

For service information identified in this proposed AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Roger Durbin, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone: (562) 627–5233; fax: (562) 627–5210; email: *roger.durbin@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposal. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–0727; Directorate Identifier 2012–NM–012–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD because of those comments.

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

Discussion

We received reports of fatigue cracks found in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000. The cracking occurred at the end fastener of the wing bulkhead clip attachment to the stringer. If undetected, a crack in the stringer may grow until the stringer severs, initiating a crack in the wing lower skin. This condition, if not corrected, could result in the wing structure not supporting the limit load condition, which could lead to loss of the structural integrity of the wing.

Relevant Service Information

We reviewed Boeing Alert Service Bulletin MD80–57A243, dated December 20, 2011. The service information describes procedures for repetitive in-tank eddy current high frequency (ETHF) inspections for cracks in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000, and a splice repair if necessary; and repetitive post-repair inspections, and repair if necessary.

FAA's Determination

We are proposing this AD because we evaluated all the relevant information and determined the unsafe condition described previously is likely to exist or develop in other products of these same type designs.

Proposed AD Requirements

This proposed AD would require accomplishing the actions specified in the service information described previously, except as discussed under ''Differences Between the Proposed AD and the Service Information.''

Differences Between the Proposed AD and the Service Information

The service bulletin specifies to contact the manufacturer for instructions on how to repair certain conditions, but this proposed AD would require repairing those conditions in one of the following ways:

- In accordance with a method that we approve; or
- Using data that meet the certification basis of the airplane, and that have been approved by the Boeing Commercial Airplanes Organization Designation Authorization (ODA) whom we have authorized to make those findings.

Costs of Compliance

We estimate that this proposed AD affects 502 airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection	13 work-hours × $85 per hour = $1,105 per inspection cycle.	None	$1,105 per inspection cycle.	$554,710 per inspection cycle.
Post-repair inspection	13 work-hours × $85 per hour = $1,105	None	1,105	554,710

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Splice repair per wing	93 work-hours × $85 per hour = $7,905	$17,759	$25,664

We have received no definitive data that would enable us to provide cost estimates for the on-condition actions of the post-repair inspection specified in this proposed AD.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

The Boeing Company: Docket No. FAA–2012–0727; Directorate Identifier 2012–NM–012–AD.

(a) Comments Due Date

We must receive comments by September 17, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company Model DC–9–81 (MD–81), DC–9–82 (MD–82), DC–9–83 (MD–83), and DC–9–87 (MD–87), and MD–88 airplanes, certificated in any category, as identified in Boeing Alert Service Bulletin MD80–57A243, dated December 20, 2011.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 57, Wings.

(e) Unsafe Condition

This AD was prompted by reports of fatigue cracks found in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000. We are issuing this AD to detect and correct such cracking, which could result in the wing structure not supporting the limit load condition, which could lead to loss of structural integrity of the wing.

(f) Compliance

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

(g) Repetitive Inspections

Before the accumulation of 19,000 total flight cycles, or within 8,710 flight cycles after the effective date of this AD, whichever occurs later: Do an in-tank eddy current high frequency (ETHF) inspection for cracks in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–57A243, dated December 20, 2011. If no cracking is found, repeat the inspection thereafter at intervals not to exceed 29,000 flight cycles.

(h) Splice Repair

If any cracking is found during the inspection required by paragraph (g) of this AD: Before further flight, do a splice repair, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–57A243, dated December 20, 2011.

(i) Post-Repair Inspection

Within 60,000 flight cycles after doing the splice repair specified in paragraph (h) of this AD: Do an ETHF inspection for cracks in Stringer 11 at the outboard flap, inboard drive hinge at Station Xrs=164.000, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin MD80–57A243, dated December 20, 2011. Repeat the inspection thereafter at intervals

not to exceed 29,000 flight cycles. If any crack is found: Before further flight, repair the crack using a method approved in accordance with the procedures specified in paragraph (j) of this AD.

(j) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Los Angeles Aircraft Certification Office (ACO), FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the ACO, send it to the attention of the person identified in the Related Information section of this AD.

(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, Los Angeles 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.

(k) Related Information

(1) For more information about this AD, contact Roger Durbin, Airframe Branch, ANM–120L, FAA, Los Angeles Aircraft Certification Office (ACO), 3960 Paramount Boulevard, Lakewood, California 90712–4137; phone (562) 627–5233; fax (562) 627–5210; email: *roger.durbin@faa.gov.*

(2) For service information identified in this AD, contact Boeing Commercial Airplanes, Attention: Data & Services Management, 3855 Lakewood Boulevard, MC D800–0019, Long Beach, California 90846–0001; telephone 206–544–5000, extension 2; fax 206–766–5683; Internet *https://www.myboeingfleet.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, Washington. For information on the availability of this material at the FAA, call 425–227–1221.

Issued in Renton, Washington on July 23, 2012.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–18622 Filed 7–31–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–101812–07]

RIN 1545–BI83

Reimbursed Entertainment Expenses

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations explaining the exception to the deduction limitations on certain expenditures paid or incurred under reimbursement or other expense allowance arrangements. These proposed regulations affect taxpayers that pay or receive advances, allowances, or reimbursements under reimbursement or other expense allowance arrangements. These proposed regulations clarify the rules for these arrangements.

DATES: Comments or a request for a public hearing must be received by October 30, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–101812–07), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–101812–07), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–101812–07).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Patrick Clinton, (202) 622–4930 ; concerning submissions of comments and/or requests for a public hearing, Oluwafunmilayo (Funmi) Taylor, (202) 622–7180 (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) explaining the exception to the section 274(a) and (n) deduction limitations on certain expenditures paid or incurred under reimbursement or other expense allowance arrangements. The proposed regulations clarify the definition of reimbursement or other expense allowance arrangements for purposes of section 274(a) and (n) and how the deduction limitations apply to reimbursement arrangements between three parties, as addressed in *Transport Labor Contract/Leasing, Inc.* v. *Commissioner,* 461 F.3d 1030 (8th Cir. 2006), *rev'g* 123 T.C. 154 (2004) (*TLC*), and Rev. Rul. 2008–23 (2008–18 I.R.B. 852).

Section 274(a)(1) limits deductions for certain expenses for entertainment, amusement, or recreation activities and for facilities used in connection with entertainment, amusement, or recreation activities. Section 274(n)(1) generally limits the amount allowable as a deduction for any expense for food, beverages, entertainment activities, or entertainment facilities to 50 percent of the amount otherwise allowable. However, the limitations of sections 274(a)(1) and 274(n)(1) do not apply to an expense described in section 274(e)(3).

In general, section 274(e)(3) excepts from the limitations of section 274(a) expenses a taxpayer pays or incurs in performing services for another person under a reimbursement or other expense allowance arrangement with the other person. The exception applies if the taxpayer is an employee performing services for an employer and the employer does not treat the reimbursement for the expenses as compensation and wages to the taxpayer (section 274(e)(3)(A)). In that case, the employee is not treated as having additional compensation and has no deduction for the expense. The employer bears and deducts the expense and is subject to the deduction limitations. See § 1.274–2(f)(2)(iv)(*b*) of the Income Tax Regulations.

If the employer treats the reimbursement as compensation and wages, the employee may be able to deduct the expense as an employee business expense. The employee bears the expense and is subject to the deduction limitations. Section 1.274–2(f)(2)(iv)(*b*)(*1*). The employer deducts an expense for compensation, which is not subject to the deduction limitations under section 274. Section 1.274–2(f)(2)(iv)(*b*)(*2*); see also section 162.

The section 274(e)(3) exception also applies if the taxpayer performs services for a person other than an employer and the taxpayer accounts (substantiates, as required by section 274(d)) to that person. Section 274(e)(3)(B). Therefore, in a reimbursement or other expense allowance arrangement in which a client or customer reimburses the expenses of an independent contractor, the deduction limitations do not apply to the independent contractor to the extent the independent contractor accounts to the client by substantiating the expenses as required by section 274(d). If the independent contractor is

subject to the deduction limitations, the limitations do not apply to the client. See § 1.274–2(f)(2)(iv)(*a*).

TLC applied these rules to a reimbursement arrangement involving three parties in the trucking industry. In some cases, truck drivers are paid wages and a per diem meals allowance by a company that leases the drivers to a client trucking company. The client trucking company pays the leasing company for the driver's expenses plus an additional fee, and the parties deduct their respective expenses. Under section 274(e)(3), if the parties have a reimbursement or other expense allowance arrangement, the section 274(n) limitation applies to only one party.

TLC was a leasing company that paid truck drivers a per diem allowance that it did not treat as compensation. TLC billed the client leasing the drivers for the drivers' wages and per diem allowances, and the client paid TLC. The Tax Court applied the section 274(n) limitation to TLC as the drivers' common law employer subject to section 274(e)(3)(A).

The Eighth Circuit stated that the Tax Court should have considered the section 274(e)(3)(B) exception between TLC and the client. TLC was providing services to its clients under a reimbursement or other expense allowance arrangement and accounted to the client. Therefore, TLC qualified for the exception in section 274(e)(3)(B) and the incidence of the section 274(n) limitation was on the client that bore the per diem expense.

Rev. Rul. 2008–23 acquiesces in the result in *TLC* and similarly holds that the party that ultimately bears the expense in a three-party reimbursement arrangement is subject to the section 274(n) limitation. The revenue ruling clarifies that a party's status as a common law employer is not relevant to the section 274(n) analysis, which the Eighth Circuit's opinion could be read to imply.

Rev. Rul. 2008–23 clarifies another issue raised by the *TLC* opinion. To define the term *reimbursement or other expense allowance arrangement* for purposes of section 274(e)(3), the Eighth Circuit looked to § 1.274–2(f)(2)(iv)(*a*), which provides that the term *reimbursement or other expense allowance arrangement* in section 274(e)(3) has the same meaning as in section 62(2)(A) (dealing with employee business expenses, later renumbered 62(a)(2)(A)), but without regard to whether the taxpayer is an employee of the person for whom the taxpayer provides services. Thus, *TLC* defined reimbursement or other expense allowance arrangement for purposes of section 274(e)(3) by reference to section 62(a)(2)(A) and the regulations at § 1.62–2, which provide the rules for the *employee* reimbursement arrangements called accountable plans. The *TLC* court's definition is inaccurate to the extent it relies on the accountable plan rules, which cover *employee* reimbursement arrangements only, in determining the existence of a reimbursement or other expense allowance arrangement for purposes of identifying who bears the expense under section 274(e)(3)(B).

Rev. Rul. 2008–23 clarifies that the § 1.274–2(f)(2)(iv)(*a*) reference to section 62(2)(A) predates the enactment of section 62(c), which addresses certain arrangements not treated as reimbursement arrangements, and the accountable plan regulations, which govern employer-employee reimbursement arrangements and their employment tax consequences. Therefore, Rev. Rul. 2008–23 holds that the section 274(e)(3) exception may apply to an expense reimbursement arrangement without regard to whether it is an accountable plan.

Explanation of Provisions

1. Definition of Reimbursement or Other Expense Allowance Arrangement

The focus of the accountable plan rules under section 62(c) and the applicable regulations is the taxability of reimbursements and allowances paid to employees and their treatment for employment tax purposes. The purpose of the rules under section 274(e)(3) is to provide an exception to the section 274(a) and (n) deduction limitations. Given these different purposes, the proposed regulations amend § 1.274–2(f)(2)(iv)(*a*) to provide an express definition of *reimbursement or other expense allowance arrangement* for purposes of section 274(e)(3) independent of the definition in section 62(c).

Under the proposed regulations, a reimbursement or other expense allowance arrangement involving employees is an arrangement under which an employee receives an advance, allowance, or reimbursement from a payor (the employer, its agent, or a third party) for expenses the employee pays or incurs in performing services as an employee. A reimbursement or other expense allowance arrangement involving persons that are not employees is an arrangement under which an independent contractor receives an advance, allowance, or reimbursement from a client or customer for expenses the independent contractor pays or incurs in performing services if either (1) a written agreement between the parties expressly provides that the client or customer will reimburse the independent contractor for expenses that are subject to the deduction limitations, or (2) a written agreement between the parties expressly identifies the party that is subject to the limitations under § 1.274–2(a)—(e) and section 274(n). Specific comments are requested on the definition of reimbursement or other expense allowance arrangement and on alternative definitions or approaches that would ensure that the deduction limitations apply to one of the parties to an expense reimbursement arrangement.

2. Two-Party Reimbursement Arrangements

The proposed regulations clarify that the rules for applying the exceptions to the section 274(a) and (n) deduction limitations apply to reimbursement or other expense allowance arrangements with employees, whether or not a payor is an employer. Under the proposed regulations, a payor includes an employer, an agent of the employer, or a third party. For example, either an independent contractor or a client or customer may be a payor of a reimbursement arrangement. Thus, any party that reimburses an employee is a payor and bears the expense if the payment is not treated as compensation and wages to the employee.

In the case of a reimbursement or other expense allowance arrangement between an independent contractor and a client or customer that includes an agreement expressly providing that the client or customer will reimburse the independent contractor for expenses that are subject to the deduction limitations, the deduction limitations do not apply to an independent contractor that accounts to the client within the meaning of section 274(d) and the associated regulations, but they do apply to the independent contractor and not to the client if the independent contractor fails to account to the client. Alternatively, the parties may enter into an express agreement identifying the party that is subject to the deduction limitations.

3. Multiple-Party Reimbursement Arrangements

The proposed regulations include an example illustrating how the rules apply to multiple-party reimbursement arrangements. Multiple-party reimbursement arrangements are separately analyzed as a series of two-party reimbursement arrangements. Thus, for example, an arrangement in

which (1) an employee pays or incurs an expense subject to limitation, (2) the employee is reimbursed for that expense by another party (the initial payor), and (3) a third party reimburses the initial payor's payment to the employee, is analyzed as two two-party reimbursement arrangements: one arrangement between the employee and the initial payor, and another arrangement between the initial payor and the third party. Examples illustrate that the limitations apply to the party that receives an accounting and that ultimately bears the expense.

Effective/Applicability Date

The regulations are proposed to apply to expenses paid or incurred in taxable years beginning on or after the date these regulations are published as final regulations in the **Federal Register**. However, taxpayers may apply these regulations for taxable years beginning before the date these regulations are published as final regulations in the **Federal Register** for which the period of limitations under section 6511 has not expired.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It 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 of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the ''Addresses'' heading. The IRS and Treasury Department request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these proposed regulations are Jeffrey T. Rodrick and Patrick Clinton of the Office of Associate Chief Counsel (Income Tax & Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendment to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order to read as follows:

Authority: 26 U.S.C. 7805 * * * Section 1.274–2 also issued under 26 U.S.C. 274(o). * * *

Par. 2. Section 1.274–2 is amended by revising paragraph (f)(2)(iv) to read as follows:

§ 1.274–2 Disallowance of deductions for certain expenses for entertainment, amusement, recreation, or travel.

* * * * *

(f) * * *

(2) * * *

(iv) *Reimbursed entertainment, food, or beverage expenses*—(A) *Introduction.* In the case of any expenditure for entertainment, amusement, recreation, food, or beverages made by one person in performing services for another person (whether or not the other person is an employer) under a reimbursement or other expense allowance arrangement, the limitations on deductions in paragraphs (a) through (e) of this section and section 274(n)(1) apply either to the person who makes the expenditure or to the person who actually bears the expense, but not to both. If an expenditure of a type described in this paragraph (f)(2)(iv) properly constitutes a dividend paid to a shareholder, unreasonable compensation paid to an employee, a personal expense, or other nondeductible expense, nothing in this exception prevents disallowance of the expenditure to the taxpayer under other provisions of the Code.

(B) *Reimbursement arrangements involving employees.* In the case of an employee's expenditure for entertainment, amusement, recreation, food, or beverages in performing services as an employee under a reimbursement or other expense allowance arrangement with a payor (the employer, its agent, or a third party), the limitations on deductions in paragraphs (a) through (e) of this section and section 274(n)(1) apply—

(*1*) To the employee to the extent the employer treats the reimbursement or other payment of the expense on the employer's income tax return as originally filed as compensation paid to the employee and as wages to the employee for purposes of withholding under chapter 24 (relating to collection of income tax at source on wages); and

(*2*) To the payor to the extent the reimbursement or other payment of the expense is not treated as compensation and wages paid to the employee in the manner provided in paragraph (f)(2)(iv)(*B*)(*1*) of this section (however, see paragraph (f)(2)(iv)(*C*) of this section if the payor receives a payment from a third party that may be treated as a reimbursement arrangement under that paragraph).

(C) *Reimbursement arrangements involving persons that are not employees.* In the case of an expense for entertainment, amusement, recreation, food, or beverages of a person who is not an employee (referred to as an independent contractor) in performing services for another person (a client or customer) under a reimbursement or other expense allowance arrangement with the person, the limitations on deductions in paragraphs (a) through (e) of this section and section 274(n)(1) apply to the party expressly identified in an agreement between the parties as subject to the limitations. If an agreement between the parties does not expressly identify the party subject to the limitations, the limitations apply—

(*1*) To the independent contractor (which may be a payor described in paragraph (f)(2)(iv)(*B*) of this section) to the extent the independent contractor does not account to the client or customer within the meaning of section 274(d) and the associated regulations; and

(*2*) To the client or customer if the independent contractor accounts to the client or customer within the meaning of section 274(d) and the associated regulations. See also § 1.274–5.

(D) *Reimbursement or other expense allowance arrangement.* The term *reimbursement or other expense allowance arrangement* means—

(*1*) For purposes of paragraph (f)(2)(iv)(B) of this section, an arrangement under which an employee receives an advance, allowance, or

reimbursement from a payor (the employer, its agent, or a third party) for expenses the employee pays or incurs; and

(*2*) For purposes of paragraph (f)(2)(iv)(C) of this section, an arrangement under which an independent contractor receives an advance, allowance, or reimbursement from a client or customer for expenses the independent contractor pays or incurs if either—

(*a*) A written agreement between the parties expressly states that the client or customer will reimburse the independent contractor for expenses that are subject to the limitations on deductions in paragraphs (a) through (e) of this section and section 274(n)(1); or

(*b*) A written agreement between the parties expressly identifies the party subject to the limitations.

(E) *Examples.* The following examples illustrate the application of this paragraph (f)(2)(iv).

Example 1. (i) Y, an employee, performs services under an arrangement in which L, an employee leasing company, pays Y a per diem allowance of $10x for each day that Y performs services for L's client, C, while traveling away from home. The per diem allowance is a reimbursement of travel expenses for food and beverages that Y pays in performing services as an employee. L enters into a written agreement with C under which C agrees to reimburse L for any substantiated reimbursements for travel expenses, including meals, that L pays to Y. The agreement does not expressly identify the party that is subject to the deduction limitations. Y performs services for C while traveling away from home for 10 days and provides L with substantiation that satisfies the requirements of section 274(d) of $100x of meal expenses incurred by Y while traveling away from home. L pays Y $100x to reimburse those expenses pursuant to their arrangement. L delivers a copy of Y's substantiation to C. C pays L $300x, which includes $200x compensation for services and $100x as reimbursement of L's payment of Y's travel expenses for meals. Neither L nor C treats the $100x paid to Y as compensation or wages.

(ii) Under paragraph (f)(2)(iv)(D)(*1*) of this section, Y and L have established a reimbursement or other expense allowance arrangement for purposes of paragraph (f)(2)(iv)(B) of this section. Because the reimbursement payment is not treated as compensation and wages paid to Y, under section 274(e)(3)(A) and paragraph (f)(2)(iv)(B)(*1*) of this section, Y is not subject to the section 274 deduction limitations. Instead, under paragraph (f)(2)(iv)(B)(*2*) of this section, L, the payor, is subject to the section 274 deduction limitations unless L can meet the requirements of section 274(e)(3)(B) and paragraph (f)(2)(iv)(C) of this section.

(iii) Because the agreement between L and C expressly states that C will reimburse L for expenses for meals incurred by employees while traveling away from home, under paragraph (f)(2)(iv)(D)(*2*)(*a*) of this section, L and C have established a reimbursement or other expense allowance arrangement for purposes of paragraph (f)(2)(iv)(C) of this section. L accounts to C for C's reimbursement in the manner required by section 274(d) by delivering to C a copy of the substantiation L received from Y. Therefore, under section 274(e)(3)(B) and paragraph (f)(2)(iv)(C)(*2*) of this section, C and not L is subject to the section 274 deduction limitations.

Example 2. (i) The facts are the same as in *Example 1* except that, under the arrangements between Y and L and between L and C, Y provides the substantiation of the expenses directly to C, and C pays the per diem directly to Y.

(ii) Under paragraph (f)(2)(iv)(D)(*1*) of this section, Y and C have established a reimbursement or other expense allowance arrangement for purposes of paragraph (f)(2)(iv)(C) of this section. Because Y substantiates directly to C and the reimbursement payment was not treated as compensation and wages paid to Y, under section 274(e)(3)(A) and paragraph (f)(2)(iv)(C)(*1*) of this section Y is not subject to the section 274 deduction limitations. Under paragraph (f)(2)(iv)(C)(*2*) of this section, C, the payor, is subject to the section 274 deduction limitations.

Example 3. (i) The facts are the same as in *Example 1,* except that the written agreement between L and C expressly provides that the limitations of this section will apply to C.

(ii) Under paragraph (f)(2)(iv)(D)(*2*)(*b*) of this section, L and C have established a reimbursement or other expense allowance arrangement for purposes of paragraph (f)(2)(iv)(C) of this section. Because the agreement provides that the 274 deduction limitations apply to C, under section 274(e)(3)(B) and paragraph (f)(2)(iv)(C) of this section, C and not L is subject to the section 274 deduction limitations.

Example 4. (i) The facts are the same as in *Example 1,* except that the agreement between L and C does not provide that C will reimburse L for travel expenses.

(ii) The arrangement between L and C is not a reimbursement or other expense allowance arrangement within the meaning of section 274(e)(3)(B) and paragraph (f)(2)(iv)(D)(*2*) of this section. Therefore, even though L accounts to C for the expenses, L is subject to the section 274 deduction limitations.

(F) *Effective/applicability date.* This paragraph (f)(2)(iv) applies to expenses paid or incurred in taxable years beginning after the date these regulations are published as final regulations in the **Federal Register**.

* * * * *

Par. 3. Section 1.274–8 is revised to read as follows:

§ 1.274–8 Effective/applicability date.

Except as provided in §§ 1.274–2(a), 1.274–2(e), 1.274–2(f)(2)(iv)(F) and 1.274–5, §§ 1.274–1 through 1.274–7 apply to taxable years ending after December 31, 1962.

Steven T. Miller,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2012–18691 Filed 7–31–12; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2011–0927; FRL–9709–6]

Approval and Promulgation of Air Quality Implementation Plans; Virginia; Prevention of Significant Deterioration and Nonattainment New Source Review; Fine Particulate Matter ($PM_{2.5}$)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the Virginia State Implementation Plan (SIP), submitted by the Virginia Department of Environmental Quality (VADEQ) on August 25, 2011. These revisions pertaining to Virginia's Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NSR) programs incorporate preconstruction permitting regulations for fine particulate matter ($PM_{2.5}$) into the Virginia SIP. A previous PSD program approval of Virginia's Chapter 80, Article 8 regulations was provided to the Commonwealth as a ''limited approval'' for reasons that will not deny this action as being fully approved. In addition, EPA is proposing to approve these revisions and portions of other related submissions for the purpose of determining that Virginia has met its statutory obligations with respect to the infrastructure requirements of the Clean Air Act (CAA) which relate to Virginia's PSD permitting program and are necessary to implement, maintain, and enforce the 1997 8-hour ozone and $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS), the 2006 $PM_{2.5}$ NAAQS, and the 2008 lead NAAQS. EPA is proposing to approve these revisions in accordance with the requirements of the Clean Air Act (CAA).

DATES: Written comments must be received on or before August 31, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2011–0927 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2011–0927, Ms. Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2011–0927. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Mr. David Talley, (215) 814–2117, or by email at *talley.david@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. On August 25, 2011, VADEQ submitted a formal revision to its State Implementation Plan (SIP) (the August 2011 SIP submission). The SIP revision consists of amendments to major NSR permitting regulations under the Virginia Administrative Code (VAC), specifically Articles 8 and 9 of 9VAC5 Chapter 80. This SIP revision generally pertains to two federal rulemaking actions regarding $PM_{2.5}$. The first is the ''Implementation of the New Source Review (NSR) Program for Particulate Matter less than 2.5 Micrometers ($PM_{2.5}$)'' (NSR $PM_{2.5}$ Rule), which was promulgated on May 16, 2008 (73 FR 28321). The second is the ''Prevention of Significant Deterioration (PSD) for Particulate Matter less than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)'' (PSD $PM_{2.5}$ Rule), which was promulgated on October 20, 2010 (75 FR 64864).

Whenever a new or revised NAAQS is promulgated, section 110(a) of the CAA imposes obligations upon states to submit SIP revisions that provide for the implementation, maintenance, and enforcement of the new or revised NAAQS within three years following the promulgation of such NAAQS—the so called infrastructure SIP revisions. Although states typically have met many of the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous PM standards, states (including all the EPA Region III states) were still required to submit SIP revisions that address section 110(a)(2) for the 1997 and 2006 $PM_{2.5}$ NAAQS. In addition to the August 2011 SIP submission, Virginia has previously submitted SIP revisions addressing requirements set forth in CAA Section 110(a)(2) for the 1997 and 2006 $PM_{2.5}$ NAAQS, as well as the 1997 ozone and 2008 lead NAAQS. Because these SIP submissions addressed Virginia's compliance with CAA section 110(a)(2), these SIP submissions are referred to as infrastructure SIP submissions. These previous submittals, as well as a technical support document (TSD), are included in the docket for today's action. The TSD contains a detailed discussion of these submittals and their relationship to the requirements of CAA section 110(a)(2).

A. Fine Particulate Matter and the NAAQS

On July 18, 1997, EPA revised the NAAQS for particulate matter (PM) to add new standards for fine particles, using $PM_{2.5}$ as the indicator. Previously, EPA used PM_{10} (inhalable particles smaller than or equal to 10 micrometers in diameter) as the indicator for the PM NAAQS. EPA established health-based (primary) annual and 24-hour standards for $PM_{2.5}$, setting an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) and a 24-hour standard at a level of 65 $\mu g/m^3$ (62 FR 38652). At the time the 1997 primary standards were established, EPA also established welfare-based (secondary) standards identical to the primary standards. The secondary standards are designed to protect against major environmental effects of $PM_{2.5}$, such as visibility impairment, soiling, and materials damage. On October 17, 2006, EPA revised the primary and secondary NAAQS for $PM_{2.5}$. In that rulemaking, EPA reduced the 24-hour NAAQS for $PM_{2.5}$ to 35 $\mu g/m^3$ and retained the existing annual $PM_{2.5}$ NAAQS of 15 $\mu g/m^3$ (71 FR 61236).

B. Implementation of NSR Requirements for $PM_{2.5}$—the NSR $PM_{2.5}$ Rule

On May 16, 2008, EPA finalized a rule (the NSR $PM_{2.5}$ Rule) to implement the 1997 p.m.$_{2.5}$ NAAQS, including changes to the NSR program (73 FR 28321). The 2008 NSR $PM_{2.5}$ Rule revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the $PM_{2.5}$ NAAQS in both attainment and nonattainment areas. The 2008 NSR $PM_{2.5}$ Rule also established the following NSR requirements to implement the $PM_{2.5}$ NAAQS: (1) Require NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) establish significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and oxides of nitrogen (NO_X); (3) establish $PM_{2.5}$ emission offsets; and (4) require states to account for gases that condense to form particles (condensables) in $PM_{2.5}$ emission limits.

Additionally, the 2008 final rule authorized states to adopt provisions in their nonattainment NSR rules that would allow major stationary sources and major modifications which will be located, or take place in, areas designated nonattainment for $PM_{2.5}$ to offset emissions increases of direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors with reductions of either direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors in accordance with offset ratios contained in the approved SIP for the applicable nonattainment area. The inclusion, in whole or in part, of the interpollutant offset provisions for $PM_{2.5}$ is discretionary on the part of the states. In the preamble to the 2008 final rule, EPA included preferred or presumptive offset ratios, applicable to specific $PM_{2.5}$ precursors that states may adopt in conjunction with the new interpollutant offset provisions for $PM_{2.5}$, and for which the state could rely on the EPA's technical work to demonstrate the adequacy of the ratios for use in any $PM_{2.5}$ non attainment area. Alternatively, the preamble indicated that states may adopt their own ratios, subject to the EPA's approval, that would have to be substantiated by modeling or other technical demonstrations of the net air quality benefit for ambient $PM_{2.5}$ concentrations. The preferred ratios were subsequently the subject of a petition for reconsideration, which the Administrator granted. EPA continues to support the basic policy that sources may offset increases in emissions of direct $PM_{2.5}$ or of any $PM_{2.5}$ precursor in a $PM_{2.5}$ nonattainment area with actual emissions reductions in direct $PM_{2.5}$ or $PM_{2.5}$ precursors in accordance with offset ratios as approved in the SIP for the applicable nonattainment area. However, we no longer consider the preferred ratios set forth in the preamble to the 2008 final rule for $PM_{2.5}$ NSR implementation to be presumptively approvable. Instead, any ratio involving $PM_{2.5}$ precursors adopted by the state for use in the interpollutant offset program for $PM_{2.5}$ nonattainment areas must be accompanied by a technical demonstration that shows the net air quality benefits of such ratio for the $PM_{2.5}$ nonattainment area in which it will be applied.

C. PSD $PM_{2.5}$ Rule

On October 20, 2010 (75 FR 64865), EPA promulgated the final ''Prevention of Significant Deterioration (PSD) for Particulate Matter less than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)'' (PSD $PM_{2.5}$ Rule). That rulemaking finalized certain program provisions under the regulations to prevent significant deterioration of air quality due to emissions of $PM_{2.5}$ (*i.e.,* under the $PM_{2.5}$ PSD regulations). This final rule supplemented the final implementation rule for $PM_{2.5,}$ known as the Clean Air Fine Particle Implementation Rule (CAFPIR) that we promulgated on April 25, 2007 (72 FR 20586), and the $PM_{2.5}$ NSR Implementation Rule that we promulgated on May 16, 2008 (73 FR28321). Together, these three rules established a regulatory framework for implementation of a $PM_{2.5}$ program in any area. This final rule established increments, SILs, and an SMC for $PM_{2.5}$ to facilitate ambient air quality monitoring and modeling under the PSD regulations for areas designated attainment or unclassifiable for $PM_{2.5}$.

D. Infrastructure Requirements Relating to Virginia's PSD Permit Program

As stated earlier, Virginia's PSD and nonattainment programs are currently operating under a limited SIP approval. However, EPA has previously determined that this limited approval will not impair Virginia's ability to enforce its PSD and nonattainment NSR provisions in a manner consistent with federal requirements (See Section III, below). With the addition of the $PM_{2.5}$ requirements described above, Virginia's nonattainment NSR and PSD programs contain all of the emission limitations and control measures and other program elements required by 40 CFR 51.165 and 40 CFR 51.166 related to the $PM_{2.5}$ NAAQS. Therefore, we are also proposing to approve the August 25, 2011 SIP submittal and the relevant portions of Virginia's infrastructure SIP submittals relating to the PSD permit program under CAA sections 110(a)(2)(C), (D)(i)(II), and (J) for the 1997 $p.m._{2.5,}$ 2006 $p.m._{2.5,}$ and 2008 lead NAAQS. EPA is also proposing to approve the relevant portion of Virginia's infrastructure submittal relating to the PSD permit program pursuant to CAA section 110(a)(2)(D)(i)(II) for the 1997 ozone NAAQS. Additionally, Virginia has met its obligations with respect to the visibility requirements of section 110(a)(2)(D)(i)(II) by virtue of its Regional Haze SIP, which EPA took final action to approve on March 23, 2012 (77 FR 16397). Therefore, EPA is also proposing to approve the portions of Virginia's infrastructure submittals related to the visibility requirements of section 110(a)(2)(D)(i)(II) for the 1997 ozone, 1997 $p.m._{2.5}$, 2006 $p.m._{2.5}$, and 2008 lead NAAQS. As already noted, the TSD for this action contains a detailed discussion of the relevant submissions and EPA's rationale for making this determination.

II. Summary of SIP Revision

The SIP revision submitted by VADEQ consists of amendments to the major NSR permitting regulations of Articles 8 and 9 of 9VAC5 Chapter 80. The revision fulfills the federal program requirements established by the EPA rulemaking actions discussed above. The amendments establish the major source threshold, significant emission rate and offset ratios for $PM_{2.5}$, and establish an allowance for interpollutant trading for offsets and NSR applicability to $PM_{2.5}$ precursor pollutants, pursuant to the May 2008 NSR $PM_{2.5}$ Rule. In addition, the amendments add maximum allowable increases in ambient pollutant concentrations (increments) pursuant to the October 2010 PSD $PM_{2.5}$ Rule. Several minor administrative revisions were made as well.

The amendments submitted by VADEQ for approval into the SIP were adopted by the State Air Pollution Control Board on June 10, 2011, and effective on August 17, 2011. They include revisions to the general definitions under Chapter 10 of 9VAC5 (specifically 9VAC5–10–30), as well as to Articles 8 (PSD) and 9 (nonattainment NSR) under Chapter 80 of 9VAC5. The following regulations under Article 8 are revised: 9VAC5–80–1615 (Definitions), 9VAC5–80–1635 (Ambient Air Increments), and 9VAC5–80–1765 (Sources Affecting Federal Class I Areas—Additional Requirements). Under Article 9, the regulations at 9VAC5–80–2010 (Definitions) and 9VAC5–80–2120 (Offsets) have been amended. Based upon EPA's review of the revisions submitted by Virginia for approval into the SIP, we find these revisions consistent with their federal counterparts.

The revisions submitted by the State of Virginia to address the new PSD requirements for $PM_{2.5}$ pursuant to the EPA's October 20, 2010 final rule include the regulatory text at 40 CFR 51.166(k)(2), concerning the implementation of SILs for $PM_{2.5}$. (See, 9VAC5–80–1715 (Source Impact Analysis)). We stated in the preamble to the 2010 final rule that we do not consider the SILs to be a mandatory SIP element, but regard them as discretionary on the part of permitting authority for use in the PSD permitting process. Nevertheless, the $PM_{2.5}$ SILs are currently the subject of litigation before the U.S. Court of Appeals (DC Circuit). In response to that litigation, the EPA has requested that the Court remand and

vacate the regulatory text in the EPA's PSD regulations at paragraph (k)(2) of section 51.166 so that the EPA can make necessary rulemaking revisions to that text.

In light of EPA's request for remand and vacatur and our acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 51.166 and 52.21, we do not believe that it is appropriate at this time to approve that portion of the State's SIP revision that contains the affected regulatory text in the State's PSD regulations, specifically new paragraph A.2 of 9VAC5–80–1715. Instead, we are taking no action at this time with regard to that specific provision contained in the SIP revision.

III. General Information Pertaining to SIP Submittals From the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) ''privilege'' for voluntary compliance evaluations performed by a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed. Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1–1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that (1) generated or developed before the commencement of a voluntary environmental assessment; (2) prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1–1198, precludes granting a privilege to documents and information ''required by law,'' including documents and information ''required by Federal law to maintain program delegation, authorization or approval,'' since Virginia must ''enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. * * *'' The opinion concludes that ''[r]egarding § 10.1–1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval.'' Virginia's Immunity law, Va. Code Sec. 10.1–1199, provides that ''[t]o the extent consistent with requirements imposed by Federal law,'' any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since ''no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.''

Therefore, EPA has determined that Virginia's Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its PSD and nonattainment NSR programs consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Proposed Action

Based upon EPA's review of the August 25, 2011 submittal, we find the regulations consistent with their Federal counterparts. Only the increment portion of the October 20, 2010 $p.m._{2.5}$ rule is a required PSD program element. Therefore, EPA is proposing to approve Virginia's SIP revision, with the exception of the portion of the revision which relates to the SILs, upon which we are taking no action. Additionally, in light of this SIP revision, EPA is proposing to approve the portions of Virginia's prior infrastructure submittals related to the PSD program which were not approved as part of our October 11, 2011 action (*See,* 76 FR 62635) as follows: (1) We are proposing to approve the portions of the December 13, 2007 submittal which address the section 110(a)(2)(D)(i)(II) requirements related to Virginia's PSD program for the 1997 ozone NAAQS; (2) We are proposing to approve the portions of the July 10, 2008 and September 2, 2008 submittals which address the requirements of sections 110(a)(2)(C), (D)(i)(II), and (J) which relate to Virginia's PSD program for the 1997 $p.m._{2.5}$ NAAQS; (3) We are proposing to approve the portions of the April 1, 2011 submittal which address the requirements of sections 110(a)(2)(C), (D)(i)(II), and (J) which relate to Virginia's PSD program for the 2006 $p.m._{2.5}$ NAAQS; (4) We are proposing to approve the portions of the March 9, 2012 submittal which address the requirements of sections 110(a)(2)(C), (D)(i)(II), and (J) which relate to Virginia's PSD program for the 2008 lead NAAQS; 5) We are proposing to approve the portions of the November 13, 2007 submittal which address the requirements of sections 110(a)(2)(D)(i) which relate to Virginia's PSD program for the 1997 ozone and 1997 $p.m._{2.5}$ NAAQS; and 6) Because Virginia has met its obligations with respect to the visibility requirements of section 110(a)(2)(D)(i)(II) by virtue of its Regional Haze SIP, which EPA took final action to approve on March 23, 2012 (77 FR 16397), EPA is also proposing to approve the portions of Virginia's previous infrastructure submittals related to the visibility requirements of section 110(a)(2)(D)(i)(II) for the 1997 ozone, 1997 $p.m._{2.5}$, 2006 $p.m._{2.5}$, and 2008 lead NAAQS.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

• Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);

• Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);

• Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule pertaining to NSR requirements for $PM_{2.5}$ does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: July 23, 2012.

W.C. Early,

Acting Regional Administrator, Region III.

[FR Doc. 2012–18800 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0381; FRL–9709–7]

Approval and Promulgation of Air Quality Implementation Plans; Delaware; Requirements for Prevention of Significant Deterioration and Nonattainment New Source Review; Fine Particulate Matter ($PM_{2.5}$)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the State of Delaware on March 14, 2012. This SIP revision pertaining to Delaware's Prevention of Significant Deterioration (PSD) and nonattainment New Source Review (NSR) programs incorporates preconstruction permitting requirements for fine particulate matter ($PM_{2.5}$) into the Delaware SIP. In addition, EPA is proposing to approve SIP revisions and portions of SIP submissions for the purpose of determining that Delaware has met its statutory obligations with respect to the infrastructure requirements of the Clean Air Act (CAA) which relate to Delaware's PSD permitting program and are necessary to implement, maintain, and enforce the1997 $PM_{2.5}$ and ozone NAAQS, the 2006 $PM_{2.5}$ NAAQS, and the 2008 lead NAAQS. EPA is approving these revisions in accordance with the requirements of the Clean Air Act (CAA).

DATES: Written comments must be received on or before August 31, 2012.

ADDRESSES: Submit your comments, identified by Docket ID Number EPA–R03–OAR–2012–0381 by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *Email: cox.kathleen@epa.gov.*

C. *Mail:* EPA–R03–OAR–2012–0381, Kathleen Cox, Associate Director, Office of Permits and Air Toxics, Mailcode 3AP10, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

D. *Hand Delivery:* At the previously-listed EPA Region III address. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R03–OAR–2012–0381. EPA's policy is that all comments received will be included in the public docket without change, and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Delaware Department of Natural Resources and Environmental Control, 89 Kings Highway, P.O. Box 1401, Dover, Delaware 19903.

FOR FURTHER INFORMATION CONTACT: Gerallyn Duke, (215) 814–2084, or by email at *duke.gerallyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean

EPA. On March 14, 2012, Delaware submitted a formal revision to the State Implementation Plan (SIP) (the March 2012 SIP submission). The SIP revision consists of amendments to 7 DE Admin. Code 1125, ''Requirements for Preconstruction Review.'' This SIP revision generally pertains to two Federal rulemaking actions regarding $PM_{2.5}$. The first is the ''Implementation of the New Source Review (NSR) Program for Particulate Matter less than 2.5 Micrometers ($PM_{2.5}$)'' (NSR $PM_{2.5}$ Rule), which was promulgated on May 16, 2008 (73 FR 28321). The second is the ''Prevention of Significant Deterioration (PSD) for Particulate Matter less than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)'' (PSD $PM_{2.5}$ Rule), which was promulgated on October 20, 2010 (75 FR 64864).

Whenever a new or revised NAAQS is promulgated, section 110(a) of the CAA imposes obligations upon states to submit SIP revisions that provide for the implementation, maintenance, and enforcement of the new or revised NAAQS within three years following the promulgation of such NAAQS—the ''Infrastructure SIP'' revisions. Although states typically have met many of the basic program elements required in section 110(a)(2) through earlier SIP submissions in connection with previous particulate matter (PM) standards, states (including all the EPA Region III states) were still required to submit SIP revisions that address section 110(a)(2) for the 1997 and 2006 $PM_{2.5}$ NAAQS. In addition to the March 2012 SIP submission, Delaware has previously submitted SIP revisions addressing requirements set forth in CAA section 110(a)(2) for the 1997 and 2006 $PM_{2.5}$ NAAQS, as well as the 1997 ozone and 2008 lead NAAQS. Because these SIP submissions addressed Delaware's compliance with CAA section 110(a)(2), these SIP submissions are referred to as Infrastructure SIP submissions. These previous submittals, as well as a technical support document (TSD), are included in the docket for today's action. The TSD contains a detailed discussion of these submittals and their relationship to the requirements of CAA section 110(a)(2).

A. Fine Particulate Matter and the NAAQS

On July 18, 1997, EPA revised the NAAQS for PM to add new standards for fine particles, using $PM_{2.5}$ as the indicator. Previously, EPA used PM_{10} (inhalable particles smaller than or equal to 10 micrometers in diameter) as the indicator for the PM NAAQS. EPA established health-based (primary) annual and 24-hour standards for $PM_{2.5}$, setting an annual standard at a level of 15 micrograms per cubic meter ($\mu g/m^3$) and a 24-hour standard at a level of 65 $\mu g/m^3$ (62 FR 38652). At the time the 1997 primary standards were established, EPA also established welfare-based (secondary) standards identical to the primary standards. The secondary standards are designed to protect against major environmental effects of $PM_{2.5}$, such as visibility impairment, soiling, and materials damage. On October 17, 2006, EPA revised the primary and secondary NAAQS for $PM_{2.5}$. In that rulemaking, EPA reduced the 24-hour NAAQS for $PM_{2.5}$ to 35 $\mu g/m^3$ and retained the existing annual $PM_{2.5}$ NAAQS of 15 $\mu g/m^3$ (71 FR 61236).

B. Implementation of NSR Requirements for $PM_{2.5}$—the NSR $PM_{2.5}$ Rule

On May 16, 2008, EPA finalized the NSR $PM_{2.5}$ Rule to implement the 1997 $PM_{2.5}$ NAAQS, including changes to the NSR program (73 FR 28321). The 2008 NSR $PM_{2.5}$ Rule revised the NSR program requirements to establish the framework for implementing preconstruction permit review for the $PM_{2.5}$ NAAQS in both attainment and nonattainment areas. The 2008 NSR $PM_{2.5}$ Rule also established the following NSR requirements to implement the $PM_{2.5}$ NAAQS: (1) Require NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) establish significant emission rates for direct $PM_{2.5}$ and precursor pollutants (including sulfur dioxide (SO_2) and oxides of nitrogen (NO_X); (3) establish $PM_{2.5}$ emission offsets; and (4) require states to account for gases that condense to form particles (condensables) in $PM_{2.5}$ emission limits.

Additionally, the 2008 final rule authorized states to adopt provisions in their nonattainment NSR rules that would allow major stationary sources and major modifications which will be located or take place in areas designated nonattainment for $PM_{2.5}$ to offset emissions increases of direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors with reductions of either direct $PM_{2.5}$ emissions or $PM_{2.5}$ precursors in accordance with offset ratios contained in the approved SIP for the applicable nonattainment area. The inclusion, in whole or in part, of the interpollutant offset provisions for $PM_{2.5}$ is discretionary on the part of the states. In the preamble to the 2008 final rule, EPA included preferred or presumptive offset ratios, applicable to specific $PM_{2.5}$ precursors that states may adopt in conjunction with the new interpollutant offset provisions for $PM_{2.5}$ and for which the state could rely on the EPA's technical work to demonstrate the adequacy of the ratios for use in any $PM_{2.5}$ non attainment area. Alternatively, the preamble indicated that states may adopt their own ratios, subject to the EPA's approval, that would have to be substantiated by modeling or other technical demonstrations of the net air quality benefit for ambient $PM_{2.5}$ concentrations.

The preferred ratios were subsequently the subject of a petition for reconsideration which the Administrator granted. EPA continues to support the basic policy that sources may offset increases in emissions of direct $PM_{2.5}$ or of any $PM_{2.5}$ precursor in a $PM_{2.5}$ nonattainment area with actual emissions reductions in direct $PM_{2.5}$ or $PM_{2.5}$ precursors in accordance with offset ratios as approved in the SIP for the applicable nonattainment area. However, we no longer consider the preferred ratios set forth in the preamble to the 2008 final rule for $PM_{2.5}$ NSR implementation to be presumptively approvable. Instead, any ratio involving $PM_{2.5}$ precursors adopted by the state for use in the interpollutant offset program for $PM_{2.5}$ nonattainment areas must be accompanied by a technical demonstration that shows the net air quality benefits of such ratio for the $PM_{2.5}$ nonattainment area in which it will be applied.

C. PSD $PM_{2.5}$ Rule

On October 20, 2010 (75 FR 64865), EPA promulgated the final ''Prevention of Significant Deterioration (PSD) for Particulate Matter less than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)'' (PSD $PM_{2.5}$ Rule). That rulemaking finalized certain program provisions under the regulations to prevent significant deterioration of air quality due to emissions of $PM_{2.5}$ (i.e., under the $PM_{2.5}$ PSD regulations). This final rule supplemented the final implementation rule for $PM_{2.5}$, known as the Clean Air Fine Particle Implementation Rule (CAFPIR) that we promulgated on April 25, 2007 (72 FR 20586), and the $PM_{2.5}$ NSR Implementation Rule that we promulgated on May 16, 2008 (73 FR 28321). Together, these three rules establish a regulatory framework for implementation of a $PM_{2.5}$ program in any area. This final rule established increments, SILs, and an SMC for $PM_{2.5}$ to facilitate ambient air quality monitoring and modeling under the PSD

regulations for areas designated attainment or unclassifiable for $PM_{2.5}$.

D. Infrastructure Requirements Relating to Delaware's PSD Permit Program

With the addition of the $PM_{2.5}$ requirements described above, Delaware's nonattainment NSR and PSD programs contain all of the emission limitations and control measures and other program elements required by 40 CFR 51.165 and 40 CFR 51.166 related to the $PM_{2.5}$ NAAQS. Therefore, we also are proposing to approve the March 2012 SIP submittal and the relevant portions of Delaware's Infrastructure SIP submittals relating to the PSD permit program requirements under CAA sections 110(a)(2)(D)(i)(II) for the 1997 ozone and $PM_{2.5}$ NAAQS, the 2006 $PM_{2.5}$ NAAQS, and the 2008 lead NAAQS. EPA also is proposing to approve the relevant portion of Delaware's submittal relating to the PSD permit program pursuant to CAA section 110(a)(2)(C) and (J) for the 2008 lead NAAQS. As already noted, the TSD for this action contains a detailed discussion of the relevant submissions and EPA's rationale for making this determination.

II. Summary of SIP Revision

The March 2012 SIP revision submitted by Delaware consists of amendments to 7 DE Admin. Code 1125, Requirements for Preconstruction Review. The revision fulfills the federal program requirements established by the 2008 NSR $PM_{2.5}$ Rule. The amendments establish the major source threshold, significant emission rate and offset ratios for $PM_{2.5}$, establish NO_X and SO_2 as precursors to $PM_{2.5}$, and establish the allowance for interpollutant trading for offsets and NSR applicability to $PM_{2.5}$ precursor pollutants, pursuant to the May 2008 NSR $PM_{2.5}$ Rule. In addition, the amendments add maximum allowable ambient pollutant concentrations (increments) and an SMC for $PM_{2.5}$ pursuant to the October 2010 PSD $PM_{2.5}$ Rule.

The amendments add definitions, in Section 1 (General Provisions), for the following terms: ''major source baseline date,'' ''condensable particulate matter,'' ''direct $PM_{2.5}$,'' and ''filterable PM.'' The amendments revise the definitions of existing terms ''baseline area,'' ''baseline concentration,'' ''building, structure, facility or installation,'' ''minor source baseline date,'' and ''significant'' to include the requirements for $PM_{2.5}$ to support the amendments to Chapter 1125. Section 2.2.5 is added to Chapter 2.0, Emission Offset Provisions, to identify NO_X and SO_2 as precursors. Section 2.4.3.3 is added to allow emissions offsets of SO_2, NO_X or $PM_{2.5}$ at a 1-to-1 ratio for the same criteria pollutants. Section 2.5.7 is added to Chapter 2.0 to allow interpollutant trading between direct $PM_{2.5}$ emissions and SO_2 or NO_X emissions using a ratio that would be approved by Delaware after public review and comment and then approved by EPA as a SIP revision. Section 3.2 in Chapter 3.0, Prevention of Significant Deterioration of Air Quality, is modified to establish increments for $PM_{2.5}$. Section 3.7 (Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions) is revised at Section 3.7.7.1 to establish an SMC for $PM_{2.5}$. No other changes to increments or SMCs for other regulated NSR pollutants are being addressed in this SIP approval.

The amendments submitted in March 2012 by Delaware for approval into the SIP were adopted by Delaware on January 17, 2012 and became effective on February 11, 2012. Based upon EPA's review of the revisions submitted by Delaware for approval into the SIP, EPA finds these revisions to be consistent with their Federal counterparts.

The revisions submitted by the State of Delaware to address the new PSD requirements for $PM_{2.5}$ pursuant to the EPA's October 20, 2010 final rule include the regulatory text at 40 CFR 51.166(k)(2), concerning the implementation of SILs for $PM_{2.5}$. (See, 7 DE Admin. Code 1125 Section 3.9 (Source Impact Analysis)). We stated in the preamble to the 2010 final rule that we do not consider the SILs to be a mandatory SIP element, but regard them as discretionary on the part of permitting authority for use in the PSD permitting process. Nevertheless, the $PM_{2.5}$ SILs are currently the subject of litigation before the U.S. Court of Appeals (D.C. Circuit). In response to that litigation, the EPA has requested that the Court remand and vacate the regulatory text in the EPA's PSD regulations at paragraph (k)(2) of section 51.166 so that the EPA can make necessary rulemaking revisions to that text.

In light of EPA's request for remand and vacatur and our acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 51.166 and 52.21, we do not believe that it is appropriate at this time to approve that portion of the State's SIP revision that contains the affected regulatory text in the State's PSD regulations, specifically new section 3.9 of 7 DE Admin. Code 1125. Instead, we are taking no action at this time with regard to that specific provision contained in the SIP revision.

III. Proposed Action

Based upon EPA's review of the March 14, 2012 submittal, EPA finds the revised regulations consistent with their Federal counterparts. Only the increment portion of the October 20, 2010 $PM_{2.5}$ rule is a required PSD program element. Therefore, EPA is proposing to approve the Delaware SIP revision with the exception of the SILs as noted earlier, upon which we are taking no action. Additionally, in light of this SIP revision, EPA is proposing to approve the portions of Delaware's December 13, 2007, March 12, 2008, September 19, 2008, September 16, 2009, and April 1, 2010 infrastructure SIP submittals which address the obligations set forth at CAA section 110(a)(2)(D)(i)(II) relating to Delaware's PSD permit program for the 1997 $PM_{2.5}$ and ozone NAAQS as well as for the 2006 $PM_{2.5}$ NAAQS. Finally, in light of Delaware's submission dated October 17, 2011 and the March 2012 SIP revision which address the obligations set forth at CAA sections 110(a)(2)(C), (D)(i)(II) and (J) relating to the Delaware's PSD permit program, EPA is proposing to determine that Delaware's SIP meets the statutory obligations relating to its PSD permit program set forth at CAA sections 110(a)(2)(C), (D)(i)(II), and (J) for the 2008 lead NAAQS. EPA is soliciting public comments on the issues discussed in this document. These comments will be considered before taking final action.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities

under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);

• Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);

• Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);

• Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

• Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

• Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and

• Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule pertaining to NSR requirements for $PM_{2.5}$ does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides.

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

Dated: July 20, 2012.

James W. Newsom,

Acting Regional Administrator, Region III.

[FR Doc. 2012–18802 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2011–0695; FRL–9708–3]

Approval and Promulgation of Implementation Plans; New Mexico; Albuquerque/Bernalillo County: Motor Vehicle Inspection

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions from the Governor of New Mexico to the State Implementation Plan for Air Quality for the City of Albuquerque/Bernalillo County area pursuant to the Clean Air Act. The revision addresses 20.11.100 NMAC, Motor Vehicle Inspection, and was submitted on July 28, 2011. This revision includes addition of emissions inspections for 1998 and newer diesel vehicles less than 10,001 pounds and all gasoline/electric hybrid vehicles; changes test frequency for some model year vehicles; allows motorists that are financially incapable of paying for certain repairs to apply for a time extension; makes minor test procedure changes; codifies certain regulatory language from the VPMD Procedures Manual into 20.11.100 NMAC; reorganizes 20.11.100 NMAC; and makes numerous non-substantive changes to clarify and improve readability of these rules. This action is being taken under section 110 of the Clean Air Act (the Act).

DATES: Comments must be received on or before August 31, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R06–OAR–2011–0695, by one of the following methods:

(1) *www.regulations.gov:* Follow the on-line instructions for submitting comments.

(2) *Email:* Ms. Sandra Rennie at *rennie.sandra@epa.gov*.

(3) *Fax:* Ms. Sandra Rennie, Air Planning Section (6PD–L), at fax number 214–665–6762.

(4) *Mail:* Ms. Sandra Rennie, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

(5) *Hand or Courier Delivery:* Ms. Sandra Rennie, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2011–0695. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information through *http://www.regulations.gov* or email, if you believe that it is CBI or otherwise protected from disclosure. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment along with any disk or CD–ROM submitted. 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 and any form of encryption and should be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The file will be made available by appointment for public inspection in the Region 6 FOIA Review Room between the hours of 8:30 a.m. and 4:30 p.m. weekdays except for legal holidays. Contact the person listed in the **FOR FURTHER INFORMATION CONTACT** paragraph below to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. A 15 cent per page fee will be charged for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area on the seventh floor at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. The State submittal related to this SIP revision, which is part of the EPA docket, is also

available for public inspection at the State and Local Air Agencies listed below during official business hours by appointment:

New Mexico Environment Department, Air Quality Bureau, 1190 St. Francis Drive, Santa Fe, New Mexico.

Albuquerque Environmental Health Department, Suite 3023, One Civic Plaza (400 Marquette Avenue NW.), Albuquerque, NM 87102.

FOR FURTHER INFORMATION CONTACT: If you have questions concerning today's proposed action, please contact Ms. Sandra Rennie (6PD–L), Air Planning Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD–L), Suite 1200, Dallas, Texas 75202–2733, telephone (214) 665–7367; fax number (214) 665–6762; email address *rennie.sandra@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document the following terms have the meanings described below:

''We'', ''us'' and ''our'' refer to EPA.

Table of Contents

I. What action is EPA proposing?
II. EPA's Evaluation
III. Proposed Action
IV. Statutory and Executive Order Reviews

I. What action is EPA proposing?

We are proposing to approve revisions to the State Implementation Plan (SIP) for Air Quality in New Mexico submitted by the State of New Mexico on July 28, 2011, that apply to the motor vehicle inspection and maintenance (I/M) program in Bernalillo County and the City of Albuquerque. Among the revisions to the I/M rules at 20.11.100 NMAC are expanding the vehicle I/M program to cover model year 1998 and newer diesel motor vehicles greater than 1,000 and less than 10,001 pounds, and all hybrid vehicle gasoline engines, changing the test frequency for some model year vehicles, revising an exemption for certain low income vehicle owners from the $300 repair or repair estimate threshold, and revising some test procedures. Regulatory language from the VPMD (Vehicle Pollution Management Division) Procedures Manual is now codified in the I/M rules. Numerous non-substantive ministerial revisions are being proposed for approval because they add clarity and improve readability of the rules. A detailed evaluation of these revisions is provided in the Technical Support Document (TSD) that was prepared for this rulemaking.

II. EPA's Evaluation

Fuel Type Subject to Testing

Although not required by federal rule, model year 1998 and newer compression ignition powered (diesel) motor vehicles of a certain size are now included in the vehicle I/M program. Diesel vehicles that are greater than 1,000 pounds gross vehicle weight (GVW) but less than 10,001 pounds GVW are covered by On-Board Diagnostics second generation (OBDII) testing. Repair of tested but failing diesel vehicles will result in fewer emissions of particulate matter, and oxides of nitrogen (NO_X, a precursor of ozone formation). Testing for this fuel type will start on January 1, 2013, as adopted in the rule.

Gasoline/electric hybrids are no longer exempt from testing. Technology improvements have made testing the small gasoline engines found in hybrids now possible. Including the growing number of these hybrid vehicles in the I/M program will result in greater emission reductions of Volatile Organic Compounds and NO_X in the program area.

Model Years Subject to Testing

A clarification is made about the newest model years that are exempt from testing. Two registration periods is clarified to mean four (4) years.

Model year 1975–1985 vehicles are now required to get tested on a biennial schedule. Previously, these vehicles were on an annual testing schedule. The Vehicle Pollution Management Division Program (Program) provided a de minimis demonstration that showed how making this change will not have an adverse impact on emissions from this group of vehicles. Other provisions in the rule require vehicles in this age group to have annual inspections if their HC (hydrocarbon) or CO (carbon monoxide) emissions are more than 75% of the standard for those pollutants. Based on the technical demonstration provided by the Program and the regulatory backstop for vehicles approaching the standard, EPA proposes to approve this revision because it will not interfere with attainment and reasonable further progress of the NAAQS or any other applicable requirement of the CAA. *See* 42 U.S.C. 7410(l); CAA 110(l).

Motor vehicles 35 years old or older are now exempt from testing. The Program estimates that less than 300 vehicles per year would fall into this age group. We agree that this small number will not have an adverse impact on the SIP considering the other emission reduction enhancements being made to the I/M program at the same time. Therefore, we propose to approve this revision because it will not interfere with attainment and reasonable further progress of the NAAQS or any other applicable requirement of the CAA. *See* 42 U.S.C. 7410(l); CAA 110(l).

Test Procedures

Minor changes to test procedures include requiring a visual inspection for a catalytic converter on all OBDII-equipped vehicles. The program is also limiting the gas cap pressure check to 1975–2005 vehicles. Increased OBD sensitivity for evaporative emissions in 2006 and newer vehicles will eliminate the need for a separate gas cap test on these newer vehicles. Therefore, we propose to approve this revision because it will not interfere with attainment and reasonable further progress of the NAAQS or any other applicable requirement of the CAA. *See* 42 U.S.C. 7410(l); CAA 110(l).

Time Extensions for Individuals on Public Assistance

The requirement for spending at least $300 for repairs to apply for a time extension has been revised to instead require a repair estimate of $300 or more from a licensed repair facility and proof that the individual is financially incapable of paying for the needed repairs. The Program has seen ineffective partial repairs as a result of this requirement for this income group of vehicle owners. The purpose of an I/M program is to bring about effective repairs with real emission reductions. When this program outcome is not achieved by this rule, eliminating this unnecessary expense for this income group is a logical change. The revision ensures that the time extension is available to those who are financially incapable of paying for necessary repairs at the time the inspection is due. Therefore, we propose to approve this revision.

Codification of Procedures

Prior to the rule revision before us, many program procedures were contained in the VPMD Procedures Manual. The Program determined that this manual was out of date but some of the regulatory language needed to be retained. Portions of the manual were codified in the rules *verbatim.* The remaining parts of the manual were abandoned. The manual was not previously part of the SIP. Non-regulatory procedure information is now contained in technical guidance that is not part of the SIP. We propose to approve the revisions that incorporate

language from the VPMD Procedures Manual into the regulatory text.

Definitions

As a result of the codification process, some additional terms were added to the definitions section. These include Audit, Clean piping, Clean scanning, Covert audit, Covert surveillance, Emissions analyzer, Emissions inspection system or EIS, Fleet, Gas cap test, Overt audit, Pretesting, and Vehicle information database or VID. Definitions adopted for these terms are those that are commonly used in the industry or similar to terms defined in the federal regulations. We propose to approve these definitions.

Other Revisions

In the process of codifying language from the Procedures Manual, the I/M rules were reorganized with some sections being moved from one numbered section to another. Useless and/or anachronistic references were removed or revised to be more meaningful. We propose to approve these non-substantive changes.

III. Proposed Action

EPA is proposing to approve revisions to the New Mexico SIP for the City of Albuquerque/Bernalillo County submitted on July 28, 2011. These include revisions to the fuel type subject to testing, the model years subject to testing, certain test procedures, an opportunity for a time extension for motorists that are financially incapable of paying for repairs of $300 or more, codification of procedures from the Procedures Manual, addition of definitions, and other non-substantive revisions. We believe these revisions will enhance the SIP and improve the effectiveness of the I/M program. This action is being taken under section 110 of the Act.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

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

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: July 20, 2012.

Samuel Coleman,

Acting Regional Administrator, Region 6.

[FR Doc. 2012–18795 Filed 7–31–12; 8:45 am]

BILLING CODE P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2008–0520; FRL–9708–8]

Approval and Promulgation of Implementation Plans; Michigan; Detroit-Ann Arbor Nonattainment Area; Fine Particulate Matter 2005 Base Year Emissions Inventory

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the fine particulate matter ($PM_{2.5}$) 2005 base year emissions inventory, a portion of the State Implementation Plan (SIP) revision submitted by the Michigan Department of Environmental Quality (MDEQ) on June 13, 2008. The emissions inventory is part of the June 13, 2008, SIP revision that Michigan submitted to meet the nonattainment requirements related to the Detroit-Ann Arbor (Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne Counties) nonattainment area for the 1997 annual $PM_{2.5}$ national ambient air quality standards (NAAQS). EPA is taking this action pursuant to sections 110 and 172 of the Clean Air Act (CAA).

DATES: Comments must be received on or before August 31, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2008–0520, by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section, Air Programs Branch (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Instructions: Direct your comments to Docket ID No. EPA–R05–OAR–2008–0520. EPA's policy is that all comments received will be included in the public

docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to EPA without going through *www.regulations.gov* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to Section I of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. We recommend that you telephone Carolyn Persoon, Environmental Engineer, at (312) 353–8290, before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Carolyn Persoon, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8290, *persoon.carolyn@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background
II. Analysis of the State's Submittal
III. Proposed Action
IV. Statutory and Executive Order Reviews

I. Background

On July 18, 1997 (62 FR 38652), EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m³) based on a 3-year average of annual mean $PM_{2.5}$ concentrations. On January 5, 2005 (70 FR 944), EPA published its air quality designations and classifications for the 1997 annual $PM_{2.5}$ NAAQS based upon air quality monitoring data for calendar years 2001–2003. These designations became effective on April 5, 2005. The Detroit-Ann Arbor area (Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne Counties) was designated nonattainment for the 1997 annual $PM_{2.5}$ NAAQS.

Designation of an area as nonattainment starts the process for a state to develop and submit to EPA a SIP under title I, part D of the CAA. This SIP must include, among other elements, a demonstration of how the NAAQS will be attained in the nonattainment area as expeditiously as practicable, but no later than the date required by the CAA. Under CAA section 172(b), a state has up to three years after an area's designation as nonattainment to submit its SIP to EPA. For the 1997 $PM_{2.5}$ NAAQS, these SIPs were due April 5, 2008. See 40 CFR 51.1002(a).

On June 13, 2008, Michigan submitted an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, a 2005 base year emissions inventory and other planning SIP revisions related to attainment of the 1997 annual $PM_{2.5}$ NAAQS in Detroit Ann-Arbor area. Subsequently, on July 5, 2011, MDEQ submitted a redesignation request for the Detroit-Ann Arbor area showing that the area had attained the 1997 annual $PM_{2.5}$ NAAQS based upon complete, quality-assured and certified ambient air monitoring data for the 2007–2009 and 2008–2010 design value periods. On July 5, 2012 (77 FR 39659) EPA proposed to determine that the area has attained the 1997 annual and 2006 24-hour $PM_{2.5}$ NAAQS based on the most recent three-years of complete certified data. If EPA finalizes these proposed determinations, it would suspend the obligation for the area to submit an attainment demonstration and associated RACM, RFP plan, contingency measures, and other planning SIP revisions related to attainment of each of these $PM_{2.5}$ standards so long as the area continues to attain the NAAQS. *See* 40 CFR 51.1004(c).

With regard to the 1997 $PM_{2.5}$ standard, EPA notes that its proposed determination of attainment did not suspend the obligation for the State to submit an emissions inventory under CAA section 172(c)(3), and EPA is therefore proposing to act upon this portion of the submission. Section 172(c)(3) of the CAA requires submission and approval of a comprehensive, accurate, and current inventory of actual emissions. EPA is proposing to approve the emissions inventory portion of the SIP revision submitted by MDEQ on June 13, 2008, as meeting the requirements of section 172(c)(3).

II. Analysis of the State's Submittal

As discussed above, section 172(c)(3) of the CAA requires areas to submit a comprehensive, accurate and current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area. MDEQ selected 2005 as base year for the emissions inventory per 40 CFR 51.1008(b). Emissions contained in MDEQ's June 13, 2008, SIP revision cover the general source categories of electric generating unit (EGU) point sources, non-EGU point sources, area sources, non-road mobile sources, marine-airport-rail (MAR) sources, on-road mobile sources, and modeled ammonia (NH_3) sources. A detailed discussion of the emissions inventory development can be found in Appendix C of the MDEQ submittal; a summary is provided below.

The table below provides a summary of the annual 2005 emissions of nitrogen oxides (NO_X), direct $PM_{2.5}$, volatile organic compounds (VOCs), sulfur dioxide (SO_2), and modeled NH_3 included in MDEQ's submittal.

TABLE 1—2005 ANNUAL NO_X EMISSIONS FOR THE DETROIT-ANN ARBOR AREA

[Tons per year]

County	Area source	Non-EGU point source	On-road source	Nonroad source	EGU point source	MAR source
Livingston	647.95	654.19	5417.90	1288.10	5.91	83.97
Macomb	2498.84	720.91	14121.20	5054.00	134.42	589.24
Monroe	606.83	3774.97	5454.40	1404.17	38483.26	958.21
Oakland	4535.97	1096.91	31088.00	7153.48	71397	822.22
St. Clair	563.69	1978.16	3812.60	1519.17	19690.31	557.31
Washtenaw	1056.74	1050.26	9962.20	2999.65	1.45	203.64
Wayne	6039.67	9408.81	43981.40	9410.39	11369.40	4166.30

TABLE 2—2005 ANNUAL DIRECT $PM_{2.5}$ EMISSIONS FOR THE DETROIT-ANN ARBOR AREA

[Tons per year]

County	Area source	Non-EGU point source	On-road source	Nonroad source	EGU point source	MAR source
Livingston	1424.61	7.35	89.47	120.62	0.10	2.55
Macomb	468.79	113.13	265.44	339.65	12.83	13.91
Monroe	1176.54	668.31	91.00	121.96	597.66	29.11
Oakland	761.34	124.44	559.86	614.54	8.86	23.91
St. Clair	341.99	112.50	71.06	108.58	142.13	18.30
Washtenaw	245.58	86.86	170.02	2632.17	0.02	6.02
Wayne	920.34	1342.36	792.05	644.00	352.76	99.30

TABLE 3—2005 ANNUAL VOC EMISSIONS FOR THE DETROIT-ANN ARBOR AREA

[Tons per year]

County	Area source	Non-EGU point source	On-road source	Nonroad source	EGU point source	MAR source
Livingston	4338.29	176.95	1696.90	1927.32	0.19	23.38
Macomb	11807.62	2271.05	5784.70	4910.60	39.67	114.92
Monroe	3663.62	3555.73	1742.60	1893.76	300.92	61.48
Oakland	17387.40	2487.15	11918.00	9862.11	8.54	93.30
St. Clair	2671.18	1379.00	1550.90	2166.18	285.49	43.26
Washtenaw	5406.23	388.83	3348.70	2632.17	0	19.96
Wayne	24887.81	6319.64	16931.10	8396.96	175.34	460.03

TABLE 4—2005 ANNUAL SO_2 EMISSIONS FOR THE DETROIT-ANN ARBOR AREA

[Tons per year]

County	Area source	Non-EGU point source	On-road source	Nonroad source	EGU point source	MAR source
Livingston	226.78	13.70	71.32	139.72	0.07	7.53
Macomb	930.59	48.26	221.44	426.07	4.32	38.28
Monroe	181.05	7733.15	72.83	139.75	120386.70	82.64
Oakland	1187.41	274.99	458.48	683.20	3.43	64.67
St. Clair	238.80	1752.75	59.06	125.05	66576.72	72.99
Washtenaw	325.00	20.75	136.90	342.20	0.28	16.93
Wayne	1540.36	6396.53	647.06	883.35	40780.46	398.38

TABLE 5—2005 ANNUAL NH_3 EMISSIONS FOR THE DETROIT-ANN ARBOR AREA

[Tons per year]

County	Area source	Non-EGU point source	On-road source	Nonroad source	EGU point source	MAR source	Modeled NH_3
Livingston	3.32	0.15	200.7	1.30	0	0.05	280.31
Macomb	13.42	16.24	645.87	4.42	0	0.27	224.2
Monroe	2.88	79.41	205.50	1.44	2.59	0.57	638.69
Oakland	24.91	19.73	1319.26	7.24	0	0.44	84.74
St. Clair	3.29	10.33	171.71	1.71	11.78	0.34	273.56
Washtenaw	6.71	4.48	388.25	2.66	0	0.12	738.07
Wayne	32.01	132.61	1859.10	8.48	1.80	1.46	113.69

States develop the 172(c)(3) emissions inventory by the incorporation of data from multiple sources. States were required to develop and submit to EPA a triennial emissions inventory according to the Consolidated Emissions Reporting Rule for all source categories (i.e., point, area, nonroad mobile and on-road mobile). This inventory often forms the basis for data that states update with more recent information and data that they use in their attainment demonstration modeling inventory. Such was the case in the development of the 2005 emissions inventory that MDEQ submitted in its attainment SIP for the Detroit-Ann Arbor area. The 2005 emissions inventory was based on data developed with the Lake Michigan Air Directors Consortium (LADCO) and the Midwest Regional Planning Organization (MRPO) and submitted by the states to the 2005 National Emissions Inventory (NEI). Data from many databases, studies and models (e.g., Vehicle Miles Traveled, fuel programs, the NONROAD 2002 model data for commercial marine vessels, locomotives and Clean Air Market Division, etc.) resulted in the inventory submitted in this SIP. The data were developed according to current EPA emissions inventory guidance ''Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations'' (August 2005) and a quality assurance project plan that was developed through LADCO and approved by EPA.

EPA has reviewed MDEQ's emissions inventory and proposes to determine that it is adequate for the purposes of meeting section 172(c)(3) emissions inventory requirement. Further, EPA's review shows that the emissions were developed consistent with the CAA, implementing regulations and EPA guidance for emission inventories.

III. Proposed Action

EPA is proposing to approve the 2005 base year emissions inventory portion of the SIP revision submitted by MDEQ on June 13, 2008. EPA is making the determination that this action is consistent with sections 110 and 172 of the CAA.

IV. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 F43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

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

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Particulate matter, Reporting and record-keeping requirements.

Dated: July 13, 2012.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2012–18799 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2005–0163; FRL–9355–8]

RIN 2070–ZA16

Aldicarb; Proposed Tolerance Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to revoke certain tolerances for the insecticide and nematocide aldicarb because, in follow-up to voluntary requests from a registrant, EPA amended an aldicarb registration to delete specific uses, leaving no aldicarb registrations for those uses. Also, in accordance with current Agency practice, EPA is proposing to revise the nomenclature of specific tolerances and make minor revisions to the tolerance expression for aldicarb.

DATES: Comments must be received on or before October 1, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2005–0163 by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), Mail Code: 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.htm.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Joseph Nevola, Pesticide Re-evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone

number: (703) 308–8037; email address: *nevola.joseph@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

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

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

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

C. What can I do if I wish the agency to maintain a tolerance that the agency proposes to revoke?

This proposed rule provides a comment period of 60 days for any person to state an interest in retaining a tolerance proposed for revocation. If EPA receives a comment within the 60-day period to that effect, EPA will not proceed to revoke the tolerance immediately. However, EPA will take steps to ensure the submission of any needed supporting data and will issue an order in the **Federal Register** under the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(f), if needed. The order would specify data needed and the timeframes for its submission, and would require that within 90 days some person or persons notify EPA that they will submit the data. If the data are not submitted as required in the order, EPA will take appropriate action under FFDCA.

EPA issues a final rule after considering comments that are submitted in response to this proposed rule. In addition to submitting comments in response to this proposal, you may also submit an objection at the time of the final rule. If you fail to file an objection to the final rule within the time period specified, you will have waived the right to raise any issues resolved in the final rule. After the specified time, issues resolved in the final rule cannot be raised again in any subsequent proceedings.

II. Background

A. What action is the agency taking?

EPA is proposing to revoke certain tolerances for aldicarb because, in follow-up to voluntary requests from a registrant, EPA amended an aldicarb registration to delete specific uses, leaving no aldicarb registrations for those uses, and therefore the tolerances are no longer needed. Also, EPA is proposing these revocations in accordance with a Memorandum of Agreement (MOA) of August 16, 2010 between EPA and the registrant regarding the registration of a pesticide product containing aldicarb, which is available in the docket of this proposed rule.

It is EPA's general practice to propose revocation of those tolerances for residues of pesticide active ingredients on crop uses for which there are no active registrations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), unless any person submits comments on the proposal that indicate a need for the tolerance to cover residues in or on imported commodities or legally treated domestic commodities.

In the **Federal Register** of October 7, 2010 (75 FR 62129) (FRL–8848–1), EPA published a notice of receipt of a request to voluntarily amend an aldicarb registration to terminate uses, including use of aldicarb in or on citrus commodities and potato.

In the **Federal Register** of May 9, 2012 (77 FR 27226) (FRL–9348–2) and May 25, 2012 (77 FR 31355) (FRL–9351–4), EPA issued a cancellation order and correction that announced its approval for the amendment of a registration, including the termination of aldicarb uses in or on citrus commodities and potato, effective immediately, which permitted no use as of May 9, 2012. Tolerances are subject to the World Trade Organization's (WTO's) Sanitary and Phytosanitary (SPS) Measures Agreement, including its provisions in Annex B, paragraph 2 and WT/MIN (01)/17, paragraph 5.2 (available at *http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm* and *http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm*) which provide a reasonable interval (6 months) for producers in exporting members to adapt to the requirements of the importing members. Therefore, the effective date of a tolerance revocation should normally be delayed at least 6 months after publication. Consequently, EPA is proposing to revoke the tolerances for aldicarb in 40 CFR 180.269 on citrus, dried pulp; grapefruit; lemon; lime; orange, sweet; and potato with an effective date of revocation that is 6 months after the date of publication of a final rule in the **Federal Register**.

Also, in accordance with current Agency practice, EPA is proposing to

revise the commodity terminology in 40 CFR 180.269(a) for ''coffee, bean, green'' to read ''coffee, green bean'' and ''soybean'' to read ''soybean, seed.'' In addition, in accordance with current Agency practice to describe more clearly the measurement and scope or coverage of the tolerances, including applicable metabolites and degradates, EPA is proposing minor revisions to the tolerance expression for aldicarb in 40 CFR 180.269(a) to read as set out in the proposed regulatory text at the end of this document. The revisions do not substantively change the tolerance or, in any way, modify the permissible level of residues permitted by the tolerance.

B. What is the agency's authority for taking this action?

A ''tolerance'' represents the maximum level for residues of pesticide chemicals legally allowed in or on raw agricultural commodities and processed foods. Section 408 of FFDCA, 21 U.S.C. 346a, as amended by the Food Quality Protection Act (FQPA) of 1996, Public Law 104–170, authorizes the establishment of tolerances, exemptions from tolerance requirements, modifications in tolerances, and revocation of tolerances for residues of pesticide chemicals in or on raw agricultural commodities and processed foods. Without a tolerance or exemption, food containing pesticide residues is considered to be unsafe and therefore ''adulterated'' under FFDCA section 402(a), 21 U.S.C. 342(a). Such food may not be distributed in interstate commerce (21 U.S.C. 331(a)). For a food-use pesticide to be sold and distributed, the pesticide must not only have appropriate tolerances under the FFDCA, but also must be registered under FIFRA (7 U.S.C. 136 *et seq.*). Food-use pesticides not registered in the United States must have tolerances in order for commodities treated with those pesticides to be imported into the United States.

EPA's general practice is to propose revocation of tolerances for residues of pesticide active ingredients on crops for which FIFRA registrations no longer exist and on which the pesticide may therefore no longer be used in the United States. EPA has historically been concerned that retention of tolerances that are not necessary to cover residues in or on legally treated foods may encourage misuse of pesticides within the United States. Nonetheless, EPA will establish and maintain tolerances even when corresponding domestic uses are canceled if the tolerances, which EPA refers to as ''import tolerances,'' are necessary to allow importation into the United States of food containing such pesticide residues. However, where there are no imported commodities that require these import tolerances, the Agency believes it is appropriate to revoke tolerances for unregistered pesticides in order to prevent potential misuse.

Furthermore, as a general matter, the Agency believes that retention of import tolerances not needed to cover any imported food may result in unnecessary restriction on trade of pesticides and foods. Under FFDCA section 408, a tolerance may only be established or maintained if EPA determines that the tolerance is safe based on a number of factors, including an assessment of the aggregate exposure to the pesticide and an assessment of the cumulative effects of such pesticide and other substances that have a common mechanism of toxicity. In doing so, EPA must consider potential contributions to such exposure from all tolerances. If the cumulative risk is such that the tolerances in aggregate are not safe, then every one of these tolerances is potentially vulnerable to revocation. Furthermore, if unneeded tolerances are included in the aggregate and cumulative risk assessments, the estimated exposure to the pesticide would be inflated. Consequently, it may be more difficult for others to obtain needed tolerances or to register needed new uses. To avoid potential trade restrictions, the Agency is proposing to revoke tolerances for residues on crops uses for which FIFRA registrations no longer exist, unless someone expresses a need for such tolerances. Through this proposed rule, the Agency is inviting individuals who need these import tolerances to identify themselves and the tolerances that are needed to cover imported commodities.

Parties interested in retention of the tolerances should be aware that additional data may be needed to support retention. These parties should be aware that, under FFDCA section 408(f), if the Agency determines that additional information is reasonably required to support the continuation of a tolerance, EPA may require that parties interested in maintaining the tolerances provide the necessary information. If the requisite information is not submitted, EPA may issue an order revoking the tolerance at issue.

C. When do these actions become effective?

EPA is proposing that the actions herein become effective 6 months after the date of publication of the final rule in the **Federal Register**. EPA is proposing this effective date for these actions to allow a reasonable interval for producers in exporting members of the WTO's SPS Measures Agreement to adapt to the requirements of a final rule. EPA believes that treated commodities will have sufficient time for passage through the channels of trade. If you have comments regarding existing stocks and whether the effective date allows sufficient time for treated commodities to clear the channels of trade, please submit comments as described under **SUPPLEMENTARY INFORMATION**.

Any commodities listed in this proposal treated with the pesticides subject to this proposal, and in the channels of trade following the tolerance revocations, shall be subject to FFDCA section 408(1)(5), as established by FQPA. Under this unit, any residues of these pesticides in or on such food shall not render the food adulterated so long as it is shown to the satisfaction of the Food and Drug Administration that:

1. The residue is present as the result of an application or use of the pesticide at a time and in a manner that was lawful under FIFRA, and

2. The residue does not exceed the level that was authorized at the time of the application or use to be present on the food under a tolerance or exemption from tolerance. Evidence to show that food was lawfully treated may include records that verify the dates when the pesticide was applied to such food.

III. International Residue Limits

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

The Codex has not established an MRL for aldicarb in or on potato, but has established MRLs for aldicarb, including an MRL in or on citrus fruits at 0.2 milligrams/kilogram (mg/kg), which is covered by U.S. tolerances for aldicarb at a higher level of 0.3 ppm on grapefruit, lemon, lime, and orange,

sweet, and 0.6 ppm on citrus, dried pulp. These MRLs are different than the tolerances established for aldicarb in the United States because of differences in use patterns and/or good agricultural practices.

IV. Statutory and Executive Order Reviews

In this proposed rule, EPA is proposing to revoke specific tolerances established under FFDCA section 408. The Office of Management and Budget (OMB) has exempted this type of action (e.g., tolerance revocation for which extraordinary circumstances do not exist) from review under Executive Order 12866, entitled ''*Regulatory Planning and Review*'' (58 FR 51735, October 4, 1993). Because this proposed rule has been exempted from review under Executive Order 12866 due to its lack of significance, this proposed rule is not subject to Executive Order 13211, entitled ''*Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*'' (66 FR 28355, May 22, 2001). This proposed rule does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* or impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4). Nor does it require any special considerations as required by Executive Order 12898, entitled ''*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*'' (59 FR 7629, February 16, 1994); or OMB review or any other Agency action under Executive Order 13045, entitled ''*Protection of Children from Environmental Health Risks and Safety Risks*'' (62 FR 19885, April 23, 1997). This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note). Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Agency previously assessed whether revocations of tolerances might significantly impact a substantial number of small entities and concluded that, as a general matter, these actions do not impose a significant economic impact on a substantial number of small entities. This analysis was published on December 17, 1997 (62 FR 66020) (FRL–5753–1), and was provided to the Chief Counsel for Advocacy of the Small Business Administration. Taking into account this analysis, and available information concerning the pesticides listed in this proposed rule, the Agency hereby certifies that this proposed rule will not have a significant negative economic impact on a substantial number of small entities. In a memorandum dated May 25, 2001, EPA determined that eight conditions must all be satisfied in order for an import tolerance or tolerance exemption revocation to adversely affect a significant number of small entity importers, and that there is a negligible joint probability of all eight conditions holding simultaneously with respect to any particular revocation. (This Agency document is available in the docket of this proposed rule). Furthermore, for the pesticide named in this proposed rule, the Agency knows of no extraordinary circumstances that exist as to the present proposal that would change the EPA's previous analysis. Any comments about the Agency's determination should be submitted to the EPA along with comments on the proposal, and will be addressed prior to issuing a final rule. In addition, the Agency has determined that this action will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, entitled ''*Federalism*'' (64 FR 43255, August 10, 1999). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' This proposed rule directly regulates growers, food processors, food handlers, and food retailers, not States. This action does not alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). For these same reasons, the Agency has determined that this proposed rule does not have any ''tribal implications'' as described in Executive Order 13175, entitled *''Consultation and Coordination with Indian Tribal Governments*'' (65 FR 67249, November 9, 2000). Executive Order 13175, requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and the Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' This proposed rule will not have substantial direct effects on tribal governments, 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, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this proposed rule.

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 18, 2012.

Steven Bradbury,

Director, Office of Pesticide Programs.

Therefore, it is proposed that 40 CFR chapter I be amended as follows:

PART 180—[AMENDED]

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

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

2. In § 180.269 paragraph (a) is revised to read as follows:

§ 180.269 Aldicarb; tolerances for residues.

(a) *General.* Tolerances are established for residues of the insecticide and nematocide aldicarb, including its metabolites and degradates, in or on the commodities in the table in this paragraph. Compliance with the tolerance levels specified in this paragraph is to be determined by measuring only the sum of aldicarb (2-methyl-2-(methylthio)propanal *O*-((methylamino)carbonyl)oxime), and its cholinesterase-inhibiting metabolites 2-methyl-2-(methylsulfinyl)propanal *O*-((methylamino)carbonyl)oxime and 2-methyl-2-(methylsulfonyl)propanal *O*-((methylamino)carbonyl)oxime, calculated as the stoichiometric equivalent of aldicarb, in or on the commodity.

Commodity	Parts per million
Bean, dry, seed	0.1
Beet, sugar, roots	0.05
Beet, sugar, tops	1
Coffee, green bean	0.1
Cotton, undelinted seed	0.1
Cotton, hulls	0.3
Peanut	0.05
Pecan	0.5
Sorghum, grain, bran	0.5
Sorghum, grain, grain	0.2
Sorghum, grain, stover	0.5
Soybean, seed	0.02
Sugarcane, cane	0.02
Sweet potato, roots	0.1

* * * * *

[FR Doc. 2012–18508 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

46 CFR Part 401

[USCG–2012–0409]

RIN 1625–AB89

Great Lakes Pilotage Rates—2013 Annual Review and Adjustment

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes rate adjustments for pilotage services on the Great Lakes, which were last amended in February 2012. The proposed adjustments would establish new base rates and are made in accordance with a required full ratemaking procedure. The proposed update reflects changes in benchmark contractual wages and benefits and an adjustment for inflation. This rulemaking promotes the Coast Guard's strategic goal of maritime safety.

DATES: Comments and related material must either be submitted to our online docket via *http://www.regulations.gov* on or before October 1, 2012 or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2012–0409 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Mr. Todd Haviland, Management & Program Analyst, Office of Great Lakes Pilotage, Commandant (CG–WWM–2), Coast Guard; telephone 202–372–2037, email *Todd.A.Haviland@uscg.mil,* or fax 202–372–1909. If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

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I. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

A. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2012–0409), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. We recommend that you include your name and a mailing address, an email address, or a phone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and insert ''USCG–2012–0409'' in the ''Search'' box. Click on ''Submit a Comment'' in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope.

We will consider all comments and material received during the comment period and may change this proposed rule based on your comments.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* insert ''USCG–2012–0409'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

C. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008 issue of the **Federal Register** (73 FR 3316).

D. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one to the docket using one of the methods specified under **ADDRESSES**. In your request, explain why you believe a public meeting would be beneficial. If

we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

II. Abbreviations

AMOU American Maritime Officers Union
CFR Code of Federal Regulations
CPI Consumer Price Index
FR **Federal Register**
MISLE Marine Information for Safety and Law Enforcement
NAICS North American Industry Classification System
NPRM Notice of proposed rulemaking
OMB Office of Management and Budget
ROI Return on Investment
§ Section symbol
U.S.C. United States Code

III. Basis and Purpose

The basis of this rulemaking is the Great Lakes Pilotage Act of 1960 (''the Act'') (46 U.S.C. Chapter 93), which requires U.S. vessels operating ''on register'' [1] and foreign vessels to use U.S. registered pilots while transiting the U.S. waters of the St. Lawrence Seaway and the Great Lakes system. 46 U.S.C. 9302(a)(1). The Act requires the Secretary of Homeland Security to ''prescribe by regulation rates and charges for pilotage services, giving consideration to the public interest and the costs of providing the services.'' Rates must be established or reviewed and adjusted each year, not later than March 1. Base rates must be established by a full ratemaking at least once every 5 years, and in years when base rates are not established they must be reviewed and adjusted if necessary. 46 U.S.C. 9303(f). The Secretary's duties and authority under the Act have been delegated to the Coast Guard. Department of Homeland Security Delegation No. 0170.1, paragraph (92)(f). Coast Guard regulations implementing the Act appear in parts 401 through 404 of Title 46, Code of Federal Regulations (CFR). Procedures for use in establishing base rates appear in 46 CFR part 404, Appendix A, and procedures for annual review and adjustment of existing base rates appear in 46 CFR part 404, Appendix C.

The purpose of this rulemaking is to establish new base pilotage rates, using the 46 CFR part 404, Appendix A, methodology.

IV. Background

The vessels affected by this rulemaking are engaged in foreign trade upon the U.S. waters of the Great Lakes. U.S. and Canadian ''Lakers,'' [2] which account for most commercial shipping on the Great Lakes, are not affected. 46 U.S.C. 9302.

The U.S. waters of the Great Lakes and the St. Lawrence Seaway are divided into three pilotage districts. Pilotage in each district is provided by an association certified by the Coast Guard Director of Great Lakes Pilotage to operate a pilotage pool. It is important to note that, while we set rates, we do not control the actual number of pilots an association maintains, so long as the association is able to provide safe, efficient, and reliable pilotage service. Also, we do not control the actual compensation that pilots receive. The actual compensation is determined by each of the three district associations, which use different compensation practices.

District One, consisting of Areas 1 and 2, includes all U.S. waters of the St. Lawrence River and Lake Ontario. District Two, consisting of Areas 4 and 5, includes all U.S. waters of Lake Erie, the Detroit River, Lake St. Clair, and the St. Clair River. District Three, consisting of Areas 6, 7, and 8, includes all U.S. waters of the St. Mary's River, Sault Ste. Marie Locks, and Lakes Michigan, Huron, and Superior. Area 3 is the Welland Canal, which is serviced exclusively by the Canadian Great Lakes Pilotage Authority and, accordingly, is not included in the U.S. rate structure. Areas 1, 5, and 7 have been designated by Presidential Proclamation, pursuant to the Act, to be waters in which pilots must at all times, be fully engaged in the navigation of vessels in their charge. Areas 2, 4, 6, and 8 have not been so designated because they are open bodies of water. While working in those undesignated areas, pilots must only ''be on board and available to direct the navigation of the vessel at the discretion of and subject to the customary authority of the master.'' 46 U.S.C. 9302(a)(1)(B).

This rulemaking is a full ratemaking to establish new base pilotage rates, using the 46 CFR part 404, Appendix A, methodology. The last full ratemaking established the current base rates in 2012 (Final Rule, 77 FR 11752, February 28, 2012). Among other things, the Appendix A methodology requires us to review detailed pilot association financial information, and we contract with independent accountants to assist in that review. We have now completed our review of the independent accountant's 2010 financial reports. The comments by the pilot associations on those reports and the independent accountant's final findings are discussed in our document entitled ''Summary—Independent Accountant's Report on Pilot Association Expenses, with Pilot Association Comments and Accountant's Responses,'' which appears in the docket.

V. Discussion of Proposed Rule

A. Summary

We propose establishing new base pilotage rates in accordance with the methodology outlined in Appendix A to 46 CFR part 404. The proposed new rates would be established by March 1, 2013 and effective August 1, 2013. They would average approximately 1.87 percent more, overall, than the February 2012 rate adjustments. Table 1 shows the proposed percent change for the new rates for each area.

All figures in the tables that follow are based on calculations performed either by an independent accountant or by the Director's staff. In both cases those calculations were performed using common commercial computer programs. Decimalization and rounding of the audited and calculated data affects the display in these tables but does not affect the calculations. The calculations are based on the actual figure that rounds values for presentation in the tables.

TABLE 1—SUMMARY OF RATE ADJUSTMENTS

If pilotage service is required in:	Then the percent change over the current rate is:
Area 1 (Designated waters)	−1.41%
Area 2 (Undesignated waters)	−1.69
Area 4 (Undesignated waters)	8.87
Area 5 (Designated waters)	0.95
Area 6 (Undesignated waters)	4.31
Area 7 (Designated waters)	0.56
Area 8 (Undesignated waters)	1.52

B. Discussion of Methodology

The Appendix A methodology provides seven steps, with sub-steps, for calculating rate adjustments. The following discussion describes those steps and sub-steps and includes tables showing how we have applied them to the 2010 detailed pilot financial information.

Step 1: Projection of Operating Expenses. In this step, we project the amount of vessel traffic annually. Based

[1] ''On register'' means that the vessel's certificate of documentation has been endorsed with a registry endorsement, and therefore, may be employed in foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef. 46 U.S.C. 12105, 46 CFR 67.17.

[2] A ''Laker'' is a commercial cargo vessel especially designed for and generally limited to use on the Great Lakes.

upon that projection, we forecast the amount of necessary and reasonable operating expenses that pilotage rates should recover.

Step 1.A: Submission of Financial Information. This sub-step requires each pilot association to provide us with detailed financial information in accordance with 46 CFR part 403. The associations complied with this requirement, supplying 2010 financial information in 2011; this is the most current and complete data set we have available.

Step 1.B: Determination of Recognizable Expenses. This sub-step requires us to determine which reported association expenses will be recognized for ratemaking purposes, using the guidelines shown in 46 CFR 404.5. We contracted with an independent accountant to review the reported expenses and submit findings recommending which reported expenses should be recognized. The accountant also reviewed which reported expenses should be adjusted prior to recognition, or if they should not be allowed for ratemaking purposes. The independent accountant made preliminary findings; they were sent to the pilot associations, and the pilot associations reviewed and commented on the preliminary findings. Then, the independent accountant made final findings. The Coast Guard Director of Great Lakes Pilotage reviewed and accepted those final findings, resulting in the determination of recognizable expenses. The preliminary findings, the associations' comments on those findings, and the final findings are all discussed in the ''Summary—Independent Accountant's Report on Pilot Association Expenses, with Pilot Association Comments and Accountant's Responses,'' which appears in the docket. Tables 2 through 4 show each association's recognized expenses.

TABLE 2—RECOGNIZED EXPENSES FOR DISTRICT ONE

Reported expenses for 2010	Area 1	Area 2	Total
	St. Lawrence River	Lake Ontario	
Pilot Costs:			
Other pilotage costs:			
Pilot subsistence/Travel	$212,715	$167,880	$380,595
License insurance	23,880	18,847	42,727
Payroll taxes	0	0	0
Other	1,432	1,130	2,562
Total other pilotage costs	238,027	187,857	425,884
Pilot Boat and Dispatch Costs:			
Pilot boat expense	95,254	75,178	170,432
Dispatch expense	0	0	0
Payroll taxes	7,962	6,283	14,245
Total pilot and dispatch costs	103,216	81,461	184,677
Administrative Expenses:			
Legal	7,959	6,282	14,241
Insurance	13,971	11,026	24,997
Employee benefits	19,454	15,354	34,808
Payroll taxes	4,816	3,801	8,617
Other taxes	4,504	3,554	8,058
Travel	215	169	384
Depreciation/auto leasing/other	17,440	13,765	31,205
Interest	12,576	9,926	22,502
Dues and subscriptions	13,075	10,319	23,394
Utilities	5,130	4,049	9,179
Salaries	49,840	39,336	89,176
Accounting/Professional fees	4,997	3,943	8,940
Other	9,408	7,425	16,833
Total Administrative Expenses	163,385	128,949	292,334
Total Operating Expenses	504,628	398,267	902,895
Proposed Adjustments (independent CPA):			
Operating Expenses:			
Other Pilot Costs:			
Pilotage Subsistence/Travel	(7,747)	(6,114)	(13,861)
Payroll taxes	64,563	50,955	115,518
Total other pilotage costs	56,816	44,841	101,657
Administrative Expenses:			
Legal	799	631	1,430
Employee benefits	(1,537)	(1,213)	(2,750)
Dues and subscriptions	(13,075)	(10,319)	(23,394)
Total Administrative Expenses	(13,813)	(10,901)	(24,714)
Total CPA Adjustments	43,003	33,940	76,943
Total Operating Expenses	547,631	432,207	979,838

TABLE 3—RECOGNIZED EXPENSES FOR DISTRICT TWO

Reported Expenses for 2010	Area 4	Area 5	Total
	Lake Erie	Southeast Shoal to Port Huron, MI	
Operating Expenses:			
Other pilotage costs:			
Pilot subsistence/Travel	$79,503	$119,254	$198,757
License insurance	6,168	9,252	15,420
Payroll taxes	53,457	80,186	133,643
Other	42,130	63,195	105,325
Total other pilotage costs	181,258	271,887	453,145
Pilot Boat and Dispatch Costs:			
Pilot boat expense	145,254	217,882	363,136
Dispatch expense	7,830	11,745	19,575
Payroll taxes	4,056	6,084	10,140
Total pilot and dispatch costs	157,140	235,711	392,851
Administrative Expenses:			
Legal	8,120	12,180	20,300
Office rent	26,275	39,413	65,688
Insurance	13,410	20,114	33,524
Employee benefits	24,420	36,631	61,051
Payroll taxes	2,980	4,471	7,451
Other taxes	19,100	28,651	47,751
Depreciation/Auto leasing/Other	22,954	34,431	57,385
Interest	14,790	22,185	36,975
Dues and subscriptions	6,200	9,300	15,500
Utilities	12,138	18,208	30,346
Salaries	46,611	69,917	116,528
Accounting/Professional fees	14,067	21,100	35,167
Other	16,157	24,235	40,392
Total Administrative Expenses	227,223	340,835	568,058
Total Operating Expenses	565,622	848,432	1,414,054
Proposed Adjustments (independent CPA):			
Operating Expenses:			
Other Pilot Costs:			
Pilotage subsistence/Travel	(3,999)	(5,999)	(9,998)
Total other pilotage costs	(3,999)	(5,999)	(9,998)
Pilot boat and dispatch costs:			
Pilot boat expense	(767)	(1,150)	(1,917)
Total pilot boat and dispatch costs	(767)	(1,150)	(1,917)
Administrative Expenses:			
Legal	(209)	(314)	(523)
Office rent	(809)	(1,213)	(2,022)
Interest	(11,268)	(16,902)	(28,170)
Dues and subscriptions	(6,200)	(9,300)	(15,500)
Total Administrative Expenses	(18,486)	(27,729)	(46,215)
TOTAL CPA ADJUSTMENTS	(23,252)	(34,878)	(58,130)
Total Operating Expenses	542,369	813,554	1,355,924

Note: Numbers may not total due to rounding.

TABLE 4—RECOGNIZED EXPENSES FOR DISTRICT THREE

Reported expenses for 2010	Area 6	Area 7	Area 8	Total
	Lakes Huron and Michigan	St. Mary's River	Lake Superior	
Operating Expenses:				
Other Pilot Costs:				
Pilot subsistence/Travel	$170,162	$81,836	$108,514	$360,512
License insurance	9,204	4,426	5,869	19,499
Payroll taxes	27,774	13,358	17,712	58,844
Other	630	303	402	1,335
Total other pilotage costs	207,770	99,923	132,497	440,190

TABLE 4—RECOGNIZED EXPENSES FOR DISTRICT THREE—Continued

Reported expenses for 2010	Area 6	Area 7	Area 8	Total
	Lakes Huron and Michigan	St. Mary's River	Lake Superior	
Pilot Boat and Dispatch Expenses:				
Pilot boat costs	197,244	94,861	125,785	417,890
Dispatch expense	72,550	34,891	46,266	153,707
Payroll taxes	8,068	3,880	5,145	17,093
Total pilot boat and dispatch costs	277,862	133,632	177,196	588,690
Administrative Expenses:				
Legal	28,089	13,509	17,913	59,511
Office Rent	4,673	2,247	2,980	9,900
Insurance	6,581	3,165	4,197	13,943
Employee benefits	57,942	27,866	36,950	122,758
Payroll taxes	5,709	2,746	3,641	12,096
Other taxes	15,381	7,397	9,808	32,586
Depreciation/auto leasing	23,495	11,299	14,983	49,777
Interest	1,537	739	980	3,256
Dues and subscriptions	13,676	6,577	8,721	28,974
Utilities	13,223	6,359	8,432	28,014
Salaries	49,802	23,951	31,759	105,512
Accounting/professional fees	11,894	5,720	7,585	25,199
Other	5,574	2,681	3,555	11,810
Total administrative expenses	237,576	114,256	151,504	503,336
Total Operating Expenses	723,208	347,811	461,197	1,532,216
Proposed Adjustments (independent CPA):				
Other Pilot Costs:				
Payroll taxes	26,213	12,606	16,716	55,535
Total other pilotage costs	26,213	12,606	16,716	55,535
Pilot Boat and Dispatch Expenses:				
Dispatch costs	(2,170)	(1,044)	(1,384)	(4,598)
Total pilot boat and dispatch costs	(2,170)	(1,044)	(1,384)	(4,598)
Administrative Expenses:				
Legal	(1,454)	(699)	(927)	(3,080)
Dues and subscriptions	(13,676)	(6,577)	(8,721)	(28,974)
Other	(1,255)	(603)	(800)	(2,658)
Total administrative expenses	(16,385)	(7,879)	(10,448)	(34,712)
Total CPA Adjustments	7,658	3,683	4,884	16,225
Total Operating Expenses	730,866	351,494	466,081	1,548,441

Note: Numbers may not total due to rounding.

Step 1.C: Adjustment for Inflation or Deflation. In this sub-step we project rates of inflation or deflation for the succeeding navigation season. Because we used 2010 financial information, the ''succeeding navigation season'' for this ratemaking is 2011. We based our inflation adjustment of 3.2 percent on the 2011 change in the Consumer Price Index (CPI) for the Midwest Region of the United States, which can be found at: *http://www.bls.gov/xg_shells/ro5xg01.htm.* This adjustment appears in Tables 5 through 7.

TABLE 5—INFLATION ADJUSTMENT, DISTRICT ONE

Reported expenses for 2010		Area 1		Area 2		Total
		St. Lawrence River		Lake Ontario		
Total Operating Expenses		$547,631		$432,207		$979,838
2011 change in the Consumer Price Index (CPI) for the Midwest Region of the United States.	×	.032	×	.032	×	.032
Inflation Adjustment	=	$17,524	=	$13,831	=	$31,355

TABLE 6—INFLATION ADJUSTMENT, DISTRICT TWO

Reported expenses for 2010		Area 4 Lake Erie		Area 5 Southeast Shoal to Port Huron, MI		Total
Total Operating Expenses		$542,369		$813,554		$1,355,924
2011 change in the Consumer Price Index (CPI) for the Midwest Region of the United States.	×	.032	×	.032	×	.032
Inflation Adjustment	=	$17,356	=	$26,034	=	$43,390

TABLE 7—INFLATION ADJUSTMENT, DISTRICT THREE

Reported expenses for 2010		Area 6 Lake Huron and Michigan		Area 7 St. Mary's River		Area 8 Lake Superior		Total
Total Operating Expenses		$730,866		$351,494		$466,081		$1,548,441
2011 change in the Consumer Price Index (CPI) for the Midwest Region of the United States.	×	.032	×	.032	×	.032	×	.032
Inflation Adjustment	=	$23,388	=	$11,248	=	$14,915	=	$49,550

Step 1.D: Projection of Operating Expenses. The final sub-step of Step 1 is to project the operating expenses for each pilotage area, on the basis of the preceding sub-steps and any other foreseeable circumstances that could affect the accuracy of the projection. Based on comments and supporting material received for the 2012 Appendix A NPRM, we determined that foreseeable circumstances exist in District One.

Eight months of District One's pilot boat mortgage payments and boat insurance qualify as foreseeable circumstances. For District One, the projected operating expenses are based on the calculations from Sub-steps 1.A through 1.C and the aforementioned foreseeable circumstances. Table 8 shows these projections.

TABLE 8—PROJECTED OPERATING EXPENSES, DISTRICT ONE

Reported expenses for 2010		Area 1 St. Lawrence River		Area 2 Lake Ontario		Total
Total operating expenses		$547,631		$432,207		$979,838
Inflation adjustment 3.2%	+	17,524	+	13,831	+	31,355
Director's adjustment & foreseeable circumstances						
Pilot boat mortgage payments	+	26,429	+	20,815	+	47,244
Pilot boat insurance	+	7,221	+	5,687	+	12,908
Total projected expenses for 2012 pilotage season	=	$598,805	=	$472,540	=	$1,071,344

Note: Numbers may not total due to rounding.

During the audit for the 2013 Appendix A rulemaking, the independent accountant informed us that District Two applied for and received a Consolidated Omnibus Budget Reconciliation Act (COBRA) subsidy for the first and second quarter of 2010. The American Recovery and Reinvestment Act of 2009 provided for a temporary premium subsidy for COBRA continuation coverage. The amount of the COBRA insurance subsidy for the period 2010 was $60,460. Federal taxes of $18,400 are accounted for in Step 6 (Federal Tax Allowance). For District Two, the projected operating expenses are based on the calculations from Sub-steps 1.A through 1.C, the COBRA subsidy, and Federal taxes. Table 9 shows these projections.

TABLE 9—PROJECTED OPERATING EXPENSES, DISTRICT TWO

Reported expenses for 2010		Area 4 Lake Erie		Area 5 Southeast Shoal to Port Huron, MI		Total
Total Operating Expenses		$542,369		$813,554		$1,355,924
Inflation Adjustment 3.2%	+	17,356	+	26,034	+	43,390
Director's adjustment & foreseeable circumstances						
American Recovery and Reinvestment Act Subsidy	+	(24,184)	+	(36,276)	+	(60,460)
Federal taxes (accounted for in Step 6)	+	(7,360)	+	(11,040)	+	(18,400)

TABLE 9—PROJECTED OPERATING EXPENSES, DISTRICT TWO—Continued

Reported expenses for 2010		Area 4 Lake Erie		Area 5 Southeast Shoal to Port Huron, MI		Total
Total projected expenses for 2013 pilotage season	=	$528,182	=	$792,272	=	$1,320,454

Because we are not now aware of any such foreseeable circumstances for District 3, its projected operating expenses are based exclusively on the calculations from Sub-steps 1.A through 1.C. Table 10 shows these projections.

TABLE 10—PROJECTED OPERATING EXPENSES, DISTRICT THREE

Reported expenses for 2010		Area 6 Lakes Huron and Michigan		Area 7 St. Mary's River		Area 8 Lake Superior		Total
Total Expenses		$730,866		$351,494		$466,081		$1,548,441
Inflation Adjustment 3.2%	+	23,388	+	11,248	+	14,915	+	49,550
Total projected expenses for 2013 pilotage season	=	$754,254	=	$362,742	=	$480,996	=	$1,597,991

Step 2: Projection of Target Pilot Compensation. In Step 2, we project the annual amount of target pilot compensation that pilotage rates should provide in each area. These projections are based on our latest information on the conditions that will prevail in 2013.

Step 2.A: Determination of Target Rate of Compensation. Target pilot compensation for pilots in undesignated waters approximates the average annual compensation for first mates on U.S. Great Lakes vessels. Compensation is determined based on the most current union contracts and includes wages and benefits received by first mates. We calculate target pilot compensation for pilots on designated waters by multiplying the average first mates' wages by 150 percent and then adding the average first mates' benefits.

The most current union contracts available to us are American Maritime Officers Union (AMOU) contracts with three U.S. companies engaged in Great Lakes shipping. There are two separate AMOU contracts available—we refer to them as Agreements A and B and apportion the compensation provided by each agreement according to the percentage of tonnage represented by companies under each agreement. Agreement A applies to vessels operated by Key Lakes, Inc., and Agreement B applies to all vessels operated by American Steamship Co. and Mittal Steel USA, Inc.

Both Agreements A and B expire on July 31, 2016. For the 2011 Appendix C and 2012 Appendix A rulemakings we did not have the current contracts and projected target pilot compensation based on historic data. We have adjusted our projections and recalculated compensation based upon the new contracts. Under Agreement A, we project that the daily wage rate would decrease from $278.73 to $270.61. Under Agreement B, the daily wage rate would increase from $343.59 to $368.05.

Because we are interested in annual compensation, we must convert these daily rates. Agreements A and B both use monthly multipliers to convert daily rates into monthly figures that represent actual working days and vacation, holiday, weekend, or bonus days. The monthly multiplier for Agreement A is 54.5 days and the monthly multiplier for Agreement B is 49.5 days. We multiply the monthly figures by 9, which represents the average length (in months) of the Great Lakes shipping season. Table 11 shows our calculations.

TABLE 11—PROJECTED WAGE COMPONENTS

Monthly component	Pilots on undesignated waters	Pilots on designated waters
Agreement A:		
$270.61 daily rate × 54.5 days	$14,748.25	$22,122.38
Monthly total × 9 months = total wages	132,734	199,101
Agreement B:		
$368.05 daily rate x 49.5 days	18,218.48	27,327.71
Monthly total x 9 months = total wages	163,966	245,949

Based on the contracts of both Agreements A and B, we will adjust their health benefits and pension contributions and leave 401K-plan contributions unchanged. Health benefits for Agreement A will decrease this benefit from $107.40 to $52.96 per day, and Agreement B will decrease this benefit from $107.40 to $105.61 per day. The multiplier that both agreements use to calculate monthly benefits from daily rates is currently 45.5 days, and we project that will remain unchanged. Agreement A eliminated pension contributions, and Agreement B increased the pension contribution from $43.55 to $44.61 per day. Agreements A and B maintained 401K plan contributions at 5 percent of the monthly wage. We use a 9-month multiplier to calculate the annual value

of these benefits. Table 12 shows our calculations.

TABLE 12—PROJECTED BENEFITS COMPONENTS

Monthly component	Pilots on undesignated waters	Pilots on designated waters
Agreement A:		
Employer contribution, 401K plan (Monthly wages × 5%)	$737.41	$1,106.12
Pension = $0.00 × 45.5 days	0.00	0.00
Health = $52.96 × 45.5 days	2,409.68	2,409.68
Monthly total benefits	3,147.09	3,515.80
Monthly total benefits × 9 months	28,323.81	31,642.20
Agreement B:		
Employer contribution, 401K plan (Monthly wages × 5%)	910.92	1,366.38
Pension = $44.61 × 45.5 days	2,029.76	2,029.76
Health = $105.61 × 45.5 days	4,805.26	4,805.26
Monthly total benefits	7,745.94	8,201.40
Monthly total benefits × 9 months	69,713.46	73,812.60

Table 13 combines our projected wage and benefit components of annual target pilot compensation.

TABLE 13—PROJECTED WAGE AND BENEFITS COMPONENTS, COMBINED

	Pilots on undesignated waters	Pilots on designated waters
Agreement A:		
Wages	$132,734	$199,101
Benefits	28,324	31,642
Total	161,058	230,744
Agreement B:		
Wages	163,966	245,949
Benefits	69,713	73,813
Total	233,680	319,762

Agreements A and B affect three companies. Of the tonnage operating under those three companies, approximately 30 percent operates under Agreement A and approximately 70 percent operates under Agreement B. Table 14 provides details.

TABLE 14—SHIPPING TONNAGE APPORTIONED BY CONTRACT

Company	Agreement A	Agreement B
American Steamship Company		815,600
Mittal Steel USA, Inc		38,826
Key Lakes, Inc	361,385	
Total tonnage, each agreement	361,385	854,426
Percent tonnage, each agreement	361,385 ÷ 1,215,811 = 29.7238%	854,426 ÷ 1,215,811 = 70.2762%

We use the percentages from Table 14 to apportion the projected wage and benefit components from Table 13. This gives us a single tonnage-weighted set of figures. Table 15 shows our calculations.

TABLE 15—TONNAGE-WEIGHTED WAGE AND BENEFIT COMPONENTS

		Undesignated waters		Designated waters
Agreement A:				
Total wages and benefits		$161,058		$230,744
Percent tonnage	×	29.7238%	×	29.7238%

TABLE 15—TONNAGE-WEIGHTED WAGE AND BENEFIT COMPONENTS—Continued

		Undesignated waters		Designated waters
Total	=	$47,873	=	$68,586
Agreement B:				
Total wages and benefits		$233,680		$319,762
Percent tonnage	×	70.2762%	×	70.2762%
Total	=	$164,221	=	$224,717
Projected Target Rate of Compensation				
Agreement A total weighted average wages and benefits		$47,873		$68,586
Agreement B total weighted average wages and benefits	+	$164,221	+	$224,717
Total	=	$212,094	=	$293,302

Step 2.B: Determination of the Number of Pilots Needed. Subject to adjustment by the Coast Guard Director of Great Lakes Pilotage to ensure uninterrupted service or for other reasonable circumstances, we determine the number of pilots needed for ratemaking purposes in each area by dividing projected bridge hours for each area, by either 1,000 (designated waters) or 1,800 (undesignated waters) bridge hours. We round the mathematical results and express our determination as whole pilots.

''Bridge hours are the number of hours a pilot is aboard a vessel providing pilotage service,'' 46 CFR part 404, Appendix A, Step 2.B(1). For that reason and as we explained most recently in the 2011 ratemaking's final rule, we do not include, and never have included, pilot delay, detention, or cancellation in calculating bridge hours. See 76 FR 6351 at 6352 col. 3 (February 4, 2011). Projected bridge hours are based on the vessel traffic that pilots are expected to serve. We use historical data, input from the pilots and industry, periodicals and trade magazines, and information from conferences to project demand for pilotage services for the coming year.

In our 2012 final rule, we determined that 38 pilots would be needed for ratemaking purposes. We have determined that 38 remains the proper number to use for ratemaking purposes in 2013. This includes five pilots in Area 2, where rounding up alone would result in only four pilots. For the same reasons we explained at length in the final rule for the 2008 ratemaking, 74 FR 220 at 221–22 (January 5, 2009) which is available in the docket, we have determined that this adjustment is essential for ensuring uninterrupted pilotage service in Area 2. Table 16 shows the bridge hours we project will be needed for each area and our calculations to determine the number of whole pilots needed for ratemaking purposes.

TABLE 16—NUMBER OF PILOTS NEEDED

Pilotage area	Projected 2013 bridge hours		Divided by 1,000 (designated waters) or 1,800 (undesignated waters)		Calculated value of pilot demand	Pilots needed (total = 38)
Area 1 (Designated waters)	5,216	÷	1,000	=	5.216	6
Area 2 (Undesignated waters)	5,509	÷	1,800	=	3.061	5
Area 4 (Undesignated waters)	6,814	÷	1,800	=	3.785	4
Area 5 (Designated waters)	5,102	÷	1,000	=	5.102	6
Area 6 (Undesignated waters)	11,411	÷	1,800	=	6.339	7
Area 7 (Designated waters)	3,223	÷	1,000	=	3.223	4
Area 8 (Undesignated waters)	9,540	÷	1,800	=	5.300	6

Step 2.C: Projection of Target Pilot Compensation. In Table 17 we project total target pilot compensation separately for each area, by multiplying the number of pilots needed in each area, as shown in Table 16, by the target pilot compensation shown in Table 15.

TABLE 17—PROJECTION OF TARGET PILOT COMPENSATION BY AREA

Pilotage area	Pilots needed (total = 38)		Target rate of pilot compensation		Projected target pilot compensation
Area 1 (Designated waters)	6	×	$293,302	=	$1,759,814
Area 2 (Undesignated waters)	5	×	212,094	=	1,060,469
Area 4 (Undesignated waters)	4	×	212,094	=	848,375
Area 5 (Designated waters)	6	×	293,302	=	1,759,814
Area 6 (Undesignated waters)	7	×	212,094	=	1,484,657
Area 7 (Designated waters)	4	×	293,302	=	1,173,209

TABLE 17—PROJECTION OF TARGET PILOT COMPENSATION BY AREA—Continued

Pilotage area	Pilots needed (total = 38)		Target rate of pilot compensation		Projected target pilot compensation
Area 8 (Undesignated waters)	6	×	212,094	=	1,272,563

Note: Numbers may not total due to rounding.

Step 3 and 3.A: Projection of Revenue. In this step, we project the revenue that would be received in 2013 if demand for pilotage services matches the bridge hours we projected in Table 16, and if 2012 pilotage rates were left unchanged. Table 18 shows this calculation.

TABLE 18—PROJECTION OF REVENUE BY AREA

Pilotage area	Projected 2013 bridge hours		2012 Pilotage rates		Revenue projection for 2013
Area 1 (Designated waters)	5,216		$467.58	=	$2,438,897
Area 2 (Undesignated waters)	5,509	×	289.72	=	1,596,067
Area 4 (Undesignated waters)	6,814	×	188.54	=	1,284,712
Area 5 (Designated waters)	5,102	×	504.11	=	2,571,969
Area 6 (Undesignated waters)	11,411	×	191.69	=	2,187,375
Area 7 (Designated waters)	3,223	×	480.26	=	1,547,878
Area 8 (Undesignated waters)	9,540	×	183.87	=	1,754,120
Total					13,381,018

Step 4: Calculation of Investment Base. This step calculates each association's investment base, the recognized capital investment in the assets employed by the association required to support pilotage operations. This step uses a formula set out in 46 CFR part 404, Appendix B. The first part of the formula identifies each association's total sources of funds. Tables 19 through 21 follow the formula up to that point.

TABLE 19—TOTAL SOURCES OF FUNDS, DISTRICT ONE

		Area 1		Area 2
Recognized Assets:				
Total Current Assets		$681,485		$537,847
Total Current Liabilities	−	78,005	−	61,564
Current Notes Payable	+	22,168	+	17,496
Total Property and Equipment (NET)	+	374,021	+	295,189
Land	−	12,315	−	9,720
Total Other Assets	+	0	+	0
Total Recognized Assets	=	987,354	=	779,248
Non-Recognized Assets:				
Total Investments and Special Funds	+	6,103	+	4,817
Total Non-Recognized Assets	=	6,103	=	4,817
Total Assets:				
Total Recognized Assets		987,354		779,248
Total Non-Recognized Assets	+	6,103	+	4,817
Total Assets	=	993,457	=	784,065
Recognized Sources of Funds:				
Total Stockholder Equity		659,702		520,656
Long-Term Debt	+	323,902	+	255,633
Current Notes Payable	+	22,168	+	17,496
Advances from Affiliated Companies	+	0	+	0
Long-Term Obligations—Capital Leases	+	0	+	0
Total Recognized Sources	=	1,005,772	=	793,785
Non-Recognized Sources of Funds:				
Pension Liability		0		0
Other Non-Current Liabilities	+	0	+	0
Deferred Federal Income Taxes	+	0	+	0
Other Deferred Credits	+	0	+	0
Total Non-Recognized Sources	=	0	=	0
Total Sources of Funds:				
Total Recognized Sources		1,005,772		793,785

TABLE 19—TOTAL SOURCES OF FUNDS, DISTRICT ONE—Continued

		Area 1		Area 2
Total Non-Recognized Sources	+	0	+	0
Total Sources of Funds	=	1,005,772	=	793,785

TABLE 20—TOTAL SOURCES OF FUNDS, DISTRICT TWO

		Area 4		Area 5
Recognized Assets:				
Total Current Assets		$454,842		$1,026,731
Total Current Liabilities	–	449,157	–	1,013,899
Current Notes Payable	+	0	+	0
Total Property and Equipment (NET)	+	312,858	+	706,224
Land	–	0	–	0
Total Other Assets	+	0	+	0
Total Recognized Assets	=	318,543	=	719,056
Non-Recognized Assets:				
Total Investments and Special Funds	+	0	+	0
Total Non-Recognized Assets	=	0	=	0
Total Assets:				
Total Recognized Assets		318,543		719,056
Total Non-Recognized Assets	+	0	+	0
Total Assets	=	318,543	=	719,056
Recognized Sources of Funds:				
Total Stockholder Equity		60,920		137,517
Long-Term Debt	+	257,622	+	581,540
Current Notes Payable	+	0	+	0
Advances from Affiliated Companies	+	0	+	0
Long-Term Obligations—Capital Leases	+	0	+	0
Total Recognized Sources	=	318,542	=	719,057
Non-Recognized Sources of Funds:				
Pension Liability		0		0
Other Non-Current Liabilities	+	0	+	0
Deferred Federal Income Taxes	+	0	+	0
Other Deferred Credits	+	0	+	0
Total Non-Recognized Sources	=	0	=	0
Total Sources of Funds:				
Total Recognized Sources		318,542		719,057
Total Non-Recognized Sources	+	0	+	0
Total Sources of Funds	=	318,542	=	719,057

TABLE 21—TOTAL SOURCES OF FUNDS, DISTRICT THREE

		Area 6		Area 7		Area 8
Recognized Assets:						
Total Current Assets		$1,009,619		$485,558		$643,846
Total Current Liabilities	–	123,906	–	59,590	–	79,016
Current Notes Payable	+	0	+	0	+	0
Total Property and Equipment (NET)	+	35,709	+	17,174	+	22,772
Land	–	0	–	0	–	0
Total Other Assets	+	354	+	170	+	226
Total Recognized Assets	=	921,776	=	443,312	=	587,828
Non-Recognized Assets:						
Total Investments and Special Funds	+	0	+	0	+	0
Total Non-Recognized Assets	=	0	=	0	=	0
Total Assets:						
Total Recognized Assets		921,776		443,312		587,828
Total Non-Recognized Assets	+	0	+	0	+	0
Total Assets	=	921,776	=	443,312	=	587,828
Recognized Sources of Funds:						
Total Stockholder Equity		921,776		443,321		587,828

TABLE 21—TOTAL SOURCES OF FUNDS, DISTRICT THREE—Continued

		Area 6		Area 7		Area 8
Long-Term Debt	+	0	+	0	+	0
Current Notes Payable	+	0	+	0	+	0
Advances from Affiliated Companies	+	0	+	0	+	0
Long-Term Obligations—Capital Leases	+	0	+	0	+	0
Total Recognized Sources	=	921,776	=	443,321	=	587,828
Non-Recognized Sources of Funds:						
Pension Liability		0		0		0
Other Non-Current Liabilities	+	0	+	0	+	0
Deferred Federal Income Taxes	+	0	+	0	+	0
Other Deferred Credits	+	0	+	0	+	0
Total Non-Recognized Sources	=	0	=	0	=	0
Total Sources of Funds:						
Total Recognized Sources		921,776		443,321		587,828
Total Non-Recognized Sources	+	0	+	0	+	0
Total Sources of Funds	=	921,776	=	443,321	=	587,828

Tables 19 through 21 also relate to the second part of the formula for calculating the investment base. The second part establishes a ratio between recognized sources of funds and total sources of funds. Since no non-recognized sources of funds (sources we do not recognize as required to support pilotage operations) exist for any of the pilot associations for this year's rulemaking, the ratio between recognized sources of funds and total sources of funds is ''1:1'' (or a multiplier of ''1'') in all cases. Table 22 applies the multiplier of ''1,'' and shows that the investment base for each association equals its total recognized assets. Table 22 also expresses these results by area, because area results will be needed in subsequent steps.

TABLE 22—INVESTMENT BASE BY AREA AND DISTRICT

District	Area	Total recognized assets ($)	Recognized sources of funds ($)	Total sources of funds ($)	Multiplier (ratio of recognized to total sources)	Investment base ($) [1]
One	1	987,354	1,005,772	1,005,772	1	987,354
	2	779,248	793,785	793,785	1	779,248
Total						1,766,602
Two [2]	4	318,543	318,542	318,542	1	318,543
	5	719,056	719,057	719,057	1	719,056
Total						1,037,599
Three	6	921,776	921,776	921,776	1	921,776
	7	443,312	443,312	443,312	1	443,312
	8	587,828	587,828	587,828	1	587,828
Total						1,952,916

[1] **Note:** "Investment base" = "Total recognized assets" × "Multiplier (ratio of recognized to total sources)".
[2] **Note:** The pilot associations that provide pilotage services in Districts One and Three operate as partnerships. The pilot association that provides pilotage service for District Two operates as a corporation.

Step 5: Determination of Target Rate of Return. We determine a market-equivalent return on investment (ROI) that will be allowed for the recognized net capital invested in each association by its members. We do not recognize capital that is unnecessary or unreasonable for providing pilotage services. There are no non-recognized investments in this year's calculations. The allowed ROI is based on the preceding year's average annual rate of return for new issues of high-grade corporate securities. For 2011, the preceding year, the allowed ROI was a little more than 4.64 percent, based on the average rate of return that year on Moody's AAA corporate bonds, which can be found at: *http://research.stlouisfed.org/fred2/series/AAA/downloaddata?cid=119.*

Step 6: Adjustment Determination. The first Sub-step in the adjustment determination requires an initial calculation, applying a formula described in Appendix A. The formula uses the results from Steps 1, 2, 3, and 4 to project the ROI that can be expected in each area, if no further adjustments are made. This calculation is shown in Tables 23 through 25.

TABLE 23—PROJECTED ROI, AREAS IN DISTRICT ONE

		Area 1		Area 2
Revenue (from Step 3)	+	$2,438,897	+	$1,596,067
Operating Expenses (from Step 1)	–	598,805	–	472,540
Pilot Compensation (from Step 2)	–	1,759,814	–	1,060,469
Operating Profit/(Loss)	=	80,278	=	63,059
Interest Expense (from audits)	–	12,576	–	9,926
Earnings Before Tax	=	67,702	=	53,133
Federal Tax Allowance	–	0	–	0
Net Income	=	67,702	=	53,133
Return Element (Net Income + Interest)		80,278		63,059
Investment Base (from Step 4)	÷	987,354	÷	779,248
Projected Return on Investment	=	0.08	=	0.08

TABLE 24—PROJECTED ROI, AREAS IN DISTRICT TWO

		Area 4		Area 5
Revenue (from Step 3)	+	$1,284,712	+	$2,571,969
Operating Expenses (from Step 1)	–	$528,181	–	$792,272
Pilot Compensation (from Step 2)	–	$848,375	–	$1,759,814
Operating Profit/(Loss)	=	($91,845)	=	$19,883
Interest Expense (from audits)	–	$3,522	–	$5,283
Earnings Before Tax	=	($95,367)	=	$14,600
Federal Tax Allowance	–	$7,360	–	$11,040
Net Income	=	($102,727)	=	$3,560
Return Element (Net Income + Interest)		($99,205)		$8,843
Investment Base (from Step 4)	÷	$318,543	÷	$719,056
Projected Return on Investment	=	(0.31)	=	0.01

TABLE 25—PROJECTED ROI, AREAS IN DISTRICT THREE

		Area 6		Area 7		Area 8
Revenue (from Step 3)	+	$2,187,375	+	$1,547,878	+	$1,754,120
Operating Expenses (from Step 1)	–	$754,254	–	$362,742	–	$480,996
Pilot Compensation (from Step 2)	–	$1,484,657	–	$1,173,209	–	$1,272,563
Operating Profit/(Loss)	=	($51,536)	=	$11,927	=	561
Interest Expense (from audits)	–	$1,537	–	$739	–	$980
Earnings Before Tax	=	($53,073)	=	$11,188	=	($419)
Federal Tax Allowance	–	$0	–	$0	–	$0
Net Income	=	($53,073)	=	$11,188	=	($419)
Return Element (Net Income + Interest)		($51,536)		$11,927		$561
Investment Base (from Step 4)	÷	$921,776	÷	$443,312	÷	$587,828
Projected Return on Investment	=	(0.06)	=	0.03	=	0.00

The second sub-step required for Step 6 compares the results of Tables 23 through 25 with the target ROI (approximately 4.64 percent) we obtained in Step 5 to determine if an adjustment to the base pilotage rate is necessary. Table 26 shows this comparison for each area.

TABLE 26—COMPARISON OF PROJECTED ROI AND TARGET ROI, BY AREA [1]

	Area 1	Area 2	Area 4	Area 5	Area 6	Area 7	Area 8
	St. Lawrence River	Lake Ontario	Lake Erie	Southeast Shoal to Port Huron, MI	Lakes Huron and Michigan	St. Mary's River	Lake Superior
Projected return on investment	0.081	0.081	(0.288)	0.028	(0.056)	0.027	0.001
Target return on investment	0.046	0.046	0.046	0.046	0.046	0.046	0.046
Difference in return on investment	0.035	0.035	(0.335)	(0.019)	(0.102)	(0.019)	(0.045)

[1] **Note**: Decimalization and rounding of the target ROI affects the display in this table but does not affect our calculations, which are based on the actual figure.

Because Table 26 shows a significant difference between the projected and target ROIs, an adjustment to the base pilotage rates is necessary. Step 6 now requires us to determine the pilotage revenues that are needed to make the target return on investment equal to the projected return on investment. This calculation is shown in Table 27. It adjusts the investment base we used in Step 4, multiplying it by the target ROI from Step 5, and applies the result to

the operating expenses and target pilot compensation determined in Steps 1 and 2.

TABLE 27—REVENUE NEEDED TO RECOVER TARGET ROI, BY AREA

Pilotage area	Operating expenses (Step 1)		Target pilot compensation (Step 2)		Investment base (step 4) × 4.64% (target ROI Step 5)		Federal tax allowance		Revenue needed
Area 1 (Designated waters)	$598,805	+	$1,759,814	+	$45,805	+	$0	=	$2,404,424
Area 2 (Undesignated waters)	472,540	+	1,060,469	+	36,151	+	0	=	1,569,160
Area 4 (Undesignated waters)	528,181	+	848,375	+	14,778	+	7,360	=	1,398,694
Area 5 (Designated waters)	792,272	+	1,759,814	+	33,358	+	11,040	=	2,596,484
Area 6 (Undesignated waters)	754,254	+	1,484,657	+	42,763	+	0	=	2,281,673
Area 7 (Designated waters)	362,742	+	1,173,209	+	20,566	+	0	=	1,556,517
Area 8 (Undesignated waters)	480,996	+	1,272,563	+	27,270	+	0	=	1,780,829
Total	3,989,788	+	9,358,902	+	220,691	+	18,400	=	13,587,781

The ''Revenue Needed'' column of Table 27 is more than the revenue we projected in Table 18. For purposes of transparency, we verify Table 27's calculations by rerunning the first part of Step 6, using the revenue needed from Table 27 instead of the Table 18 revenue projections we used in Tables 23 through 25. Tables 28 through 30 show that attaining the Table 27 revenue needed is sufficient to recover target ROI.

TABLE 28—BALANCING REVENUE NEEDED AND TARGET ROI, DISTRICT ONE

		Area 1		Area 2
Revenue Needed	+	$2,404,424	+	$1,569,160
Operating Expenses (from Step 1)	–	$598,805	–	$472,540
Pilot Compensation (from Step 2)	–	$1,759,814	–	$1,060,469
Operating Profit/(Loss)	=	$45,805	=	$36,151
Interest Expense (from audits)	–	$12,576	–	$9,926
Earnings Before Tax	=	$33,229	=	$26,225
Federal Tax Allowance	–	$0	–	$0
Net Income	=	$33,229	=	$26,225
Return Element (Net Income + Interest)		$45,805		$36,151
Investment Base (from Step 4)	÷	$987,354	÷	$779,248
Return on Investment	=	0.0464	=	0.0464

TABLE 29—BALANCING REVENUE NEEDED AND TARGET ROI, DISTRICT TWO

		Area 4		Area 5
Revenue Needed	+	$1,398,694	+	$2,596,484
Operating Expenses (from Step 1)	–	$528,181	–	$792,272
Pilot Compensation (from Step 2)	–	$848,375	–	$1,759,814
Operating Profit/(Loss)	=	$22,138	=	$44,398
Interest Expense (from audits)	–	$3,522	–	$5,283
Earnings Before Tax	=	$18,616	=	$39,115
Federal Tax Allowance	–	$7,360	–	$11,040
Net Income	=	$11,256	=	$28,075
Return Element (Net Income + Interest)		$14,778		$33,358
Investment Base (from Step 4)	÷	$318,543	÷	$719,056
Return on Investment	=	0.0464	=	0.0464

TABLE 30—BALANCING REVENUE NEEDED AND TARGET ROI, DISTRICT THREE

		Area 6		Area 7		Area 8
Revenue Needed	+	$2,281,673	+	$1,556,517	+	$1,780,829
Operating Expenses (from Step 1)	–	$754,254	–	$362,742	–	$480,996
Pilot Compensation (from Step 2)	–	$1,484,657	–	$1,173,209	–	$1,272,563
Operating Profit/(Loss)	=	$42,763	=	$20,566	=	$27,270
Interest Expense (from audits)	–	$1,537	–	$739	–	$980
Earnings Before Tax	=	$41,226	=	$19,827	=	$26,290
Federal Tax Allowance	–	$0	–	$0	–	$0
Net Income	=	$41,226	=	$19,827	=	$26,290
Return Element (Net Income + Interest)		$42,763		$20,566		$27,270
Investment Base (from Step 4)	÷	$921,776	÷	$443,312	÷	$587,828

TABLE 30—BALANCING REVENUE NEEDED AND TARGET ROI, DISTRICT THREE—Continued

		Area 6		Area 7		Area 8
Return on Investment	=	0.0464	=	0.0464	=	0.0464

Step 7: Adjustment of Pilotage Rates. Finally, and subject to negotiation with Canada or adjustment for other supportable circumstances, we calculate rate adjustments by dividing the Step 6 revenue needed (Table 27) by the Step 3 revenue projection (Table 18), to give us a rate multiplier for each area. Tables 31 through 33 show these calculations.

TABLE 31—RATE MULTIPLIER, AREAS IN DISTRICT ONE

Ratemaking projections		Area 1 St. Lawrence River		Area 2 Lake Ontario
Revenue Needed (from Step 6)		$2,404,424		$1,569,160
Revenue (from Step 3)	÷	$2,438,897	÷	$1,596,067
Rate Multiplier	=	0.9859	=	0.9831

TABLE 32—RATE MULTIPLIER, AREAS IN DISTRICT TWO

Ratemaking projections		Area 4 Lake Erie		Area 5 Southeast Shoal to Port Huron, MI
Revenue Needed (from Step 6)		$1,398,694		$2,596,484
Revenue (from Step 3)	÷	$1,284,712	÷	$2,571,969
Rate Multiplier	=	1.0887	=	1.0095

TABLE 33—RATE MULTIPLIER, AREAS IN DISTRICT THREE

Ratemaking projections		Area 6 Lakes Huron and Michigan		Area 7 St. Mary's River		Area 8 Lake Superior
Revenue Needed (from Step 6)		$2,281,673		$1,556,517		$1,780,829
Revenue (from Step 3)	÷	$2,187,375	÷	$1,547,878	÷	$1,754,120
Rate Multiplier	=	1.0431	=	1.0056	=	1.0152

Rates for cancellation, delay, or interruption in rendering services (46 CFR 401.420) and basic rates and charges for carrying a U.S. pilot beyond the normal change point, or for boarding at other than the normal boarding point (46 CFR 401.428), would increase by 1.55 percent in all areas.

We calculate a rate multiplier for adjusting the basic rates and charges described in 46 CFR 401.420 and 401.428 and applicable in all areas. We divide total revenue needed (Step 6, Table 27) by total projected revenue (Step 3 & 3A, Table 18). Our proposed rate changes for 46 CFR 401.420 and 401.428 reflect the multiplication of the rates we established for those sections in our 2012 final rule, by the rate multiplier shown as the result of our calculation in Table 34.

TABLE 34—RATE MULTIPLIER FOR BASIC RATES AND CHARGES IN 46 CFR 401.420 AND 401.428

Ratemaking Projections		
Total Revenue Needed (from Step 6)		$13,587,781
Total revenue (from Step 3)	÷	$13,381,018
Rate Multiplier	=	1.0155

We multiply the existing rates we established in our 2012 final rule by the rate multipliers from Tables 31 through 33 to calculate the area by area rate changes we propose for 2013. Tables 35 through 37 show these calculations.

TABLE 35—PROPOSED ADJUSTMENT OF PILOTAGE RATES, AREAS IN DISTRICT ONE

	2012 Rate		Rate multiplier		Adjusted rate for 2013
Area 1 St. Lawrence River:					
Basic Pilotage	$19.02/km, $33.67/mi	×	0.986	=	$18.75/km, $33.19/mi
Each lock Transited	$422	×	0.986	=	$416
Harbor movage	$1,381	×	0.986	=	$1,361
Minimum basic rate, St. Lawrence River	$921	×	0.986	=	$908
Maximum rate, through trip	$4,041	×	0.986	=	$3,984
Area 2 Lake Ontario:					
6-Hour period	$865	×	0.983	=	$851
Docking or Undocking	$826	×	0.983	=	$812

Note: Numbers may not total due to rounding.

TABLE 36—PROPOSED ADJUSTMENT OF PILOTAGE RATES, AREAS IN DISTRICT TWO

	2012 Rate		Rate multiplier		Adjusted rate for 2013
Area 4 Lake Erie:					
6-Hour period	$760	×	1.089	=	$828
Docking or undocking	585	×	1.089	=	637
Any point on Niagara River below Black Rock Lock	1,493	×	1.089	=	1,626
Area 5 Southeast Shoal to Port Huron, MI between any point on or in:					
Toledo or any point on Lake Erie W. of Southeast Shoal	1,369	×	1.010	=	1,382
Toledo or any point on Lake Erie W. of Southeast Shoal & Southeast Shoal	2,317	×	1.010	=	2,339
Toledo or any point on Lake Erie W. of Southeast Shoal & Detroit River	3,008	×	1.010	=	3,037
Toledo or any point on Lake Erie W. of Southeast Shoal & Detroit Pilot Boat	2,317	×	1.010	=	2,339
Port Huron Change Point & Southeast Shoal (when pilots are not changed at the Detroit Pilot Boat).	4,036	×	1.010	=	4,074
Port Huron Change Point & Toledo or any point on Lake Erie W. of Southeast Shoal (when pilots are not changed at the Detroit Pilot Boat).	4,675	×	1.010	=	4,719
Port Huron Change Point & Detroit River	3,031	×	1.010	=	3,060
Port Huron Change Point & Detroit Pilot Boat	2,358	×	1.010	=	2,381
Port Huron Change Point & St. Clair River	1,677	×	1.010	=	1,693
St. Clair River	1,369	×	1.010	=	1,382
St. Clair River & Southeast Shoal (when pilots are not changed at the Detroit Pilot Boat).	4,036	×	1.010	=	4,074
St. Clair River & Detroit River/Detroit Pilot Boat	3,031	×	1.010	=	3,060
Detroit, Windsor, or Detroit River	1,369	×	1.010	=	1,382
Detroit, Windsor, or Detroit River & Southeast Shoal	2,317	×	1.010	=	2,339
Detroit, Windsor, or Detroit River & Toledo or any point on Lake Erie W. of Southeast Shoal.	3,008	×	1.010	=	3,037
Detroit, Windsor, or Detroit River & St. Clair River	3,031	×	1.010	=	3,060
Detroit Pilot Boat & Southeast Shoal	1,677	×	1.010	=	1,693
Detroit Pilot Boat & Toledo or any point on Lake Erie W. of Southeast Shoal	2,317	×	1.010	=	2,339
Detroit Pilot Boat & St. Clair River	3,031	×	1.010	=	3,060

Note: Numbers may not total due to rounding.

TABLE 37—PROPOSED ADJUSTMENT OF PILOTAGE RATES, AREAS IN DISTRICT THREE

	2011 Rate		Rate multiplier		Adjusted rate for 2012
Area 6 Lakes Huron and Michigan:					
6-Hour Period	$662	×	1.043	=	$691
Docking or undocking	629	×	1.043	=	656
Area 7 St. Mary's River between any point on or in:					
Gros Cap & De Tour	2,568	×	1.006	=	2,583
Algoma Steel Corp. Wharf, Sault Ste. Marie, Ont. & De Tour	2,568	×	1.006	=	2,583
Algoma Steel Corp. Wharf, Sault. Ste. Marie, Ont. & Gros Cap	967	×	1.006	=	973
Any point in Sault St. Marie, Ont., except the Algoma Steel Corp. Wharf & De Tour.	2,153	×	1.006	=	2,165
Any point in Sault St. Marie, Ont., except the Algoma Steel Corp. Wharf & Gros Cap.	967	×	1.006	=	973
Sault Ste. Marie, MI & De Tour	2,153	×	1.006	=	2,165
Sault Ste. Marie, MI & Gros Cap	967	×	1.006	=	973
Harbor movage	967	×	1.006	=	973
Area 8 Lake Superior:					
6-Hour period	577	×	1.015	=	586

TABLE 37—PROPOSED ADJUSTMENT OF PILOTAGE RATES, AREAS IN DISTRICT THREE—Continued

	2011 Rate		Rate multiplier		Adjusted rate for 2012
Docking or undocking	549	×	1.015	=	557

Note: Numbers may not total due to rounding.

VI. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and executive orders related to rulemaking. Below we summarize our analyses based on 14 of these statutes or executive orders.

A. Regulatory Planning and Review

Executive Orders 12866 (''Regulatory Planning and Review'') and 13563 (''Improving Regulation and Regulatory Review'') direct agencies to assess the 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 is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866. Accordingly, the NPRM has not been reviewed by the Office of Management and Budget.

A draft regulatory assessment follows.

The Coast Guard is required to review and adjust pilotage rates on the Great Lakes annually. See Parts III and IV of this preamble for detailed discussions of the Coast Guard's legal basis and purpose for this rulemaking and for background information on Great Lakes pilotage ratemaking. Based on our annual review for this proposed rulemaking, we are adjusting the pilotage rates for the 2013 shipping season to generate sufficient revenue to cover allowable expenses, target pilot compensation, and returns on investment. The rate adjustments in this proposed rule would, if codified, lead to a cost in all three districts with an estimated cost to shippers of approximately $148,000 across all three districts.

The proposed rule would apply the 46 CFR part 404, Appendix A, full ratemaking methodology and increase Great Lakes pilotage rates, on average, approximately 1.87 percent overall from the current rates set in the 2012 final rule. The Appendix A methodology is discussed and applied in detail in Part V of this preamble. Among other factors described in Part V, it reflects audited 2010 financial data from the pilotage associations (the most recent year available for auditing), projected association expenses, and regional inflation or deflation. The last full Appendix A ratemaking was concluded in 2011 and used financial data from the 2009 base accounting year. The last annual rate review, conducted under 46 CFR part 404, Appendix C, was completed early in 2011.

In general, we expect an increase in pilotage rates for a certain area to result in additional costs for shippers using pilotage services in that area, while a decrease would result in a cost reduction or savings for shippers in that area. The shippers affected by these rate adjustments are those owners and operators of domestic vessels operating on register (employed in foreign trade) and owners and operators of foreign vessels on a route within the Great Lakes system. These owners and operators must have pilots or pilotage service as required by 46 U.S.C. 9302. There is no minimum tonnage limit or exemption for these vessels. The Coast Guard's interpretation is that the statute applies only to commercial vessels and not to recreational vessels.

Owners and operators of other vessels that are not affected by this rule, such as recreational boats and vessels only operating within the Great Lakes system may elect to purchase pilotage services. However, this election is voluntary and does not affect the Coast Guard's calculation of the rate and is not a part of our estimated national cost to shippers. Coast Guard sampling of pilot data suggests there are very few U.S. domestic vessels, without registry and operating only in the Great Lakes that voluntarily purchase pilotage services.

We used 2008–2010 vessel arrival data from the Coast Guard's Marine Information for Safety and Law Enforcement (MISLE) system to estimate the average annual number of vessels affected by the rate adjustment to be 204 vessels that journey into the Great Lakes system. These vessels entered the Great Lakes by transiting through or in part of at least one of the three pilotage districts before leaving the Great Lakes system. These vessels often make more than one distinct stop, docking, loading, and unloading at facilities in Great Lakes ports. Of the total trips for the 204 vessels, there were approximately 319 annual U.S. port arrivals before the vessels left the Great Lakes system, based on 2008–2010 vessel data from MISLE.

The impact of the rate adjustment to shippers is estimated from the District pilotage revenues. These revenues represent the direct and indirect costs (''economic costs'') that shippers must pay for pilotage services. The Coast Guard sets rates so that revenues equal the estimated cost of pilotage.

We estimate the additional impact (costs or savings) of the rate adjustment in this proposed rule to be the difference between the total projected revenue needed to cover costs in 2013 based on the 2012 rate adjustment and the total projected revenue needed to cover costs in 2013 as set forth in this proposed rule. Table 38 details additional costs or savings by area and district.

TABLE 38—RATE ADJUSTMENT AND ADDITIONAL IMPACT OF THE PROPOSED RULE BY AREA AND DISTRICT

[$U.S.; Non-discounted]

	Projected revenue needed in 2012 *	Projected revenue needed in 2013 **	Additional costs or savings of this proposed rule
Area 1	$2,308,357	$2,404,424	$96,067

TABLE 38—RATE ADJUSTMENT AND ADDITIONAL IMPACT OF THE PROPOSED RULE BY AREA AND DISTRICT—Continued

[$U.S.; Non-discounted]

	Projected revenue needed in 2012 *	Projected revenue needed in 2013 **	Additional costs or savings of this proposed rule
Area 2	1,614,791	1,569,160	(45,631)
Total, District One	3,923,148	3,973,583	50,435
Area 4	1,310,549	1,398,694	88,145
Area 5	2,600,490	2,596,484	(4,006)
Total, District Two	3,911,039	3,995,178	84,139
Area 6	2,227,555	2,281,673	54,118
Area 7	1,565,906	1,556,517	(9,389)
Area 8	1,811,863	1,780,829	(31,034)
Total, District Three	5,605,324	5,619,020	13,696

* These 2012 estimates are detailed in Table 18 of the 2012 final rule (76 FR 6351).
** These 2013 estimates are detailed in Table 27 of this rulemaking.
Some values may not total due to rounding.
''Additional Revenue or Cost of this Rulemaking'' = ''Revenue needed in 2012'' minus ''Revenue needed in 2011.''

After applying the rate change in this proposed rule, the resulting difference between the projected revenue in 2012 and the projected revenue in 2013 is the annual impact to shippers from this rule. This figure would be equivalent to the total additional payments or savings that shippers would incur for pilotage services from this proposed rule. As discussed earlier, we consider a reduction in payments to be a cost savings.

The impact of the rate adjustment in this proposed rule to shippers varies by area and district. The rate adjustments would lead to a cost in all three districts, with affected shippers operating in District One, District Two, and District Three experiencing costs of $50,435, $84,139, and $13,696, respectively. To calculate an exact cost or savings per vessel is difficult because of the variation in vessel types, routes, port arrivals, commodity carriage, time of season, conditions during navigation, and preferences for the extent of pilotage services on designated and undesignated portions of the Great Lakes system. Some owners and operators would pay more and some would pay less depending on the distance and port arrivals of their vessels' trips. However, the additional savings reported earlier in this NPRM does capture the adjustment the shippers would experience as a result of the proposed rate adjustment. As Table 38 indicates, shippers operating in all areas would experience an annual cost due to this rulemaking. The overall impact of the proposed rule would be a cost to shippers of approximately $148,270 across all three districts.

This proposed rulemaking would allow the U.S. Coast Guard to meet the statutory requirements to review the rates for pilotage services on the Great Lakes—ensuring proper pilot compensation.

B. Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we have considered whether this proposed 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 people.

We expect entities affected by the proposed rule would be classified under the North American Industry Classification System (NAICS) code subsector 483—Water Transportation, which includes the following 6-digit NAICS codes for freight transportation: 483111—Deep Sea Freight Transportation, 483113—Coastal and Great Lakes Freight Transportation, and 483211—Inland Water Freight Transportation. According to the Small Business Administration's definition, a U.S. company with these NAICS codes and employing less than 500 employees is considered a small entity.

For the proposed rule, we reviewed recent company size and ownership data from 2008–2010 Coast Guard MISLE data and business revenue and size data provided by publicly available sources such as MANTA and Reference USA. We found that large, mostly foreign-owned, shipping conglomerates or their subsidiaries owned or operated all vessels engaged in foreign trade on the Great Lakes. We assume that new industry entrants would be comparable in ownership and size to these shippers.

There are three U.S. entities affected by the proposed rule that receive revenue from pilotage services. These are the three pilot associations that provide and manage pilotage services within the Great Lakes districts. Two of the associations operate as partnerships and one operates as a corporation. These associations are designated the same NAICS industry classification and small entity size standards described above, but they have far fewer than 500 employees; they have approximately 65 total employees combined. We expect no adverse impact to these entities from this proposed rule because all associations receive enough revenue to balance the projected expenses associated with the projected number of bridge hours and pilots.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment to the Docket Management Facility at the address under **ADDRESSES**. In your

comment, explain why you think it qualifies, as well as how and to what degree this proposed rule would economically affect it.

C. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please consult Mr. Todd Haviland, Management & Program Analyst, Office of Great Lakes Pilotage, Commandant (CG–WWM–2), Coast Guard; telephone 202–372–2037, email *Todd.A.Haviland@uscg.mil,* or fax 202–372–1909. 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.

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).

D. Collection of Information

This proposed rule would call for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). This rule does not change the burden in the collection currently approved by the Office of Management and Budget Under OMB Control Number 1625–0086, Great Lakes Pilotage Methodology.

E. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has 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. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism because States are expressly prohibited by 46 U.S.C. 9306 from regulating pilotage on the Great Lakes.

F. 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 proposed rule would not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

G. Taking of Private Property

This proposed rule would 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.

H. Civil Justice Reform

This proposed 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.

I. Protection of Children

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

J. Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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.

K. Energy Effects

We have analyzed this proposed 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.

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

M. Environment

We have analyzed this proposed 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 made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. A preliminary environmental analysis checklist supporting this determination is available in the docket where indicated under the ''Public Participation and Request for Comments'' section of this preamble. This rule is categorically excluded under section 2.B.2, figure 2–1, paragraph (34)(a) of the Instruction. Paragraph 34(a) pertains to minor regulatory changes that are editorial or procedural in nature. This proposed rule adjusts rates in accordance with applicable statutory and regulatory mandates. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

List of Subjects in 46 CFR Part 401

Administrative practice and procedure, Great Lakes, Navigation (water), Penalties, Reporting and recordkeeping requirements, Seamen.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 46 CFR part 401 as follows:

PART 401—GREAT LAKES PILOTAGE REGULATIONS

1. The authority citation for part 401 continues to read as follows:

Authority: 46 U.S.C. 2104(a), 6101, 7701, 8105, 9303, 9304; Department of Homeland Security Delegation No. 0170.1; 46 CFR 401.105 also issued under the authority of 44 U.S.C. 3507.

2. In § 401.405, revise paragraphs (a) and (b), including the footnote to table (a), to read as follows:

§ 401.405 Basic rates and charges on the St. Lawrence River and Lake Ontario.

* * * * *

(a) Area 1 (Designated Waters):

Service	St. Lawrence river
Basic Pilotage	[1] $18.75 per kilometer or $33.19 per mile.
Each Lock Transited	[1] $416.
Harbor Movage	[1] $1,361.

[1] The minimum basic rate for assignment of a pilot in the St. Lawrence River is $908, and the maximum basic rate for a through trip is $3,984.

(b) Area 2 (Undesignated Waters):

Service	Lake Ontario
6-Hour Period	$851
Docking or Undocking	812

3. In § 401.407 revise paragraphs (a) and (b), including the footnote to Table (b), to read as follows:

§ 401.407 Basic rates and charges on Lake Erie and the navigable waters from Southeast Shoal to Port Huron, MI.

* * * * *

(a) Area 4 (Undesignated Waters):

Service	Lake Erie (east of Southeast Shoal)	Buffalo
6-Hour Period	$828	$828
Docking or Undocking	637	637
Any point on the Niagara River below the Black Rock Lock	N/A	1,626

(b) Area 5 (Designated Waters):

Any point on or in	Southeast Shoal	Toledo or any point on Lake Erie west of Southeast Shoal	Detroit River	Detroit Pilot Boat	St. Clair River
Toledo or any port on Lake Erie west of Southeast Shoal	$2,339	$1,382	$3,037	$2,339	N/A
Port Huron Change Point	[1] 4,074	[1] 4,719	3,060	2,339	1,693
St. Clair River	[1] 4,074	N/A	3,060	3,060	1,382
Detroit or Windsor or the Detroit River	2,339	3,037	1,382	N/A	3,060
Detroit Pilot Boat	1,693	2,339	N/A	N/A	3,060

[1] When pilots are not changed at the Detroit Pilot Boat.

4. In § 401.410, revise paragraphs (a), (b), and (c) to read as follows:

§ 401.410 Basic rates and charges on Lakes Huron, Michigan, and Superior; and the St. Mary's River.

* * * * *

(a) Area 6 (Undesignated Waters):

Service	Lakes Huron and Michigan
6-Hour Period	$691
Docking or Undocking	656

(b) Area 7 (Designated Waters):

Area	De Tour	Gros Cap	Any harbor
Gros Cap	$2,583	N/A	N/A
Algoma Steel Corporation Wharf at Sault Ste. Marie, Ontario	2,583	973	N/A
Any point in Sault Ste. Marie, Ontario, except the Algoma Steel Corporation Wharf	2,165	973	N/A
Sault Ste. Marie, MI	2,165	973	N/A
Harbor Movage	N/A	N/A	$973

(c) Area 8 (Undesignated Waters):

Service	Lake Superior
6-Hour Period	$586
Docking or Undocking	557

§ 401.420 [Amended]

5. Amend § 401.420 as follows:

a. In paragraph (a), remove the text ''$124'' and add, in its place, the text ''$126''; and remove the text ''$1,942'' and add, in its place, the text ''$1,972'';

b. In paragraph (b), remove the text ''$124'' and add, in its place, the text ''$126''; and remove the text ''$1,942'' and add, in its place, the text ''$1,972''; and

c. In paragraph (c)(1), remove the text ''$733'' and add, in its place, the text ''$744''; and in paragraph (c)(3), remove the text ''$124'' and add, in its place, the text ''$126'', and remove the text ''$1,942'' and add, in its place, the text ''$1,972''.

§ 401.428 [Amended]

6. In § 401.428, remove the text ''$748'' and add, in its place, the text ''$744''.

Dated: July 9, 2012.

Dana A. Goward,

Director, Marine Transportation Systems Management, U.S. Coast Guard.

[FR Doc. 2012–18714 Filed 7–31–12; 8:45 am]

BILLING CODE 9110–04–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 90

[WP Docket No. 07–100; PS Docket No. 06–229; WT Docket No. 06–150; FCC 12–61]

4.9 GHz Band

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission allocated the 4940–4990 MHz (4.9 GHz) band in 2002 for fixed and mobile use and dedicated the band for public safety broadband communications. In the ten years since, the band has gone underutilized. The

purpose of these proposed rules is to invigorate and maximize use of the 4.9 GHz band and attract more users while improving spectrum efficiency. The Commission seeks comment on formal coordination requirements, expanded eligibility, how the band can complement the 700 MHz public safety broadband network, technical rule changes, aeronautical mobile operations, interoperability standards, and deployment reporting.

DATES: Submit comments on or before October 1, 2012. Submit reply comments October 30, 2012.

ADDRESSES: You may submit comments, identified by WP Docket No. 07–100, PS Docket No. 06–229, WT Docket No. 06–150, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/.* Follow the instructions for submitting comments.
- *Mail:* U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- *Hand or Messenger Delivery:* 445 12th St. SW., Room TW–A325, Washington, DC 20554.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by email: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments, additional information on the rulemaking process, and where to find materials available for inspection, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Thomas Eng, Policy and Licensing Division, Public Safety and Homeland Security Bureau, Federal Communications Commission, 445 12th Street SW., Washington, DC 20554, at (202) 418–0019, TTY (202) 418–7233, or via email at *Thomas.Eng@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Fifth Further Notice of Proposed Rulemaking* in WP Docket No. 07–100; PS Docket No. 06–229; WT Docket No. 06–150; adopted and released on June 13, 2012. The complete text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW., Room CY–A257, Washington, DC 20554. This document may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., in person at 445 12th Street SW., Room CY–B402, Washington, DC 20554, via telephone at (202) 488–5300, via facsimile at (202) 488–5563, or via email at *FCC@BCPIWEB.com.* Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities or by sending an email to *FCC504@fcc.gov* or calling the Consumer and Governmental Affairs Bureau at (202) 418–0530, TTY (202) 418–0432. This document is also available on the Commission's Web site at *http://www.fcc.gov.*

Comments

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121, May 1 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/*or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.
- Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554. The filing hours are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street SW., Washington, DC 20554.

Introduction and Background

In this *Fifth Further Notice of Proposed Rulemaking* (*Fifth Further Notice*), we seek comment on specific proposals designed to establish appropriate frequency coordination procedures for public safety operations in the 4940–4990 MHz (4.9 GHz) and to encourage improved spectrum efficiency and greater use of the 4.9 GHz band. These steps are part of our continuing effort to provide clear and concise rules that facilitate and promote the deployment of new wireless technologies, devices and services. In addition, given directives in the Middle Class Tax Relief and Job Creation Act of 2012 (''Spectrum Act'') to develop a nationwide interoperable public safety broadband network, we invite comment on how the 4.9 GHz band can best be used to complement this network.

In April 2009, the Commission released the *Report and Order and Further Notice of Proposed Rulemaking* (*Report and Order* and *Further Notice,* respectively) to ''encourag[e] public safety users to more fully utilize the 4.9 GHz band'' for broadband communications. In the *Further Notice,* the Commission proposed, among other things, to require that applicants for 4.9 GHz primary permanent fixed stations complete the formalized licensee-to-licensee coordination process established in part 101 for fixed microwave stations.

The Commission received five comments and two reply comments in response to the *Further Notice.* The commenters raised questions about the proposed licensee-to-licensee coordination process, for which a majority of commenters proposed database and registration approaches as alternatives. In order to permit further comment on proposals for coordination, we further explore 4.9 GHz coordination in the *Fifth Further Notice.* The *Fifth Further Notice* also seeks additional comment on the information we received at the February 25, 2011, 4.9 GHz Workshop hosted by the Commission on several issues, including not only coordination but also eligibility, licensing, band plan, power and antenna gain, aeronautical mobile use, and standards.

We also seek further comment on how public safety use of the 4.9 GHz band can best promote the long-established goal of establishing a nationwide public safety broadband network operating in the 700 MHz band. As we observed in

the *Fourth Further Notice of Proposed Rulemaking* (*Fourth FNPRM*) in this proceeding, while the 700 MHz band contemplated for this network is allocated for mobile use, public safety broadband networks also have a critical need for fixed uses, such as for surveillance and backhaul capacity, and that public safety entities are currently using the 4.9 GHz band for such uses. Accordingly, the Commission sought comment on several 4.9 GHz issues, including how 4.9 GHz band networks could complement 700 MHz public safety broadband networks.

The Spectrum Act, enacted on February 22, 2012, has provided the road map for deployment of the nationwide interoperable public safety broadband network contemplated by the Commission in the *Fourth FNPRM.* Section 6101 of the Spectrum Act directs the Commission to reallocate the 700 MHz ''D Block'' (758–763 MHz/788–793 MHz) for public safety services. Section 6201 of the Act requires the Commission to assign a license for both the D Block and the existing public safety broadband spectrum (763–769 MHz/793–799 MHz) to the First Responder Network Authority (FirstNet), an independent authority within the National Telecommunications and Information Administration (NTIA). The Spectrum Act also establishes a Public Safety Trust Fund, with $7 billion available for buildout of the new network. The *Fifth Further Notice* seeks comment about how the new statutory framework for the public safety broadband network should affect public safety operations in the 4.9 GHz band, and whether FirstNet is or should be eligible for a 4.9 GHz band license.

Fifth Further Notice of Proposed Rulemaking

In 2002, when the Commission allocated the 4.9 GHz band for fixed and mobile services in support of public safety, it envisioned that the band would support new broadband applications such as high-speed digital technologies and wireless local area networks (WLANs) for incident scene management, dispatch operations, and vehicular/personal communications. This allocation responded to new national priorities focusing on homeland security, and was designed ''to transition to an environment in which the public safety community enjoys maximum access to emerging broadband technologies.'' The Commission's allocation gained extensive support by first responders, the National Public Safety Telecommunications Council (NPSTC), and others asserting that the public safety community was in great need of additional spectrum to meet their critical operations needs, and that the 4.9 GHz band was ideal for these emerging broadband technologies.

Notwithstanding the Commission's action to accord primary status to broadband permanent fixed point-to-point links in 2009, we believe that the development of the 4.9 GHz band, to date, has fallen short of its potential. There are approximately 2,440 licenses in the 4.9 GHz band. We estimate that fewer than 2,442 governmental entities hold these licenses because certain entities may have multiple licenses. By contrast, Census Bureau data for 2007 indicate that there were 89,476 local governmental jurisdictions in the United States, all of which are eligible to hold licenses in the 4.9 GHz band. We therefore take this opportunity to reevaluate our existing policies and to consider new approaches to spur robust and efficient use in this band. Toward that end, we seek comment on a number of important issues. First, we solicit views on the alternative frequency coordination proposals for 4.9 GHz licensees advanced in response to our *Further Notice.* Second, we seek comment on how 4.9 GHz licensees currently use this spectrum, how we might obtain more information about such uses, what applications and uses are best suited for the band, and what are the most cost-effective ways to improve accessibility to the band while minimizing the adverse impact on incumbent operations. We seek comment on specific proposals regarding expanded eligibility and alternative licensing approaches. Next, we seek comment about the impact of the newly enacted Spectrum Act on broadband uses of the 4.9 GHz band by public safety entities. We also seek comment on adjustments to the existing channel plan for this band and other technical changes designed to promote more efficient use of the spectrum. Finally, we ask whether the need for interoperability warrants the adoption of technical standards in this band.

In this *Fifth Further Notice,* we also request comment on a wide range of questions that will enable us to weigh the costs and benefits associated with all rule changes we will be considering. For this reason, we request that commenters provide specific data and information, such as actual or estimated dollar figures for each specific cost or benefit addressed, including a description of how the data or information was calculated or obtained and any supporting documentation or other evidentiary support. All comments will be considered and given appropriate weight. Vague or unsupported assertions regarding costs or benefits generally can be expected to receive less weight and be less persuasive than more specific and supported statements.

Coordination

As noted above, our rules currently require 4.9 GHz licensees to ''cooperate in the selection and use of channels in order to reduce interference and make the most effective use of the authorized facilities.'' In the *Further Notice,* the Commission expressed concern that this rule ''may not ensure that applicants for primary permanent fixed stations offer sufficient protection to other primary permanent fixed stations and other co-primary users,'' and that ''additional measures are required to minimize the potential for interference.'' Accordingly, the Commission advanced a proposal for a notification and response coordination procedure used in part 101 of the Commission's rules. The Commission also invited commenters to suggest any alternative measures that would serve the purpose of the proposal. The comments identified two such alternatives: the registration and database creation approach, and the regional plan approach. We seek comment below on these alternatives.

Although quantifying the benefits of coordination to primary users and the added costs imposed on applicants may be difficult, we believe it is important to determine whether adopting a coordination procedure will significantly benefit the public. This is due to the apparent benefits of coordination: (i) Reduced risk of interference, which translates into clearer communications, which in turn may mean the difference of life or death in an emergency situation, and (ii) improved spectrum efficiency, which would allow more entities to use the 4.9 GHz band for wireless broadband communications. We therefore are seeking more information on the benefits and costs of implementing such a procedure. Specifically, are the Commission's concerns from the *Further Notice* as recounted above sufficiently valid to warrant a more formal coordination requirement? Is § 90.1209(b) sufficient as it is? Are there interference issues today that cannot be resolved by the requirements of this rule? How would the 4.9 GHz license environment look if the Commission does not alter 4.9 GHz coordination requirements? If commenters agree with the Commission's concerns, are there non-regulatory alternatives to new coordination procedures?

Part 101 Approach

Background and prior comments. In the *Further Notice,* the Commission sought comment on a proposal to modify § 90.1209(b) to require applicants for primary fixed stations providing point-to-point and point-to-multipoint communications to complete the prior coordination procedures of § 101.103(d) of the Commission's rules. In response, the National Spectrum Management Association (NSMA) supported the approach as ''allow[ing] a high degree of frequency reuse while avoiding harmful interference.'' It notes that ''[m]any public safety organizations are licensees of fixed microwave spectrum under part 101 and we believe that these users have confidence in the value of the prior coordination process for these systems.'' NSMA recommends that coordination should be required for all permanent fixed systems, including secondary systems, for three reasons: site-by-site licensing is required for all fixed stations; secondary systems are potential interference sources; and this interference is most appropriately addressed in the coordination process.

NPSTC, Harris, APCO and Motorola oppose the part 101 coordination method. These parties emphasize that part 101 links are highly directional and thus can be represented as narrow paths on a coordination map; in contrast, they note, the low-power, less-directional, geographically-dispersed links in a 4.9 GHz network must be represented as a service area or sector. NPSTC argues that § 101.103(d) requirements regarding ''permissible levels'' of interference and resolution of ''technical problems'' are difficult to apply in the 4.9 GHz context, where there are a large variety of operations and where system overlap is often impossible to avoid. It also notes that the § 101.103(d)(1) provision for attaching an explanation to the application in the event technical problems cannot be resolved includes no criteria to be applied to either accept or reject such an explanation. In reply comments, Motorola agrees that ''requiring public safety agencies to coordinate and reply without standards to guide the engagement will lead to protracted and burdensome negotiations.'' Motorola states that ''it would be difficult, if not impossible, to establish technical criteria for this band given the diversity of networks and devices that can be deployed in the 4.9 GHz band.'' Harris similarly notes that in this context part 101 coordination would ''create confusion, be burdensome and would slow the deployment of broadband and data-sharing applications.''

NSMA submitted reply comments to address these concerns about part 101 coordination. NSMA notes that part 101 coordination ''takes place among the licensees'' and does not require the involvement of FCC-certified frequency coordinators or regional planning committees. Moreover, NSMA states that ''the interference criteria used are those deemed appropriate by the parties involved and may be based on good engineering practice as applicable to the band'' and that part 101 coordination ''can be completed much more quickly [than 30 days] or even verbally if the parties agree.'' Finally, NSMA argues that when directional antennas are used to form point-to-point links, ''methods of direct interference calculations [used in the part 101 context] could be used even if the antennas are lower in gain and larger in beamwidth.''

Discussion. We acknowledge the views of the majority of commenters that part 101-type coordination procedures proposed in the *Further Notice* may not be appropriate for this band because they would add a level of uncertainty and complexity to the coordination process. For example, § 101.103(d)(1) requires applicants to select technical parameters ''that will avoid interference in excess of permissible levels to other users.'' As NPSTC noted above, ''permissible levels'' of interference are not defined in the 4.9 GHz rules under part 90. Motorola also noted that requiring public safety agencies to coordinate without technical standards to guide the engagement could lead to protracted and burdensome negotiations, as incumbent licensees have no technical guidance on whether a proposed 4.9 GHz fixed link could cause interference to existing 4.9 GHz operations. We recognize that it would be difficult to establish technical criteria operations due to the diversity of networks and devices that can be deployed in the 4.9 GHz band. While we invite further comment on part 101-type coordination procedures for the 4.9 GHz band, we consider and invite comments on other coordination procedures below.

Registration and Database Approach

Comments. NPSTC and APCO assert that the Commission should provide for a registration procedure administered by the National Regional Planning Council (NRPC) in conjunction with individual public safety 700 MHz regional planning committees (RPCs). NPSTC states that ''a NPSTC representative held informal discussions with the NRPC recently and it appears that the NRPC, in conjunction with individual RPCs, is willing to assist with such a registration process.'' Motorola supports this NRPC/RPC registration proposal.

Discussion. Given the support of the majority of commenters and several participants in the 4.9 GHz Workshop, and the passage of time since the Commission adopted the majority of the 4.9 GHz service rules in 2003 and 2004, we seek further comment on the possibility of having the NRPC and/or RPCs administer registration in the 4.9 GHz band. We note that neither the NRPC nor any RPC filed comments or reply comments to the *Further Notice,* so we invite their input in particular. Commenters should explain whether and why the NRPC and/or RPCs are the most appropriate entities to administer this process, or if other entities would be better or equally qualified. We solicit views concerning each of the following areas described below: registration, database options, and coordination.

Registration. Under the NPSTC and APCO proposal, the registration process would populate a database with *existing* licensee technical parameter data so that a coordinating entity may select appropriate frequencies for *new* applicants. Based on our experiences, databases can provide a practical tool for certified frequency coordinators to perform their channel assignments if the appropriate information is included in the database. For example, the Universal Licensing System (ULS) does not contain receiver locations for point-to-point or point-to-multipoint links, base station coordinates, antenna gain, output power, and antenna height for facilities licensed on a geographic basis. Without this information, a coordinating entity would have great difficulty in protecting incumbent primary fixed links and base stations from interference from later-coordinated operations.

For this reason, we propose to require all current 4.9 GHz licensees to register the technical parameters of their permanent fixed point-to-point, point-to-multipoint and base-to-mobile stations, including permanent fixed receivers when applicable, into a database. A database registration requirement would reduce the incidence of actual interference and would ensure that primary operations receive proper interference protection. In combination with existing license information available in ULS, this data would provide any coordinating entity with a detailed survey of the operating environment in a given geographic area. We solicit input on a comprehensive list of technical parameters that the database should store for each type of operation to facilitate successful coordination. A database administrator would first populate the database with

data from ULS and then update the database on a regular basis. Subsequent registrations would supplement ULS data with additional data that is not currently in ULS, but would be needed in order to coordinate new applications. We envision that a coordinating entity, acting on behalf of an applicant, would use this database to select the most appropriate frequencies for new facilities. The database would need to be updated as licenses for new facilities are granted. We envision that this database would enable any coordinating entity to use the technical information in the database to coordinate new users while protecting incumbent licensees from interference. This framework would enable licensees with primary status to register the technical parameters of their facilities with the database administrator in order to ensure that their existing operations are protected from interference from new operations. We seek comment on all aspects of this proposal, including the entity best suited to operate the database. Are there any other benefits to a registration database requirement?

We seek comment on whether the lack of available information regarding existing 4.9 GHz fixed links is a problem that requires our attention. Specifically, we welcome views on whether the anticipated benefits of using some form of a registration database would outweigh the potential burdens imposed on licensees and applicants by the collection of the type of information with such a database. The registration requirement would also impose information collection costs on licensees and applicants. With respect to burdens, what are the time and labor costs for licensees to register their data? Are licensees concerned about privacy and security regarding putting the details of their 4.9 GHz networks into a database? In considering the database options below, we ask commenters to consider the overall costs and benefits associated with each option.

Database options. To the extent that commenters support a mandatory database registration requirement, we seek comment on the most cost effective means to achieve that goal. We tentatively conclude that the most cost-effective option is for the Commission to create and maintain a 4.9 GHz registration database that is modeled after an existing registration database. We note, for example, that the Commission created a registration database as part of ULS for use on an interim basis in the millimeter wave 70/80/90 GHz bands. For purposes of populating the database for the 70/80/90 GHz bands, the Commission collected information such as coordinates of permanent fixed transmitters and receivers along with technical parameters and equipment information on FCC Form 601 Schedule M. We seek comment on the utility of this approach. Could the Commission use a similar approach to leverage its experience and staff expertise to create a new dedicated 4.9 GHz database, thus leading to lower initial development costs and ongoing operating costs? The 3650 MHz band has a similar database to 70/80/90 GHz, but it does not collect receiver information. We tentatively conclude that this model is not ideal because it is difficult to coordinate around primary permanent fixed point-to-point links if there is no receiver information.

We also seek comment on whether the Computer-Assisted Pre-Coordination Resource and Database (CAPRAD) would be more suitable to accommodate a database for coordinating applications seeking to use the 4.9 GHz band. CAPRAD is an established, third-party database for the 700 and 800 MHz narrowband channels that RPCs use in advance of submitting regional plans to the FCC. Although RPCs widely use CAPRAD, we note that the Commission has never mandated its use. We note that RPCs are unfunded entities and may not be able to afford third party database access as part of their coordination duties. Accordingly, we seek comment on CAPRAD funding and administration for both development of 4.9 GHz capability and long-term continuity and maintenance of the database.

Finally, we solicit views about whether other parties would be in the best position to develop and administer a 4.9 GHz database. For example, in the White Spaces proceeding, the Office of Engineering and Technology designated nine commercial entities to serve as TV band device database administrators. Among other requirements, the entities had to demonstrate technical expertise, describe database function and architecture, and describe how devices would communicate with the database. If commenters support a new 4.9 GHz database developed and administered by third parties, we seek comment on its funding. Should the database administrator(s) charge coordinators for access, and what fee structure is reasonable?

Alternatively, we seek comment on whether the database paradigm developed in the TV White Spaces (TVWS) context itself could be extended to accommodate public safety use in the 4.9 GHz band. Could the TVWS databases be extended to include public safety registration information for this band? Could existing or newly authorized TVWS database administrators administer this additional functionality? Could such a system provide a platform, over time, to enable secondary commercial use of the band with database-enabled protections to public safety operations? We note that the TVWS database paradigm is vastly different from the other suggestions above because it could enable a dynamic, almost real-time environment where different entities or different transmitters or links could be used at different times based on prior knowledge of activity in the band. Is such a dynamic database advantageous for the 4.9 GHz band? If so, then what is the feasibility for equipment manufacturers to provide geolocation capability to 4.9 GHz equipment and enable almost real-time flow of geolocation and 4.9 GHz band usage information between the equipment and a database? How would the database integrate existing operations that do not have these capabilities with new operations? What is the time frame for developing and deploying equipment? Finally, what are the cost implications on equipment and for coordination?

Coordination. We seek suggestions for appropriate coordination procedures. Should we mandate that 4.9 GHz applicants seek the concurrence of their RPC as a condition to Commission action on new applications and major modifications of existing facilities? What entities could provide coordination services on a continuing basis? How would 4.9 GHz coordination compare to the coordination process handled by certified frequency coordinators in the other public safety frequency bands? We seek comment on whether alternative entities, such as the certified public safety frequency coordinators, should handle coordination functions for the 4.9 GHz band. We also seek comment on what technical criteria should be used to ensure that new 4.9 GHz facilities protect existing users from interference. Should the technical criteria be codified in our rules or should it be an industry-agreed standard?

Applicability of coordination procedure. We note that the *Further Notice* proposal for a more formal coordination procedure was limited to primary fixed operations. We seek comment on whether we should require coordination for other uses, such as temporary fixed, mobile, and (as NSMA has urged) secondary permanent fixed uses. We also seek comment on whether all possible uses should be subject to a coordination requirement, or whether

certain uses should be exempt and be subject only to § 90.1209.

Inactive/unformed RPCs. We seek comment on registration requirements in regions with inactive or unformed RPCs. NPSTC states, ''[o]ne concern that could arise with such a process is that a few of the 700 MHz RPC's are not yet active.'' In 2008, NPSTC found that ''87% of the current [4.9 GHz] licenses do fall within active RPC areas,'' which would leave 13% of 4.9 GHz licensees without an RPC. We seek updated information on this question. In the event that individual RPCs administer registration, should registration in such areas default to the NRPC?

Costs and benefits. We seek comment on the costs and benefits associated with registration administered by the NRPC/RPCs. We ask commenters representing the NRPC or the RPCs to discuss to what extent they possess the personnel, technical, and financial resources to administer registration responsibilities for the 4.9 GHz band considering that these organizations are unfunded. Should the NRPC/RPCs be entitled to charge licensees a fee for registration? What is the likely or appropriate amount of such fees or other costs? We seek comment on whether the benefits associated with this proposal can be quantified and whether they outweigh the costs?

Regional Plan Approach, § 90.1211

Section 90.1211(a) of the Commission's rules specifies that each region may (but is not required to) submit a plan on guidelines to be used for sharing spectrum in the 4.9 GHz band. Paragraphs (b) and (c) of § 90.1211 contain elements to be included in regional plans and instructions for their modification, respectively. In 2004, the Commission reaffirmed its decision in the 4.9 GHz Third Report and Order not to make regional planning mandatory in the 4.9 GHz band.

Harris notes that § 90.1211 already specifies a process for ensuring coordination of 4.9 GHz links and proposes that it be amended so that the Regional Plans also cover permanent fixed links, as well as mobile and temporary fixed links. Harris asserts that having a single entity manage coordination in each region is appropriate because public safety 4.9 GHz networks can use the same infrastructure for fixed and nomadic links,'' and that such an approach ''would better implement the Commission's intended licensing based on the geographic jurisdiction of licensees. In its view, ''[t]he RPCs would be aware of operational links within a defined area on a map of a jurisdiction in which a licensee uses a specific channel and can provide 'coverage sectors' or 'frequency coverage' where a network is deployed on that frequency.'' Harris does not mention the NRPC, and thus appears to endorse a regional as opposed to a national approach. Nor does it mention a registration database.

Under the Harris approach, we ask whether RPCs could manage coordination in each region by submitting regional plans to the Commission rather than having licensees register technical parameters in a database. How would RPCs be able to coordinate new applicants successfully around incumbent operations without a comprehensive database?

In 2004, the Commission stayed the 2004 deadline for submitting regional plans. Because the stay is still in effect, we seek comment on whether we should lift the stay in this proceeding and pursue Harris' recommendation. What would be the appropriate deadline for RPCs to submit plans on guidelines to be used for sharing the 4.9 GHz spectrum within the relevant region? Would twelve months after the lifting of this stay allow sufficient time? For commenters that support lifting the stay, should we modify the rule and now mandate that all active RPCs submit plans on guidelines to be used for sharing the 4.9 GHz spectrum within the relevant region? Should we require periodic updates to the plans to account for evolution in use of the band, and if so what period would be appropriate? Should we amend § 90.1211(b) so that regional plans include descriptions of permanent fixed links, as Harris suggests, and also base stations? What other modifications to the rule would be necessary? For commenters that support a continued stay, would subsections (b) and (c), which detail minimum common elements for all plans and modification procedures, continue to serve any purpose? If not, should we delete those rules altogether, and why? Finally, are the national registration database approach and the regional plan approach mutually exclusive? If not, how could certain elements of each approach be combined to serve the public interest?

Expanded Eligibility and Alternate Licensing

We also take this opportunity to explore additional ways in which we could promote efficient and increased use of the 4.9 GHz band. One approach is to expand eligibility to include certain non-public safety entities. Three other approaches—all suggested by participants at the 4.9 GHz Workshop—are to implement usage-specific licensing, to substitute jurisdictional licensing for individual entity licensing, and to allow all permanent fixed point-to-point operations on a primary basis regardless of whether they support broadband or narrowband traffic. These approaches are not necessarily mutually exclusive, so we seek comment on various combinations of these approaches in addition to responses to the more specific questions we ask below.

Expanded eligibility. Currently, only entities providing public safety services are eligible for licenses in the 4.9 GHz band. Non-public safety entities may use the 4.9 GHz spectrum by entering into sharing agreements with eligible 4.9 GHz public safety licensees, but only for ''operations in support of public safety.'' We invite parties that have entered into such agreements to file comments describing their arrangements and how they are using 4.9 GHz spectrum. We seek comment on whether the Commission should extend eligibility to use the band to non-public safety users, subject to protections to maintain the integrity of public safety operations. While we believe that all primary uses of the 4.9 GHz band should remain limited to operations in support of public safety consistent with § 90.1203(b), we tentatively conclude that expanding eligibility for commercial use on a secondary basis would benefit and reduce regulatory burdens on non-public safety entities by removing a barrier to entry to use the 4.9 GHz band. In particular, we note the spectral proximity of the 4.9 GHz band to the 5 GHz band widely used by unlicensed Wi-Fi networks. We seek comment on whether expanding eligibility might improve the availability, variety, and economics of equipment that uses the band, to the benefit of public safety operations. Should the Commission open eligibility to commercial users on a secondary or other non-interfering basis subject to a shutdown feature to enable priority access by public safety entities? Commenters in support of commercial use should provide functional details on how such a shutdown feature would operate in practice. Could such a mechanism be based upon dynamic access control using a database similar to the TV White Spaces database? We seek comment on whether critical infrastructure industry (CII) entities, including utility companies, should be eligible to hold 4.9 GHz licenses on a primary basis, thus removing the requirement for a sharing agreement. How would allowing CII to be licensed

affect the coordination schemes discussed above? Should the Commission extend eligibility to government entities that provide non-public safety services? Of what relevance here is the Spectrum Act's expanded definition of public safety entities to include emergency response providers? We seek comment on what other benefits might arise by relaxing use of the band. What are the costs for expanding eligibility, if any, including spectrum congestion?

Usage-specific licensing. Currently, all classes of operations in the 4.9 GHz band, such as base, mobile, and fixed operations, are able to co-exist on one license. Station class codes differentiate the various classes. One participant from the 4.9 GHz Workshop recommended that the Commission implement different types of licenses based on usage. For example, under this recommendation, an eligible user would operate permanent fixed links under one license with a distinct radio service code, while the same user would conduct its mobile-only operations under a separate license with a different radio service code. Usage-specific licenses may facilitate coordination, especially if the Commission decides not to implement a registration database as part of ULS. We seek comment on the merits of usage-specific licensing. For example, interested parties would be able to see licenses for base/mobile operations, point-to-point, and mobile-only, and plan new operations around the incumbents accordingly. Would usage-specific radio service codes be duplicative of the current system of station class codes for different uses on a single license? Would usage-specific license types have a direct impact on accommodating new technology or encouraging development in the band? Would licensees view usage-specific license types as restrictive or flexible, and why? If commenters support usage-specific licensing, then we also seek comment on whether new or existing radio service codes are the better method to implement usage-specific license types. We also seek comment on the benefits and costs of implementing distinct licensing. Would licensees need to modify their licenses or possibly apply for new licenses to separate different uses that are currently authorized under one license?

Jurisdictional licensing. Another participant from the 4.9 GHz Workshop recommended that the Commission require single jurisdictional licensing, as opposed to individual licenses for each agency within a jurisdiction. For example, a town's fire, emergency medical services, and police departments would operate under one town 4.9 GHz license, as opposed to separate licenses. We seek comment on this recommendation. Would single jurisdictional licensing help eligible users effectively utilize the spectrum and encourage different users to coordinate their operations amongst each other? Would this approach, by reducing the number of licenses, substantially simplify RPC coordination? In the event that the Commission expands primary eligibility to CII entities as described above, should CII and traditional public safety entities in the same jurisdiction, such as a power utility company and a fire department, be forced to share a 4.9 GHz license without the safeguard of priority use in favor of the public safety entities in times of emergency, or should a private agreement govern use of the license? We seek comment on the benefits and costs associated with jurisdictional licensing. What other benefits would accrue from jurisdictional licensing? What time and costs would be required for individual users within a jurisdiction to coordinate their operations amongst each other? How would the Commission enforce licensee responsibilities for arrangements involving related or unrelated entities operating in the same jurisdiction?

Primary permanent fixed links. Prior to 2009, the Commission licensed all permanent fixed stations on a secondary basis to other operations in the 4.9 GHz band. In 2009, the Commission amended § 90.1207(d) to permit licensing of permanent fixed point-to-point and point-to-multipoint stations that deliver broadband services on a primary basis, while those stations that deliver narrowband traffic remain secondary. One participant from the 4.9 GHz Workshop recommended that the Commission promote use of the band by allowing all permanent fixed point-to-point operations on a primary basis, regardless of whether they support broadband or narrowband traffic. We seek comment on this proposal. We seek comment on whether such action may result in prolonged interference disputes or increased coordination challenges. Because the recommendation applies only to permanent fixed point-to-point stations, we also seek comment on whether permanent fixed point-to-multipoint stations that do not deliver broadband service would remain secondary.

Complement to 700 MHz Broadband Networks

As noted above, in the *Fourth FNPRM,* we recognized the need for broadband available for fixed uses in connection with the public safety broadband network, and invited comment on how the 4.9 GHz band could be used to complement the 700 MHz public safety broadband spectrum, which is allocated to mobile use. MSI and Harris filed comments relevant to this topic. As part of the Spectrum Act, Congress has now mandated the creation of FirstNet, which will be responsible for constructing and deploying a nationwide interoperable public safety broadband network. It has also authorized the Commission to ''take any action necessary to assist [FirstNet] in effectuating its duties and responsibilities'' under that Act. We seek comment on the use of the 4.9 GHz band for fixed, backhaul, and mobile uses in support of the 700 MHz band public safety broadband network, and whether such uses are appropriate or desirable. In general, we seek comment on what changes to the 4.9 GHz rules are necessary to better enable the 4.9 GHz band to complement the 700 MHz public safety broadband network. Finally, we seek comment on FirstNet's eligibility to hold licenses in the 4.9 GHz band.

Fixed uses. In response to the *Fourth FNPRM,* MSI suggests that ''[t]he 4.9 GHz band could be used to supplement the 700 MHz public safety mobile broadband spectrum particularly for offloading video.'' Since the 4.9 GHz band has a fixed service allocation, we believe the 4.9 GHz band is ideal for video fixed uses, such as point-to-point video surveillance links. We seek further comment on whether and how fixed links in the 4.9 GHz band could complement the 700 MHz broadband public safety network. What other dual-band applications do commenters envision? How can fixed links be used during day-to-day operations as well as during emergencies or disasters? Are there applications, system configurations, or geographic morphologies that are best suited for fixed use in the 4.9 GHz band? What changes to the 4.9 GHz rules, if any, are necessary to enable fixed links in the 4.9 GHz band to complement the 700 MHz public safety broadband network? We ask commenters supporting rule changes to discuss how such rule changes would serve the public interest. We also request comment on the relative costs and benefits of using 4.9 GHz technology to complement the 700 MHz public safety broadband network as compared to other technologies, such as point-to-point microwave interconnection in other bands and fiber optic interconnection.

Backhaul and coordination/licensing. We seek comment on how the 4.9 GHz band can assist public safety communications with their backhaul needs. Harris states, ''[t]he 4.9 GHz band could be a vital resource to public safety in providing 700 MHz backhaul services.'' Harris suggests, ''[r]ules that allow 4.9 GHz networks to compliment [sic] 700 MHz networks will maximize the capabilities and capacity of both bands.'' We seek comment on what specific rules could allow 4.9 GHz networks to complement 700 MHz networks? Next, MSI suggests that the Commission could ''mandate the use of 4.9 GHz for public safety backhaul instead of 6–38 GHz.'' We seek comment on this proposal; however, we are concerned about restricting flexibility and choice. If the 4.9 GHz band is used for both backhaul and fixed broadband to complement 700 MHz, how will coordination be affected? Would 4.9 GHz fixed links and backhaul links have similar technical parameters in terms such as antenna gain, power, and path? If so, would the two types of traffic be treated the same from a coordination standpoint? Should 4.9 GHz components that interconnect with the 700 MHz public safety broadband network be treated different than other 4.9 GHz components from a coordination standpoint? Related to our licensing questions above, we seek comment on whether a new type of license should be issued for 4.9 GHz operations that interconnect with the 700 MHz public safety broadband network. What changes to the 4.9 GHz coordination and licensing rules, if any, are necessary to enable backhaul use in the 4.9 GHz band to complement the 700 MHz public safety broadband network, and how would these changes serve the public interest?

FirstNet eligibility. We seek comment on whether FirstNet—the statutorily designated licensee of the national public safety broadband network operating in the 700 MHz band—is or should be eligible for a 4.9 GHz band license. The Spectrum Act requires FirstNet's network to include a core network that, *inter alia,* provides ''connectivity between * * * the radio access network; and * * * the public Internet or the public switched network, or both.'' This function is commonly referred to as ''backhaul.'' As we discussed above, the 4.9 GHz band could support backhaul links for the Public Safety Broadband Network.

As noted above, our rules currently limit eligibility for licensing in the 4.9 GHz band to ''[e]ntities providing public safety services as defined under § 90.523.'' Section 90.523 in turn incorporates the definition of public safety services used in section 337(f)(1) of the Communications Act, which refers for purposes of allocations in the 700 MHz band to services the sole or principal purpose of which is to protect the safety of life, health, or property; that are provided by State or local government entities; or by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and that are not made commercially available to the public by the provider.

FirstNet is an ''an independent authority within the NTIA,'' a Federal entity. It is not a state or local government entity, nor is it a nongovernmental organization that is authorized by a governmental entity whose primary mission is the provision of public safety services. FirstNet thus does not appear to qualify for 4.9 GHz licenses under the current definition. On the other hand, our rules do permit 4.9 GHz licensees to enter into sharing agreements with or other arrangements with entities that do not meet these eligibility requirements. Is the rule permitting these sharing agreements sufficient to allow FirstNet to take advantage of the opportunities the 4.9 GHz band has to offer? Or, should we amend our rules to establish FirstNet's eligibility? If so, should its eligibility be restricted to applications in support of the national public safety broadband network, such as backhaul? Of what relevance to these questions is the relationship of FirstNet under the Spectrum Act to State government entities that participate in the deployment of FirstNet or in the statutory ''opt out'' process, or to secondary users of the 700 MHz public safety broadband network providing non-public safety services?

Channel Plan Adjustments

In 2003, the Commission adopted a frequency utilization plan that it determined ''will be beneficial from an operational perspective, and will not unduly restrict the flexibility of 4.9 GHz band licensees and users.'' The Commission created a plan that ''consist[s] of ten one-megahertz channels and eight five-megahertz channels that can be combined to a maximum of twenty megahertz, which provides users with maximum flexibility to employ existing technologies, while leaving the door open for the implementation of future broadband technologies in the band.'' We seek comment on how well the channel plan has served the Commission's goals. Moreover, we encourage interested parties to comment on the relative costs and benefits of the following specific approaches to modifying that plan, and how they might promote more efficient use of the band.

Channel aggregations. We seek comment on whether more flexible channel aggregations are necessary to accommodate new technology. We note that § 90.1213 already affords some bandwidth flexibility by permitting aggregated channel bandwidths of 5, 10, 15, or 20 MHz. What other aggregations should the Commission allow? Do licensees have throughput requirements that necessitate channel aggregations greater than 20 MHz? We also seek comment on the individual channels. Do users find inefficiencies with the channel bandwidths for certain applications? Should the Commission revise the channel plan to specify different channel bandwidths other than 1 and 5 MHz? Interested parties should propose specific band plan alternatives along with appropriate justification. What are the costs associated with channel plan adjustment? What would manufacturers spend to design and produce equipment that could conform to a channel plan adjustment?

Narrow channels. Next, we address the ten 1–MHz bandwidth channels at the edges of the 4.9 GHz band. These narrow channels can support low-bandwidth applications, such as slow scan video surveillance and backhaul of narrowband voice traffic. Accordingly, we seek comment on a proposal to designate some or all of the 1–MHz bandwidth channels for non-broadband (*i.e.,* narrowband) use on a primary basis, and we ask whether such designation would promote use of the 4.9 GHz band. Would such designation be detrimental to broadband applications? What would be the costs associated with such designation? Are ten 1–MHz bandwidth channels sufficient, and if not, what quantity should the band plan provide? On the other hand, should the Commission reduce the number of 1–MHz bandwidth channels to provide more spectrum for broadband applications, notwithstanding that current rules allow users to aggregate the 1–MHz channels to form larger bandwidths? What effect would such a reduction have on potential interference into adjacent bands, particularly radio astronomy operations?

Usage-specific channels. Finally, we seek comment on designating certain channels in the band for specific uses, such as fixed point-to-point or mobile operations. MSI argues that mixed use of fixed and mobile services could

introduce unacceptable interference, and that dedicating a fixed portion of the band to point-to-point use and providing a reasonable coordination mechanism would help enable the use of 4.9 GHz spectrum for broadband backhaul. We invite interested parties to propose specific band plans that balance different uses, along with appropriate justification. Should applicants be required to demonstrate that other microwave bands or terrestrial interconnection facilities are not available for their proposed use as a condition for receiving a point-to-point backhaul authorization in the 4.9 GHz band? Should the use of the 4.9 GHz band for point-to-point backhaul links be limited to paths in excess of a given length, e.g., greater than 16 km? Alternatively, rather than designating certain channels in the band for specific uses by rule, should we leave such decisions up to the designated regional authority or coordinator for a given area based on the specific needs of that area? This would result in different channel uses in different areas, but it could provide maximum flexibility for spectrum users. If commenters support this scenario, how would users and coordinators manage potential interference at regional boundaries?

Other Issues

In this section, we consider the merits of power limit changes, antenna gain, polarization restrictions, aeronautical mobile use, standards changes, emission masks, and the implementation of deployment reporting requirements.

Power and Polarization Restrictions

Comments. As noted above, some commenters to the *Further Notice* observed that 4.9 GHz fixed links have a relatively wide beam that is less directional than a typical microwave link. Wide beamwidths for point-to-point links translate to inefficient use of the 4.9 GHz band because they cover a larger sector when only a narrow path is needed to reach a single receiver. Links with narrower beams could be coordinated closer together without risk of interference, resulting in more efficient use of spectrum. Harris argues that ''4.9 GHz fixed links can not be deployed with antenna above 26dB gain, and thus will not have a smaller beamwidth than ~ 8–10 degrees.'' By contrast, commenters note that microwave links have a minimum antenna gain that is higher than the maximum antenna gain for 4.9 GHz fixed links, and thus the beamwidth is only a few degrees, resulting in narrow, highly directional paths. In response to the *Fourth FNPRM,* NPSTC suggest that ''one way [to make use of the 4.9 GHz band more efficient] is to specify a maximum ERP [effective radiated power] and a larger antenna gain thus reducing beam width.'' The 4.9 GHz rules do not contain ERP limits but, rather, maximum conducted output power and peak power spectral density limits.

ERP and antenna gain. We seek recommendations for an ERP limit for high power, permanent and temporary fixed transmitters. NPSTC also suggests exploring use of better coordination and larger antennas to make more efficient use of the 4.9 GHz band for broadband backhaul. Accordingly, we seek comment on whether we should specify a minimum antenna gain for high power, permanent and temporary fixed operations, thereby to minimize beamwidth and the potential for interference. Section 90.1215 provides a maximum directional antenna gain for point-to-point and point-to-multipoint operations of up to 26 dBi with no corresponding reduction in maximum conducted output power or spectral density output power. If antennas with a gain of more than 26 dBi are used, ERP must be reduced proportionately. The Commission imposed the 26 dBi antenna gain limit ''in order to avoid interference from fixed operations to mobile operations.'' To make point-to-point use in the band more efficient, we seek comment on whether the Commission should establish a minimum gain for point-to-point transmitting antennas and, if so, what value of gain is appropriate and what power reduction, if any, should be required. We also seek comment on whether we should impose a maximum ERP limitation on point-to-point links. We do not propose specific rule modifications at this time without a more substantial record. Interested commenters should provide technical analyses to support their recommendations on peak power and peak spectral density and/or antenna gain, bearing in mind the restriction imposed by § 90.205 of the Commission's rules: ''applicants for licenses must request and use no more power than the actual power necessary for satisfactory operation.'' Should the Commission impose side lobe radiation limits on antennas used in point-to-point links? Commenters should note that any increase in the power limits for the 4.9 GHz band would also have to be reflected in our agreements with Mexico and Canada for this band. What are the costs associated with requiring larger, narrower beamwidth, antennas? Is there a practical limit to the size of antenna that may be employed? Is the gain in spectrum efficiency commensurate with the cost of larger antennas?

In addition, we seek comment on requiring point-to-point links to use a specific polarization, e.g., horizontal or vertical, to reduce potential interference to other links or to portable or mobile devices. Applicants are required to specify the type of polarization proposed when they file 4.9 GHz applications. Should the Commission specify the polarization to be used in devices other than point-to-point links? What are the costs to retrofit or replace an antenna to change its polarization? Would polarization diversity increase the number of links that could be placed in a given area, thus increasing throughput? What benefits would this higher throughput provide? Are there other polarizations, e.g., angular, elliptical or circular, that would increase the number of links that could be placed in a given area or reduce potential interference?

Aeronautical Mobile Use

Background. Sections 2.106 and 90.1205(c) prohibit aeronautical mobile operations in the 4940–4990 MHz band. In 2003, the Commission concluded that it could not fashion a general rule to permit aeronautical mobile operation that would adequately protect radio astronomy from interference in all scenarios. However, the Commission concurrently established a policy to consider requests for aeronautical mobile operations on a case-by-case basis under the waiver process based upon a sufficient technical showing that the proposed operations would not interfere with in-band and adjacent band radio astronomy operations. The Commission has granted roughly a dozen waivers of § 90.1205(c).

Discussion. Given the interest in aeronautical mobile use of the band, we seek comment about whether to lift the general prohibition and allow licensees to bypass the waiver process, while maintaining an appropriate level of application review. We propose to revise § 90.1205(c) so that the rule permits aeronautical mobile operation in the band on a secondary, non-interference basis to 4.9 GHz terrestrial services and subject to certain conditions and requirements. The revised rule would require an applicant to provide a description of proposed operation to demonstrate that aeronautical mobile operations protect radio astronomy operations and 4.9 GHz terrestrial services from interference as a part of its application. The revised rule would also require that the applicant certify to the Commission that

it has served a copy of the application to all listed radio astronomy observatories whose boundaries fall within a threshold distance from the edge of the aeronautical operation. We seek comment on whether these measures are sufficient to protect radio astronomy, or whether 4.9 GHz aeronautical mobile operation should be secondary to radio astronomy operations by rule. We seek comment on whether aeronautical mobile operation in the 4940–4990 MHz band poses an interference risk to fixed and mobile terrestrial services in the lower adjacent band 4800–4940 MHz and radio astronomy service in the band 4990–5000 MHz, and if so, we seek comment on whether a new rule is necessary to address this issue. We also propose to revise the allocation of the 4940–4990 MHz band in § 2.106, the Table of Frequency Allocations, to provide for aeronautical mobile service in addition to fixed and mobile services.

We therefore seek comment on what threshold distance for aeronautical mobile operations should apply, and whether a uniform distance is appropriate given the geographic diversity of the nation. The revised rule would note that the Commission will coordinate all such applications with the National Telecommunications and Information Administration. We seek comment on whether the rule should impose a maximum altitude of 1500 feet above ground, consistent with many of the waivers. We also seek comment on allowing only low power devices as defined by § 90.1215 for aeronautical mobile use. Moreover, we seek comment on whether the Commission should, on a case-by-case basis, impose special conditions and operating restrictions on individual licenses as necessary to reduce risk of interference to radio astronomy operations and 4.9 GHz terrestrial services. In addition, we propose to require that applicants submit their applications to their respective RPC or the NRPC for coordination. We seek comment on whether and how applications for airborne use should be coordinated differently from terrestrial uses. Applicants would also have to demonstrate that their aeronautical operations comply with our international agreements. For instance, 4.9 GHz transmitters may be operated in aircraft along the Mexico border provided certain signal strength limits at and beyond the border are satisfied.

While allowing aeronautical mobile use would be a permissive rule change rather than a restrictive one, we seek comment on the opportunity costs and benefits for licensees that seek to deploy aeronautical mobile operations. What are the costs and time requirements to provide a description of the proposed operation, to determine the distance to radio astronomy observatories, and to serve a copy of the application to affected observatories? What is the cost for GPS lock or similar equipment designed to cease transmissions in the 4.9 GHz band if the aerial vehicle exceeds the maximum altitude or a certain maximum distance from the center point coordinates? How can aeronautical mobile use of the 4.9 GHz band benefit public safety?

Standards

In 2003 and again in 2004, the Commission declined to adopt technical standards that would provide interoperability in the 4.9 GHz band because: (1) The variety of services supported by the band did not readily lend themselves to standardization or interoperability, and (2) standards likely would have cemented the 4.9 GHz band in 2004 technology such that public safety would have been denied the benefits of emerging broadband technologies. We seek comment on whether these concerns are still valid today, and whether public safety's need for interoperability outweighs these concerns. We note that the Commission adopted the Long Term Evolution (LTE) standard as the common air interface for the 700 MHz public safety broadband network to ensure nationwide interoperability. In that instance, the Commission ''depart[ed] from the Commission's traditional posture of technological neutrality'' because ''establishing a common air interface for 700 MHz public safety networks is necessary to achieve our critical goal of a nationwide interoperable public safety wireless broadband network.'' We share the goal of interoperability for the 4.9 GHz band. Does achieving this goal for the 4.9 GHz band require us to determine a standard for deployment in this band, or is a more flexible approach possible? According to a suggestion from the 4.9 GHz workshop, ''developing open standards for equipment and infrastructure will allow interoperability and prohibit proprietary system deployments.''

How should the FCC ensure that a competitive marketplace for equipment develops in the 4.9 GHz band? What safeguards can the FCC put in place and how should they be applied to equipment that has already been deployed in the band? Next, because the 4.9 GHz band supports a variety of services, would it make sense to set multiple standards depending on the type of use rather than a single standard for all uses? Are most users of low power devices (output power under 20 dBm) gravitating toward a standard, such as IEEE 802.11, without a Commission mandate? Are users gravitating toward another standard for high power devices (output power higher than 20 dBm)? At present, is it possible to interconnect two or more 4.9 GHz networks for the purpose of responding to a multi-jurisdictional emergency? If not, how would standards make this possible? We seek comment on the costs and benefits for imposing equipment standards. What are the costs for equipment manufacturers to conform their designs to new standards, including costs associated with testing and FCC equipment certification? How would standards affect equipment costs for licensees over time? Because Wi-Fi equipment employs the IEEE 802.11 standard, how could economies of scale reduce equipment costs? Would standards benefit the public safety community by promoting interoperability?

What is the potential to adapt or redevelop equipment that is certified in nearby or adjacent frequency bands for use in the 4.9 GHz band? We note that in the band 4800–4940 MHz, the Table of Frequency Allocations lists fixed and mobile allocations for Federal users, similar to the allocations for 4.9 GHz for non-Federal users. Is any equipment from the 4800–4940 MHz band adaptable for the 4940–4990 MHz band? On the other hand, is it possible to adapt equipment certified for the 4.9 GHz band for other nearby bands? In either case, what are the steps and costs for such adaptations? We ask these questions to determine whether manufacturers may achieve economies of scale by developing multi-band equipment and thus pass on savings to end users.

Emission masks. In 2004, the Commission loosened emission masks on devices in the 4.9 GHz band so that low power devices are subject to the DSRC–A mask—identical to the IEEE 802.11a mask; and that high power devices are subject to the more restrictive DSRC–C mask. We seek comment on how well these emission masks are enabling public safety to leverage commercial-off-the-shelf (COTS) technologies in adjacent bands, such as the 5.4 GHz U–NII band and the ITS band. We seek comment on what other masks we should consider that would better enable 4.9 GHz users to leverage COTS equipment while reducing adjacent channel interference.

Deployment Reports

Consistent with our interest above regarding how licensees use the band and the importance of spectrum efficiency, we anticipate that it will be useful for the Commission to receive periodic updates from 4.9 GHz licensees on what spectrum uses and applications they are deploying, and the progress of those deployments. Progress reports will provide the Commission with more information about the kinds of operations licensees deploy and will enable it to make more informed decisions regarding the development of the 4.9 GHz band rules in the future. The deployment report would include information such as status of equipment development and purchase, including number of devices and users; site development, including use of existing towers; deployments and upgrades (commencement and completion), including site information and location; and applications in development or in use. We thus seek comment on whether to impose on 4.9 GHz licensees a periodic reporting requirement. What other specific information should the Commission collect in the report? Would it be appropriate to require such reporting on a quarterly basis for the first year following the license grant and on an annual basis thereafter? Should we subject such a requirement to a sunset provision? Should we also require reporting on planning and funding? Because a deployment report would describe how a particular licensee is using the 4.9 GHz band, would a deployment reporting requirement be unnecessary with respect to usage-specific licenses? Does one obviate the other? We seek comment on the compliance burdens associated with proposed information collection, including the costs and time required for completion. Would a reporting requirement be beneficial to any party other than the Commission, and if so, how?

Procedural Matters

Ex Parte Presentations

This matter shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with § 1.1206(b). In proceedings governed by § 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

Regulatory Flexibility Analysis

As required by the Regulatory Flexibility Act of 1980, see 5 U.S.C. 603, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) and Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and rules addressed in this document. The FRFA is set forth in Appendix C and the IRFA is set forth in Appendix E of the *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking*. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in response to this *Fifth Further Notice of Proposed Rulemaking* as set forth herein, and they should have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking,* including this IRFA and FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). See 5 U.S.C. 603(a).

Paperwork Reduction Act Analysis

This *Fifth Further Notice of Proposed Rulemaking* contains proposed new information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the PRA. Public and agency comments are due October 1, 2012. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.'' The Commission will submit the *Fifth Further Notice of Proposed Rulemaking* to the Office of Management and Budget for review under section 3507(d) of the PRA.

Congressional Review Act

The Commission will send a copy of the *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking* to Congress and the Government Accountability Office pursuant to the Congressional Review Act (''CRA''), see 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

Accordingly, *we order,* pursuant to sections 1, 4(i), 301, 302, 303, 316, and 403 of the Communications Act of 1934, 47 U.S.C. 151, 154(i), 301, 302, 303, 316, and 403, that this *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking* is *hereby adopted.*

We further order that the Commission's Consumer and Governmental Affairs Bureau, Reference Center, *shall send* a copy of this *Fourth Report and Order and Fifth Further Notice of Proposed Rulemaking,* including the Final and Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Parts 2 and 90

Communications equipment; Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications

Commission proposes to amend 47 CFR parts 2 and 90 as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

2. Section 2.106, the Table of Frequency Allocations, is amended by revising page 40 to read as follows:

§ 2.106 Table of Frequency Allocations.

* * * * *

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3300-3400 RADIOLOCATION 5.149 5.429 5.430	3300-3400 RADIOLOCATION Amateur Fixed Mobile 5.149	3300-3400 RADIOLOCATION Amateur 5.149 5.429	3300-3500 RADIOLOCATION US108 G2 US342	3300-3500 Amateur Radiolocation US108 5.282 US342	Private Land Mobile (90) Amateur Radio (97)
3400-3600 FIXED FIXED-SATELLITE (space-to-Earth) Mobile 5.430A Radiolocation 5.431	3400-3500 FIXED FIXED-SATELLITE (space-to-Earth) Amateur Mobile 5.431A Radiolocation 5.433 5.282	3400-3500 FIXED FIXED-SATELLITE (space-to-Earth) Amateur Mobile 5.432B Radiolocation 5.433 5.282 5.432 5.432A			
	3500-3700 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile Radiolocation 5.433	3500-3600 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.433A Radiolocation 5.433	3500-3650 RADIOLOCATION G59 AERONAUTICAL RADIONAVIGATION (ground-based) G110	3500-3600 Radiolocation	Private Land Mobile (90)
3600-4200 FIXED FIXED-SATELLITE (space-to-Earth) Mobile		3600-3700 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile Radiolocation 5.433 5.435	US245	3600-3650 FIXED-SATELLITE (space-to-Earth) US245 Radiolocation	Satellite Communications (25) Private Land Mobile (90)
			3650-3700 US348 US349	3650-3700 FIXED FIXED-SATELLITE (space-to-Earth) NG169 NG185 MOBILE except aeronautical mobile US348 US349	
	3700-4200 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile		3700-4200	3700-4200 FIXED FIXED-SATELLITE (space-to-Earth) NG180	Satellite Communications (25) Fixed Microwave (101)
4200-4400 AERONAUTICAL RADIONAVIGATION 5.438 5.439 5.440			4200-4400 AERONAUTICAL RADIONAVIGATION 5.440 US261		Aviation (87)
4400-4500 FIXED MOBILE 5.440A			4400-4500 FIXED MOBILE	4400-4500	
4500-4800 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 MOBILE 5.440A			4500-4800 FIXED MOBILE US245	4500-4800 FIXED-SATELLITE (space-to-Earth) 5.441 US245	
4800-4990 FIXED MOBILE 5.440A 5.442 Radio astronomy 5.149 5.339 5.443			4800-4940 FIXED MOBILE US203 US342	4800-4940 US203 US342	
			4940-4990 5.339 US342 US385 G122	4940-4990 FIXED MOBILE Aeronautical Mobile 5.339 US311 US342	Public Safety Land Mobile (90Y) Page 40

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PART 90—PRIVATE LAND MOBILE RADIO SERVICES

3. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r) and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r) and 332(c)(7).

4. Section 90.1203 is amended by revising paragraph (a) to read as follows:

§ 90.1203 Eligibility.

(a) The following groups of entities are eligible to hold a Commission license for systems operating in the 4940–4990 MHz band on a primary basis.

(1) Entities providing public safety services as defined under § 90.523. All of the requirements and conditions set forth in that section also govern authorizations in the 4940–4990 MHz band.

(2) Critical infrastructure industry (CII) entities as defined under § 90.7.

* * * * *

5. Section 90.1205 is amended by revising paragraph (c) to read as follows:

§ 90.1205 Permissible operations.

* * * * *

(c) Aeronautical mobile operations are permitted on a secondary, non-interference basis to 4.9 GHz terrestrial services under the following restrictions. Altitude may not exceed 457 meters (1500 feet) above ground. Licensees may use only low power devices as defined by § 90.1215 for aeronautical mobile use. All applications for aeronautical operation require prior Commission approval. The applicant shall provide a description of proposed operation to demonstrate that the proposed aeronautical mobile operations protect radio astronomy operations and 4.9 GHz terrestrial services from interference. Applicants shall submit their applications to their respective regional planning committee or the National Association of Regional Planning Committees for coordination. The applicant shall certify that it has served a copy of the application to all radio astronomy observatories listed in the Table of Frequency Allocations, § 2.106 footnote US311 of this chapter, whose geographic boundaries fall within [distance to be determined] kilometers of the edge of the proposed aeronautical operation. The Commission will coordinate all applications for aeronautical mobile operation with the National Telecommunications and Information Administration. The Commission has the discretion to impose special conditions and operating restrictions on individual licenses as necessary to reduce risk of interference to radio astronomy operations and 4.9 GHz terrestrial services.

6. Section 90.1209 is amended by revising paragraph (b) to read as follows:

§ 90.1209 Policies governing the use of the 4940–4990 MHz band.

* * * * *

(b) Each application for a new frequency assignment or for a change in existing facilities as listed in § 1.929(c)(4) of this chapter must be submitted through the applicable regional planning committee (RPC) for coordination. In areas without active RPCs, all licensees shall cooperate in the selection and use of channels in order to reduce interference and make the most effective use of the authorized facilities. A database identifying the locations of registered stations will be available at *http://wireless.fcc.gov/uls*. RPCs and licensees should examine this database before seeking station authorization, and make every effort to ensure that their fixed and base stations operate at a location, and with technical parameters, that will minimize the potential to cause and receive interference. Point-to-point stations must employ either horizontal or vertical polarization; point-to-point unpolarized transmissions are prohibited. Licensees of stations suffering or causing harmful interference are expected to cooperate and resolve this problem by mutually satisfactory arrangements. If licensees are unable to do so, the Commission may impose restrictions including specifying the transmitter power, antenna height, or area or hours of operation of the stations concerned. Further, the Commission may prohibit the use of any 4.9 GHz channel under a system license at a given geographical location when, in the judgment of the Commission, its use in that location is not in the public interest.

* * * * *

7. Section 90.1213 is amended by revising the introductory text to read as follows:

§ 90.1213 Band plan.

The following channel center frequencies are permitted to be aggregated for channel bandwidths of 5, 10, 15 or 20 MHz as described in paragraph (b) of this section. Channel numbers 1 through 5 and 14 through 18 are 1 MHz bandwidth channels and channel numbers 6 through 13 are 5 MHz bandwidth channels. Channel numbers 1 through 5 and 14 through 18 are designated for narrow bandwidth operations and should be used in aggregations only if all other 5 MHz channels are blocked.

* * * * *

8. Section 90.1219 is added to read as follows:

§ 90.1219 Deployment reporting.

(a) Licensees in the 4.9 GHz band shall file deployment reports with the Commission. Licensees may attach deployment reports to FCC Form 601. The report shall contain the following information:

(1) Status of equipment development and purchase, including number of devices and users;

(2) Site development, including use of existing towers;

(3) Deployments and upgrades (commencement and completion), including site information and location; and

(4) Applications in development or in use.

(b) During the first year following the initial grant or modification of a 4.9 GHz license, reports are due every three months after the grant date. After the first anniversary of the license grant, licensees must file deployment reports on an annual basis.

[FR Doc. 2012–18566 Filed 7–31–12; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 120425024–1024–01]

RIN 0648–XB089

Endangered and Threatened Wildlife; 90-Day Finding on a Petition To Delist the Green Turtle in Hawaii and Notice of Status Review

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

ACTION: Ninety-day petition finding, request for information, and initiation of status review.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to identify the Hawaiian population of the green turtle (*Chelonia mydas*) as a Distinct Population Segment (DPS) and delist the DPS under the Endangered Species Act (ESA). The green turtle was listed under the ESA on July 28, 1978. Breeding populations of the green turtle in Florida and along the Pacific Coast of Mexico are listed as endangered; all

other populations are listed as threatened. We find that the petition viewed in the context of information readily available in our files presents substantial scientific and commercial information indicating that the petitioned action may be warranted.

We are hereby initiating a status review of green turtles as currently listed to determine whether the petitioned action is warranted and to examine green turtles globally with regard to application of the DPS policy in light of significant new information since the listing of the species in 1978. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information pertaining to this species and potential critical habitat from any interested party.

DATES: Scientific and commercial information pertinent to the petitioned action and the global DPS review must be received by October 1, 2012.

ADDRESSES: You may submit information or data, identified by ''NOAA–NMFS–2012–0154,'' by any one of the following methods:

- *Electronic Submissions:* Submit all electronic information via the Federal eRulemaking Portal *http://www.regulations.gov*. To submit information via the e-Rulemaking Portal, first click the ''submit a comment'' icon, then enter ''NOAA–NMFS–2012–0154'' in the keyword search. Locate the document you wish to provide information on from the resulting list and click on the ''Submit a Comment'' icon to the right of that line.
- *Mail or hand-delivery:* Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All information received is a part of the public record and may be posted to *http://www.regulations.gov* without change. All personally identifiable information (for example, name, address, etc.) voluntarily submitted may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept information from anonymous sources. Attachments to electronic submissions will be accepted in Microsoft Word, Excel, Corel WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Heather Coll, NMFS, Office of Protected Resources, (301) 427–8455.

SUPPLEMENTARY INFORMATION:

Background

On February 16, 2012, NMFS and the U.S. Fish and Wildlife Service (USFWS) (together, the Services) received a petition from the Association of Hawaiian Civic Clubs to identify the Hawaiian green turtle population as a Distinct Population Segment (DPS) and delist the DPS under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Copies of the petition are available upon request (see **ADDRESSES**, above).

ESA Statutory, Regulatory, and Policy Provisions and Evaluation Framework

In accordance with section 4(b)(3)(A) of the ESA, to the maximum extent practicable and within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce is required to make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When we find that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted, as is the case here, we are required to promptly commence a review of the status of the species concerned, during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, within 12 months of receipt of the petition we conclude the review with a finding as to whether, in fact, the petitioned action is warranted. Because the finding at the 12-month stage is based on a comprehensive review of all best available information, as compared to the narrow scope of review at the 90-day stage, which focuses on information set forth in the petition, this 90-day finding does not prejudge the outcome of the status review.

Under the ESA, the term ''species'' means a species, a subspecies, or a DPS of a vertebrate species (16 U.S.C. 1532(16)). A joint NMFS–USFWS policy clarifies the Services' interpretation of the phrase ''Distinct Population Segment,'' or DPS (61 FR 4722; February 7, 1996). The DPS Policy requires the consideration of two elements when evaluating whether a vertebrate population segment qualifies as a DPS under the ESA: Discreteness of the population segment in relation to the remainder of the species; and, if discrete, the significance of the population segment to the species.

A species is ''endangered'' if it is in danger of extinction throughout all or a significant portion of its range, and ''threatened'' if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: (1) The present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

Under section 4(a)(1) of the ESA and the implementing regulations at 50 CFR 424.11(d), a species shall be removed from the list if the Secretary of Commerce determines, based on the best scientific and commercial data available after conducting a review of the species' status, that the species is no longer threatened or endangered because of one or a combination of the section 4(a)(1) factors. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) Recovery. The principal goal of the Services is to return listed species to a point at which protection under the ESA is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error (50 CFR 424.11(d)).

The ESA requires us to designate critical habitat concurrent with final listing rule ''to the maximum extent prudent and determinable'' (16 U.S.C. 1533 (a)(3)(A)). The ESA defines ''critical habitat'' as ''* * * the specific areas within the geographical area occupied by the species at the time it is listed * * * on which are found those

physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and * * * specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination * * * that such areas are essential for the conservation of the species.'' 16 U.S.C. 1532(5)(A). Critical habitat was previously designated for the green turtle in coastal waters surrounding Culebra Island, Puerto Rico (63 FR 46693; September 2, 1998).

ESA-implementing regulations issued jointly by the Services (50 CFR 424.14(b)) define ''substantial information,'' in the context of reviewing a petition to list, delist, or reclassify a species, as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition (1) clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Judicial decisions have clarified the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination that a petitioned action ''may be'' warranted. As a general matter, these decisions hold that a petition need not establish a ''strong likelihood'' or a ''high probability'' that a species is either threatened or endangered to support a positive 90-day finding.

To make a 90-day finding on a petition to list, delist, or reclassify a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the petitioned action may be warranted, including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be disregarded at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioners' assertions. In other words, conclusive information indicating the species may meet the ESA's requirements for listing is not required to make a positive 90-day finding.

The petition contains information on the species with emphasis on the green turtle population in Hawaii, including its biology and ecology, population status and trends, and elements for identifying the Hawaiian population as a DPS. To support their assertion that the Hawaiian population of green turtles is discrete from other green turtle populations, they posit that the Hawaiian population is discrete due to genetic distinction, spatial disconnectedness, and morphological differences, and is derived mostly from the nesting population at French Frigate Shoals. Petitioners assert that the Hawaiian population of green turtles is significant to the taxon to which it belongs because there would be a significant gap in the species' range if the Hawaiian population were lost, as there are no other breeding populations within the area ranging from approximately 15° to 30° North latitude and from 180° to 150° West longitude in the Central North Pacific Ocean. Further, petitioners provide information on the Hawaiian population of the green turtle relative to all ESA section 4(a)(1) factors and assert that the Hawaiian green turtle population, upon being identified as a DPS, should be delisted.

Petition Finding

Based on the above information and criteria specified in 50 CFR 424.14(b)(2), we find that the petitioners present substantial scientific and commercial information indicating that identifying the Hawaiian population of green turtle as a DPS and delisting this DPS may be warranted. Under section 4(b)(3)(A) of the ESA, an affirmative 90-day finding requires that we promptly commence a status review of the petitioned species (16 U.S.C. 1533 (b)(3)(A)). Furthermore, the Services completed a 5-year review of the green turtle on August 31, 2007, as required under Section 4(c)(2) of the ESA, and this review revealed that, in the time subsequent to the global listing of the green turtle, a substantial amount of information had become available on population structure (through genetic studies) and distribution (through telemetry, tagging, and genetic studies). The 5-year review recommended that a review of the species be conducted in the future.

Information Solicited

To ensure that the status review is based on the best available scientific and commercial data, we are soliciting information on whether green turtles should be listed as DPSs, including the identification of the Hawaiian population of the green turtle as a DPS, and, if so, whether they should be classified as endangered or threatened, or delisted based on the above ESA section 4(a)(1) factors. Specifically, we are soliciting information in the following areas: (1) Historical and current population status and trends; (2) historical and current distribution; (3) migratory movements and behavior; (4) genetic population structure, including recommendations on a global DPS structure; (5) current or planned activities that may adversely impact green turtles; and (6) ongoing efforts to conserve green turtles. We request that all information and data be accompanied by supporting documentation such as (1) maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

We are also requesting information on areas within U.S. jurisdiction that may qualify as critical habitat for any DPS of green turtles that we might consider for listing. Areas that include the physical and biological features essential to the conservation of the species should be identified, and information regarding the potential need for special management considerations for those features should be provided. Essential features include, but are not limited to (1) Space for individual growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for reproduction and development of offspring; (5) habitats that are protected from disturbance or are representative of the historical, geographical and ecological distributions of the species (50 CFR 424.12(b)).

References Cited

A complete list of references is available upon request from NMFS Protected Resources Headquarters Office (see **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: July 26, 2012.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2012–18768 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 77, No. 148

Wednesday, August 1, 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

Forest Service

Central Idaho Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Central Idaho Resource Advisory Committee will meet in Salmon, Idaho. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the title II of the Act. The meeting is open to the public. The purpose of the meeting is monitoring of projects being implemented under Public Law 110–343 and, if authorized by the Secretary of Agriculture by the meeting date, to review and recommend projects to be funded under Public Law 112–141.

DATES: The meeting will be held August 16, 2012 at 9 a.m.

ADDRESSES: The meeting will be held at the Public Lands Center, 1206 S. Challis Street, Salmon, Idaho 83467.

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Public Lands Center, 1206 S. Challis Street Salmon, Idaho 83467. Please call ahead to 208–756–5192 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Karen E. Dunlap, Resource Advisory Committee Coordinator, 208–756–5192 (voice) or 208–756–5151 (fax) or email *kdunlap@fs.fed.us*.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday. Requests for reasonable accommodation for access to the facility or proceedings may be made by contacting the person listed **FOR FURTHER INFORMATION CONTACT**.

SUPPLEMENTARY INFORMATION: The following business will be conducted: monitoring of projects being implemented under Public Law 110–343 and if authorized by the Secretary of Agriculture by the meeting date, to review and recommend projects to be funded under Public Law 112–141. An agenda will be posted at the following Web site address in advance of the meeting date: *http://www.fs.usda.gov/scnf/*. Individuals wishing to propose projects for possible funding by the CIRAC may do so by submitting proposals in writing by August 10, 2012 to Public Lands Center Attn: Karen Dunlap, 1206 S. Challis Street, Salmon, Idaho 83467 or by email to *kdunlap@fs.fed.us*, or via facsimile to 208–756–5151 in order to be scheduled on the agenda. A summary of the meeting will be posted at *http://www.fs.usda.gov/scnf/* within 21 days of the meeting.

Dated: July 25, 2012.

Frank V. Guzman,

Forest Supervisor.

[FR Doc. 2012–18652 Filed 7–31–12; 8:45 am]

BILLING CODE 3410–11–P

COMMISSION ON CIVIL RIGHTS

Agenda and Notice of Public Meeting of the Arkansas Advisory Committee

The original notice contains an error, the meeting location has changed. The meeting will not be held at the University of Little Rock Willliam H. Bowen School of Law Auditorium, 1201 McMath Avenue, Little Rock, AR 72202, the new meeting location will be at the Holiday Inn Presidential, 600 Interstate 30, Bush/Reagan Room, Little Rock, AR 72202.

Dated in Washington, DC, July 27, 2012.

Peter Minarik,

Acting Chief, Regional Programs Coordination Unit.

[FR Doc. 2012–18756 Filed 7–31–12; 8:45 am]

BILLING CODE 6335–01–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–54–2012]

Foreign-Trade Zone 143—West Sacramento, CA

Application for Extended Production Authority; Subzone 143D, Grafil Inc. (Carbon Fiber Production); Sacramento, California

An application has been submitted to the Foreign-Trade Zones Board (the Board) by Grafil Inc. (Grafil), operator of Subzone 143D, requesting to extend production authority at its facilities located in Sacramento, California. The application conforming to the requirements of the regulations of the Board (15 CFR 400.23) was docketed on July 26, 2012.

Subzone 143D was approved by the Board in 2009 at two Grafil facilities located in Sacramento, California (Board Order 1620, 74 FR 24798, 5/26/2009). Activity at the facilities (110 employees) includes the production, warehousing and distribution of carbon fiber using polyacrylonitrile (PAN) precursor.

Grafil's subzone and production authority were approved for a period of five years, until May 7, 2014 (Board Order 1620, May 7, 2009; 74 FR 24798, 5/26/2009). The current application is requesting to extend the FTZ production authority indefinitely. Grafil sources PAN precursor (duty rates, 7.5% or 8%) from abroad (representing 35% of the value of the finished product).

Production under FTZ procedures could exempt Grafil from customs duty payments on the foreign PAN precursor used in export production. The company anticipates that some 45 percent of the plant's shipments will be exported. On its domestic sales, Grafil would be able to choose the duty rate during customs entry procedures that apply to carbon fiber (duty free) for the foreign PAN precursor. Customs duties also could possibly be deferred or reduced on foreign status production equipment. The request indicates that the savings from FTZ procedures would help improve the plant's international competitiveness.

In accordance with the Board's regulations, Diane Finver of the FTZ Staff is designated examiner to evaluate and analyze the facts and information presented in the application and case

record and to report findings and recommendations to the Board.

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 October 1, 2012. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to October 15, 2012.

A copy of the application 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 Diane Finver at *Diane.Finver@trade.gov* or (202) 482–1367.

Dated: July 26, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–18806 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–865]

Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China: Preliminary Results of 2010–2011 Antidumping Duty Administrative Review and Intent To Rescind in Part

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

SUMMARY: The Department of Commerce (the ''Department'') is conducting an administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products (''hot-rolled steel'') from the People's Republic of China (''PRC''), covering the period of review (''POR'') November 1, 2010 through October 31, 2011. As discussed below, the Department preliminarily determines that the PRC-wide entity made sales in the United States at prices below normal value (''NV''). If these preliminary results are adopted in our final results of review, the Department will instruct U.S. Customs and Border Protection (''CBP'') to assess antidumping duties on entries of subject merchandise during the POR.

DATES: *Effective Date:* August 1, 2012.

FOR FURTHER INFORMATION CONTACT: Steven Hampton, 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) 482–0116.

SUPPLEMENTARY INFORMATION:

Background

On November 29, 2001, the Department published in the **Federal Register** an antidumping duty order on hot-rolled steel from the PRC.[1] On December 30, 2011, the Department published a notice of initiation of an administrative review of the antidumping duty order on hot-rolled steel from the PRC covering the period November 1, 2010, through October 31, 2011, for 18 companies.[2] Of the 18 companies on which the Department initiated an administrative review, four companies stated that they did not export subject merchandise to the United States during the POR and 14 companies did not certify or apply for a separate rate. The Department addresses the review status of each company below.

Respondent Selection

Section 777A(c)(1) of the Tariff Act of 1930, as amended (''the Act'') directs the Department to calculate individual weighted-average dumping margins for each known exporter or producer of the subject merchandise. However, section 777A(c)(2) of the Act gives the Department discretion to limit its examination to a reasonable number of exporters or producers if it is not practicable to examine all exporters or producers involved in the review.

On January 18, 2012, the Department released CBP data for entries of the subject merchandise during the POR under administrative protective order (''APO'') to all interested parties having access to materials released under an APO, and invited comments regarding the CBP data and respondent selection.[3] The Department did not receive any comments regarding the CBP data or respondent selection. On January 24, 2012 the Department received a no-sales certification from Baosteel.[4] On February 28, 2012, the Department received a no-shipment certification from Hunan Valin Xiangtan Iron & Steel (''Hunan Valin'').[5] On February 29, 2012 the Department selected Angang International Group (''Angang'') as a mandatory respondent because this company is the only company for which a review was requested that appears in the CBP data as having exported subject merchandise during this POR.[6] On March 1, 2012, the Department sent an antidumping duty questionnaire to Angang.[7] The Department did not receive a response or extension request from Angang. On March 23, 2012, the Department stated on the record that the deadline for Angang to submit a response to the Department's questionnaire expired on March 22, 2012 and that the Department did not receive a response or extension request from Angang.[8] Additionally, the Department confirmed delivery of this questionnaire.[9]

Scope of the Order

The products covered by the order are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither

[1] *See Notice of the Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China,* 66 FR 59561 (November 29, 2001) (''*Order*'').

[2] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 76 FR 82268 (December 30, 2011) (''*Initiation Notice*''). Those companies are: Angang Group International; Baosteel Group Corporation; Baoshan Iron & Steel Co., Ltd.; Bengang Steel Plates Co., Ltd.; Benxi Iron and Steel Group Co., Ltd.; Daye Special Steel Co., Ltd.; Dongbei Special Steel Group; Dongguang Bo Yunte Metal Co., Ltd.; Dongyang Global Strip Steel Co., Ltd.; Haverer Group Ltd.; Hebei Iron and Steel Int'l; Hunan Valin Xiangtan Iron & Steel; Jinan Iron & Steel Co., Ltd.; Shanghai Baosteel International Economic & Trading Co., Ltd.; Shenzhen Zhaoheng Specialty Steel Co.; Union Steel China; Xinyu Iron & Steel Co., Ltd.; and Zhejiang Shenghua Steel Co., Ltd.

[3] *See* the Department's Letter to All Interested Parties regarding 2010–2011 Administrative Review of the Antidumping Duty Order of Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China dated February 29, 2012.

[4] *See* Letter from Baosteel Group Corporation, Shanghai Baosteel International Economic & Trading Co., Ltd., and Baoshan Iron & Steel Co., Ltd., (collectively ''Baosteel'') to the Secretary of Commerce, regarding Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China: No Sales Certification, dated January 24, 2012.

[5] *See* Letter from Hunan Valin to the Secretary of Commerce, regarding Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China: No Shipment Letter, dated February 28, 2012.

[6] *See* Memorandum to James Doyle, Director, Office 9, Import Administration from Steven Hampton, International Trade Compliance Analyst, Office 9, Import Administration regarding 2010–2011 Administrative Review of the Antidumping Duty Order on Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China dated February 29, 2012.

[7] *See* Department's letter to Angang regarding Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China, dated March 1, 2012.

[8] *See* Memorandum to Scot Fullerton, Program Manager, Office 9, from Steven Hampton, International Trade Compliance Analyst regarding Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China: Documentation to Confirm Receipt of Questionnaire dated March 23, 2012.

[9] *Id.*

clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*i.e.,* flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of the order. Specifically included within the scope of the order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (''IF'')) steels, high strength low alloy (''HSLA'') steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products included in the scope of the order, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products in which: i) iron predominates, by weight, over each of the other contained elements; ii) the carbon content is 2 percent or less, by weight; and, iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
2.25 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of the order unless otherwise excluded. The following products, for example, are outside or specifically excluded from the scope of the order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including, *e.g.,* American Society for Testing and Materials (''ASTM'') specifications A543, A387, A514, A517, A506).
- Society of Automotive Engineers (''SAE'')/American Iron & Steel Institute (''AISI'') grades of series 2300 and higher.
- Ball bearing steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- USS abrasion-resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTSUS.

The merchandise subject to the order is classified in the HTSUS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled carbon steel flat products covered by the order, including: vacuum degassed fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Intent To Rescind, in Part, of Administrative Review

The Department has preliminarily determined that Baosteel and Hunan Valin did not have shipments of subject merchandise during the POR of this administrative review. The Department received no-shipment certifications from Baosteel and Hunan Valin on January 24, 2012, and February 28, 2012, respectively. To confirm the facts behind these assertions, the Department issued a no-shipment inquiry to CBP requesting that it provide any information that contradicted the no-shipment claims. The Department did not receive any response from CBP, thus indicating that there were no entries of subject merchandise into the United States manufactured and/or shipped by Baosteel or Hunan Valin. Because the evidence on the record indicates that neither Baosteel nor Hunan Valin exported subject merchandise to the United States during the POR, we preliminarily determine that these respondents had no reviewable transactions during this period. With respect to Baosteel, which currently has a separate rate, the Department intends to rescind the review. With respect to Hunan Valin however, we note that it does not have a separate rate. Therefore, Hunan Valin is under review as part of the PRC-wide entity and we will make a determination with respect to the PRC-wide entity at these preliminary results and the final results.

Non-Market Economy Country Status

In every case conducted by the Department involving the PRC, the PRC has been treated as a nonmarket economy (''NME'') country. In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by the administering authority.[10]

Separate Rates

In proceedings involving NME countries, it is the Department's practice to begin with a rebuttable presumption that all companies within the country are subject to government control and thus should be assessed a single

[10] *See, e.g., Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 30758, 30760 (June 4, 2007), unchanged in *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China,* 72 FR 60632 (October 25, 2007).

antidumping duty rate.[11] It is the Department's policy to assign all exporters of merchandise subject to review in an NME country this single rate unless an exporter can affirmatively demonstrate that it is sufficiently independent so as to be entitled to a separate rate.[12] Exporters can demonstrate this independence through demonstrating the absence of both *de jure* and *de facto* government control over export activities.[13] The Department analyzes each entity exporting the subject merchandise under a test arising from the *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China,* 56 FR 20588, 20589 (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, 22586–87 (May 2, 1994) (''*Silicon Carbide*''). However, if the Department determines that a company is wholly foreign-owned or located in a market economy (''ME''), then a separate rate analysis is not necessary to determine whether it is free of government control.

The only mandatory respondent in this review, Angang, did not submit a separate rate application or certification. Moreover, Angang did not submit a full response to the Department's questionnaire, including sections related to its separate rate eligibility. Therefore, because Angang did not demonstrate its eligibility for separate rate status, the Department preliminarily finds that it is not separate from the PRC-wide entity. The remaining companies included in the *Initiation Notice* did not submit separate rate applications or certifications. There are, therefore, no respondents for which to calculate a separate rate in this administrative review.

PRC-Wide Entity

Upon initiation of the administrative review, the Department provided the opportunity for all companies upon which the review was initiated to complete either the separate-rates application or certification.[14]

As stated above in the ''Separate Rates'' section of this notice, the Department has preliminarily determined that Angang failed to demonstrate its eligibility for a separate rate and is thus properly considered not to be separate from PRC-wide entity. As explained above in the ''Separate Rates'' section, all companies within the PRC are considered to be subject to government control unless they are able to demonstrate an absence of government control with respect to their export activities. Accordingly, such companies are assigned a single antidumping duty rate distinct from the separate rate(s) determined for companies that are found to be free of government control with respect to their export activities. In this regard, we note that no party has submitted evidence in this proceeding to demonstrate that such government influence is no longer present or that our treatment of the PRC-wide entity is otherwise incorrect.

Facts Otherwise Available

Section 776(a) of the Act mandates that the Department use facts otherwise available if necessary information is not otherwise available on the record of the antidumping proceeding. Specifically, section 776(a)(2) of the Act provides that where an interested party: (A) Withholds information that has been requested by the Department; (B) fails to provide requested information by the requested date or in the form and manner requested; (C) significantly impedes an antidumping proceeding; or (D) provides such information but the information cannot be verified, the Department shall use facts otherwise available in reaching its determination.

Angang did not respond to the antidumping questionnaire issued by the Department on March 1, 2012. As such, because the PRC-wide entity, which includes Angang, provided the Department with no data from which it could calculate a margin, the Department finds that necessary information to calculate a margin is not available on the record of this proceeding. The Department finds that because Angang, as part of the PRC-wide entity, failed to submit any response to the Department's questionnaire, the PRC-wide entity withheld requested information, failed to provide the information in a timely manner and in the form requested, and significantly impeded this proceeding, pursuant to sections 776(a)(2)(A), (B), and (C) of the Act. On this basis, the Department finds that it must rely on the facts otherwise available to determine a margin for the PRC-wide entity in accordance with section 776(a) of the Act.[15]

Adverse Facts Available

Section 776(b) of the Act states that if the Department ''finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority * * * the administering authority * * * may use an inference that is adverse to the interests of the party in selecting from among the facts otherwise available.''[16] Adverse inferences are appropriate to ''ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' [17] In selecting an adverse inference, the Department may rely on information derived from the petition, the final determination in the investigation, any previous review, or any other information placed on the record.[18]

The Department determines that by failing to respond to the Department's questionnaire, the PRC-wide entity, which includes Angang, has failed to cooperate to the best of its ability in providing the requested information. Accordingly, pursuant to sections 776(a)(2)(A), (B), and (C) and section 776(b) of the Act, we find it appropriate to apply a margin to the PRC-wide entity based entirely on the facts available, and to apply an adverse inference.[19] By doing so, we ensure that the PRC-wide entity, which includes Angang, will not obtain a more favorable result by failing to cooperate than had it cooperated fully in this review. Therefore, we are assigning the PRC-wide entity, which includes Angang, a rate of 90.83 percent, the highest-rate and the only rate ever determined for the PRC-wide entity on the record of this proceeding.[20]

[11] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China,* 71 FR 53079, 53082 (September 8, 2006); *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China,* 71 FR 29303, 29307 (May 22, 2006) (''*Diamond Sawblades*'').

[12] *See, e.g., Diamond Sawblades,* 71 FR at 29307.

[13] *Id.*

[14] *See Initiation Notice,* 76 FR at 82269.

[15] *See Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 71 FR 69546 (December 1, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

[16] *See also* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316 at 870 (1994) (''SAA'').

[17] *Id.*

[18] *See* section 776(b) of the Act.

[19] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of the First Administrative Review and New Shipper Review,* 72 FR 10689, 10692 (March 9, 2007) (decision to apply total AFA to the NME-wide entity), unchanged in *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review,* 72 FR 52052 (September 12, 2007).

[20] *See Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China,* 66

Corroboration

Section 776(c) of the Act requires that, where the Department relies on secondary information in selecting adverse facts available (''AFA''), the Department corroborate such information to the extent practicable. To be considered corroborated, the Department must find the information has probative value, meaning that the information must be both reliable and relevant.[21]

The Department considers the AFA rate calculated for the current review as both reliable and relevant. On the issue of reliability, the Department calculated the rate for a mandatory respondent (*i.e.,* for Benxi Iron & Steel Group Co., Ltd.) in the less than fair value (''LTFV'') investigation.[22] No information has been presented in the current review that calls into question the reliability of this information. With respect to the relevance, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard the margin and determine an appropriate margin. For example, in *Fresh Cut Flowers from Mexico* the Department disregarded the highest margin in that case as best information available (the predecessor to AFA) because the margin was based on another company's uncharacteristic business expense resulting in an unusually high margin.[23] The information used in calculating this margin was based on sales and production data submitted by a mandatory respondent, Benxi Iron & Steel Group Co., Ltd., in the LTFV investigation, together with the most appropriate surrogate value information available on the record in the LTFV investigation.[24] Finally, there is no information on the record of this review that demonstrates that this rate is not appropriate for use as AFA. For all these reasons, we determine that this rate continues to have relevance with respect to the PRC-wide entity, including Angang.

As the 90.83 percent AFA rate is both reliable and relevant, we determine that it has probative value and is corroborated to the extent practicable, in accordance with section 776(c) of the Act. Therefore, we have assigned this AFA rate of 90.83%, as established in the investigation, to exports of the subject merchandise by PRC-wide entity, including Angang.[25]

Public Comment

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, filed electronically using Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). An electronically filed hearing request must be received successfully in its entirety by the Department's electronic records system, IA ACCESS, by 5 p.m. Eastern Time within 30 days after the date of publication of this notice.[26] Requests should contain the party's name, address, and telephone number, the number of participants, and a list of the issues to be discussed. If a request for a hearing is made, the Department will inform parties of the scheduled date for the hearing which will be held at the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230, at a time and location to be determined.[27] Parties should confirm by telephone the date, time, and location of the hearing.

Interested parties are invited to comment on the preliminary results of this review within 30 days after the date of publication of this notice in the **Federal Register**.[28] Interested parties may file rebuttal briefs, limited to issues raised in the case briefs not later than five days after the time limit for filing case briefs.[29] Parties who submit arguments are requested to submit with each argument a statement of the issue, a brief summary of the argument, and a table of authorities cited. The Department intends to issue the final results of this administrative review, including the results of our analysis of issues raised in the written comments, within 120 days of publication of these preliminary results in the **Federal Register**.[30]

Assessment Rates

Upon issuance of the final results, the Department will determine, and CBP shall assess, antidumping duties on all appropriate entries covered by this review.[31] The Department intends to issue assessment instructions to CBP 15 days after the publication date of the final results of this review. We will instruct CBP to assess duties at the *ad valorem* margin rate published above. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any assessment rate calculated in the final results of this review is above *de minimis.* The final results of this review shall be the basis for the assessment of antidumping duties on entries of merchandise covered by the final results of this review and for future deposits of estimated duties, where applicable.

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for shipments of the subject merchandise from the PRC entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by sections 751(a)(2)(C) of the Act: (1) For Angang, the cash deposit rate will be that established in the final results of this review (except, if the rate is zero or *de minimis,* then zero cash deposit will be required); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that received a separate rate in a prior segment of this proceeding, the cash deposit rate will continue to be the existing exporter-specific rate; (3) for all PRC exporters of subject merchandise that have not been found to be entitled to a separate rate, the cash deposit rate

FR 49632 (September 28, 2001) (''*Hot-Rolled Steel Final Determination*'')

[21] *See* SAA at 870; *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part,* 62 FR 11825 (March 13, 1997).

[22] *See Hot-Rolled Steel Final Determination,* 66 FR at 49633.

[23] *See Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review,* 61 FR 6812, 6814 (February 22, 1996) *(''Fresh Cut Flowers from Mexico'').*

[24] *See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China,* 66 FR 22183 (May 3, 2001), unchanged in *Hot-Rolled Steel Final Determination,* 66 FR at 49633.

[25] The PRC-wide entity includes, Angang; Bengang Steel Plates Co., Ltd.; Benxi Iron and Steel Group Co., Ltd.; Daye Special Steel Co., Ltd.; Dongbei Special Steel Group; Dongguang Bo Yunte Metal Co., Ltd.; Dongyang Global Strip Steel Co., Ltd.; Haverer Group Ltd.; Hebei Iron and Steel Int'l; Hunan Valin; Jinan Iron & Steel Co., Ltd.; Shenzhen Zhaoheng Specialty Steel Co.; Union Steel China; Xinyu Iron & Steel Co., Ltd., and Zhejiang Shenghua Steel Co., Ltd.

[26] *See* 19 CFR 351.310(c).

[27] *See* 19 CFR 351.310.

[28] *See* 19 CFR 351.309(c)(1)(ii).

[29] *See* 19 CFR 351.309(d).

[30] *See* section 751(a)(3)(A) of the Act.

[31] *See* 19 CFR 351.212(b).

will be the PRC-wide rate of 90.83 percent; and (4) 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 that supplied that non-PRC exporter. These deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a preliminary reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Department's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: July 26, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–18831 Filed 7–31–12; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

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

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

Background

Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspended investigation, an interested party, as defined in section 771(9) of the Tariff Act of 1930, as amended (''the Act''), may request, in accordance with 19 CFR 351.213, that the Department of Commerce (''the Department'') conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

All deadlines for the submission of comments or actions by the Department discussed below refer to the number of calendar days from the applicable starting date.

Respondent Selection

In the event the Department limits the number of respondents for individual examination for administrative reviews initiated pursuant to requests made for the orders identified below, the Department intends to select respondents based on U.S. Customs and Border Protection (''CBP'') data for U.S. imports during the period of review. We intend to release the CBP data under Administrative Protective Order (''APO'') to all parties having an APO within five days of publication of the initiation notice and to make our decision regarding respondent selection within 21 days of publication of the initiation **Federal Register** notice. Therefore, we encourage all parties interested in commenting on respondent selection to submit their APO applications on the date of publication of the initiation notice, or as soon thereafter as possible. The Department invites comments regarding the CBP data and respondent selection within five days of placement of the CBP data on the record of the review.

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

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

Deadline for Withdrawal of Request for Administrative Review

Pursuant to 19 CFR 351.213(d)(1), a party that has requested a review may withdraw that request within 90 days of the date of publication of the notice of initiation of the requested review. The regulation provides that the Department may extend this time if it is reasonable to do so. In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months on or after August 2012, the Department does not intend to extend the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

The Department is providing this notice on its Web site, as well as in its ''Opportunity to Request Administrative Review'' notices, so that interested parties will be aware of the manner in which the Department intends to exercise its discretion in the future.

Opportunity To Request a Review: Not later than the last day of August 2012,[1] interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in August for the following periods:

[1] Or the next business day, if the deadline falls on a weekend, federal holiday or any other day when the Department is closed.

	Period of review
Antidumping Duty Proceedings	
Germany: Corrosion-Resistant Carbon Steel Flat Products A–428–815	8/1/11–7/31/12
Seamless Line and Pressure Pipe A–428–820	8/1/11–7/31/12
Sodium Nitrite A–428–841	8/1/11–7/31/12
Italy: Granular Polytetrafluoroethylene Resin A–475–703	8/1/11–7/31/12
Japan: Brass Sheet & Strip A–588–704	8/1/11–7/31/12
Tin Mill Products A–588–854	8/1/11–7/31/12
Malaysia: Polyethylene Retail Carrier Bags A–557–813	8/1/11–7/31/12
Mexico: Light-Walled Rectangular Pipe and Tube A–201–836	8/1/11–7/31/12
Republic of Korea: Corrosion-Resistant Carbon Steel Flat Products A–580–816	8/1/11–7/31/12
Light-Walled Rectangular Pipe and Tube A–580–859	8/1/11–7/31/12
Romania: Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4½ Inches) A–485–805	8/1/11–7/31/12
Thailand: Polyethylene Retail Carrier Bags A–549–821	8/1/11–7/31/12
The People's Republic of China: Floor-Standing, Metal-Top Ironing Tables and Parts Thereof A–570–888	8/1/11–7/31/12
Laminated Woven Sacks A–570–916	8/1/11–7/31/12
Light-Walled Rectangular Pipe and Tube A–570–914	8/1/11–7/31/12
Petroleum Wax Candles A–570–504	8/1/11–7/31/12
Polyethylene Retail Carrier Bags A–570–886	8/1/11–7/31/12
Sodium Nitrite A–570–925	8/1/11–7/31/12
Sulfanilic Acid A–570–815	8/1/11–7/31/12
Steel Nails A–570–909	8/1/11–7/31/12
Tetrahydrofurfuryl Alcohol A–570–887	8/1/11–7/31/12
Tow-Behind Lawn Groomers and Parts Thereof A–570–939	8/1/11–7/31/12
Woven Electric Blankets A–570–951	8/1/11–7/31/12
Ukraine: Silicomanganese A–823–805	8/1/11–7/31/12
Vietnam: Frozen Fish Fillets A–552–801	8/1/11–7/31/12
Countervailing Duty Proceedings	
Republic of Korea: Corrosion-Resistant Carbon Steel Flat Products C–580–818 1/1/11–12/31/11.	
Stainless Steel Sheet and Strip in Coils C–580–835	1/1/11–12/31/11
The People's Republic of China: Laminated Woven Sacks C–570–917	1/1/11–12/31/11
Light-Walled Rectangular Pipe and Tube C–570–915	1/1/11–12/31/11
Sodium Nitrite C–570–926	1/1/11–12/31/11
Tow-Behind Lawn Groomers and Parts Thereof C–570–940 1/1/11–12/31/11.	

Suspension Agreements

None.

In accordance with 19 CFR 351.213(b), an interested party as defined by section 771(9) of the Act may request in writing that the Secretary conduct an administrative review. For both antidumping and countervailing duty reviews, the interested party must specify the individual producers or exporters covered by an antidumping finding or an antidumping or countervailing duty order or suspension agreement for which it is requesting a review. In addition, a domestic interested party or an interested party described in section 771(9)(B) of the Act must state why it desires the Secretary to review those particular producers or exporters.[2] If the interested party intends for the Secretary to review sales of merchandise by an exporter (or a producer if that producer also exports merchandise from other suppliers) which were produced in more than one country of origin and each country of origin is subject to a separate order, then the interested party must state specifically, on an order-by-order basis, which exporter(s) the request is intended to cover.

Please note that, for any party the Department was unable to locate in prior segments, the Department will not accept a request for an administrative review of that party absent new information as to the party's location. Moreover, if the interested party who files a request for review is unable to locate the producer or exporter for which it requested the review, the interested party must provide an explanation of the attempts it made to locate the producer or exporter at the same time it files its request for review, in order for the Secretary to determine if the interested party's attempts were reasonable, pursuant to 19 CFR 351.303(f)(3)(ii).

As explained in *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003), the Department has clarified its practice with respect to the collection of final antidumping duties on imports of merchandise where intermediate firms are involved. The public should be aware of this clarification in determining whether to request an administrative review of merchandise subject to antidumping findings and orders. *See also* the Import Administration web site at *http://ia.ita.doc.gov.*

All requests must be filed electronically in Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS'') on the IA ACCESS Web site at *http://iaaccess.trade.gov. See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011). Further, in accordance with 19 CFR 351.303(f)(l)(i), a copy of each request must be served on the petitioner and each exporter or producer specified in the request.

The Department will publish in the **Federal Register** a notice of ''Initiation of Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation'' for requests received by the last day of August 2012. If the Department does not receive, by the last day of August 2012, a request for review of entries covered by an order, finding, or suspended investigation listed in this notice and for the period identified

[2] If the review request involves a non-market economy and the parties subject to the review request do not qualify for separate rates, all other exporters of subject merchandise from the non-market economy country who do not have a separate rate will be covered by the review as part of the single entity of which the named firms are a part.

above, the Department will instruct CBP to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

For the first administrative review of any order, there will be no assessment of antidumping or countervailing duties on entries of subject merchandise entered, or withdrawn from warehouse, for consumption during the relevant provisional-measures ''gap'' period, of the order, if such a gap period is applicable to the period of review.

This notice is not required by statute but is published as a service to the international trading community.

Dated: July 20, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–18826 Filed 7–31–12; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Advance Notification of Sunset Reviews

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

Background

Every five years, pursuant to section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') and the International Trade Commission automatically initiate and conduct a review to determine whether revocation of a countervailing or antidumping duty order or termination of an investigation suspended under section 704 or 734 of the Act would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

Upcoming Sunset Reviews for September 2012

The following Sunset Reviews are scheduled for initiation in September 2012 and will appear in that month's Notice of Initiation of Five-Year Sunset Review.

	Department Contact
Antidumping Duty Proceedings	
Certain Pasta from Italy (A–475–818) (3rd Review)	David Goldberger, (202) 482–4136.
Certain Pasta from Turkey (A–489–805) (3rd Review)	David Goldberger, (202) 482–4136.
Countervailing Duty Proceedings	
Certain Pasta from Italy (C–475–819) (3rd Review)	David Goldberger, (202) 482–4136.
Certain Pasta from Turkey (C–489–806) (3rd Review)	David Goldberger, (202) 482–4136.

Suspended Investigations

No Sunset Review of suspended investigations is scheduled for initiation in September 2012.

The Department's procedures for the conduct of Sunset Reviews are set forth in 19 CFR 351.218. Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3—*Policies Regarding the Conduct of Five-year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin,* 63 FR 18871 (April 16, 1998). The Notice of Initiation of Five-Year (''Sunset'') Reviews provides further information regarding what is required of all parties to participate in Sunset Reviews.

Pursuant to 19 CFR 351.103(c), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Please note that if the Department receives a Notice of Intent to Participate from a member of the domestic industry within 15 days of the date of initiation, the review will continue. Thereafter, any interested party wishing to participate in the Sunset Review must provide substantive comments in response to the notice of initiation no later than 30 days after the date of initiation.

This notice is not required by statute but is published as a service to the international trading community.

Dated: July 19, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–18818 Filed 7–31–12; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–819]

Certain Pasta From Italy: Preliminary Results of the 15th (2010) Countervailing Duty Administrative Review and Rescission, In Part

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

SUMMARY: The Department of Commerce (''Department'') is conducting an administrative review of the countervailing duty order on certain pasta from Italy for the period January 1, 2010, through December 31, 2010. We preliminarily determine that Molino e Pastificio Tomasello S.p.A. (''Tomasello'') received countervailable subsidies during the period of review (''POR''). Interested parties are invited to comment on these preliminary results.

DATES: *Effective Date:* August 1, 2012.

FOR FURTHER INFORMATION CONTACT: Joseph Shuler or Christopher Siepmann, AD/CVD Operations, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–1293 and (202) 482–7958, respectively.

SUPPLEMENTARY INFORMATION:

Background

On July 24, 1996, the Department published a countervailing duty order on certain pasta (''pasta'' or ''subject merchandise'') from Italy. *See Notice of Countervailing Duty Order and Amended Final Affirmative Countervailing Duty Determination: Certain Pasta From Italy,* 61 FR 38544 (July 24, 1996). On July 1, 2011, the Department published a notice of ''Opportunity to Request Administrative Review'' of this countervailing duty order for the POR corresponding to calendar year 2010. *See Antidumping or*

Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 76 FR 38609, 38610 (July 1, 2011). On July 29, 2011, we received requests for administrative review from producers and exporters of subject merchandise, Industria Alimentare Filiberto Bianconi 1947 S.p.A. (''Bianconi'') and Tomasello. In accordance with 19 CFR 351.221(c)(1)(i), we published a notice of initiation of this review on August 26, 2011. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 76 FR 53404, 53407 (August 26, 2011).

On September 20, 2011, we issued countervailing duty questionnaires to the Commission of the European Union (''EU''), the Government of Italy (''GOI''), Tomasello, and Bianconi. On October 20, 2011, Bianconi withdrew its request for administrative review. We received responses to our questionnaires in October 2011. We issued supplemental questionnaires to the GOI in February and April 2012, and we received corresponding responses in February and May 2012. We issued supplemental questionnaires to Tomasello in February and June 2012 and received corresponding responses in March and July 2012.

On March 16, 2012, we extended the time limit for the preliminary results of this review. *See Certain Pasta from Italy: Extension of Time Limit for the Preliminary Results of the Countervailing Duty Administrative Review,* 77 FR 15718 (March 16, 2012).

Period of Review

The POR for which we are measuring subsidies is January 1, 2010, through December 31, 2010.

Scope of the Order

Imports covered by the order are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastasis, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by the scope of the order is typically sold in the retail market, in fiberboard or cardboard cartons, or polyethylene or polypropylene bags of varying dimensions.

Excluded from the scope of the order are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. Also excluded are imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by the Instituto Mediterraneo Di Certificazione, Bioagricoop S.r.l., QC&I International Services, Ecocert Italila, Consorzio per il Controllo dei Prodotti Biologici, Associazione Italiana per l'Agricoltura Biologica, or Codex S.r.l. In addition, based on publicly available information, the Department has determined that, as of August 4, 2004, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Bioagricert S.r.l. are also excluded from the order. *See* Memorandum from Eric B. Greynolds to Melissa G. Skinner, dated August 4, 2004, which is on file in the Department's Central Records Unit (''CRU''), room 7046 of the main Commerce building. In addition, based on publicly available information, the Department has determined that, as of March 13, 2003, imports of organic pasta from Italy that are accompanied by the appropriate certificate issued by Instituto per la Certificazione Etica e Ambientale are also excluded from the order. *See* Memorandum from Audrey Twyman to Susan Kuhbach, dated February 28, 2006, entitled ''Recognition of Instituto per la Certificazione Etica e Ambientale (ICEA) as a Public Authority for Certifying Organic Pasta from Italy,'' which is on file in the Department's CRU. Pursuant to the Department's May 12, 2011 changed circumstances review, effective January 1, 2009, gluten-free pasta is also excluded from the scope of the CVD order. *See Certain Pasta From Italy: Final Results of Countervailing Duty Changed Circumstances Review and Revocation, In Part,* 76 FR 27634 (May 12, 2011).

The merchandise subject to review is currently classifiable under items 1901.90.90.95 and 1902.19.20 of the Harmonized Tariff Schedule of the United States (''HTSUS''). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise subject to the order is dispositive.

Partial Rescission of the Administrative Review

Pursuant to 19 CFR 351.213(d)(1), the Secretary will rescind an administrative review, in whole or in part, if a party that requested the review withdraws the request within 90 days of the date of publication of the initiation notice of the requested review. On October 20, 2011, Bianconi timely withdrew its request for review. Because no other parties requested a review of Bianconi's exports to the United States, the Department hereby rescinds the administrative review of certain pasta with respect to Bianconi in accordance with 19 CFR 351.213(d)(1). The Department intends to issue assessment instructions to U.S. Customs and Border Protection (''CBP'') 15 days after publication of this notice for any entries from Bianconi during the POR. The Department will instruct CBP to assess countervailing duties at rates equal to the cash deposit of estimated countervailing duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i).

Use of Facts Otherwise Available and Adverse Inferences

Sections 776(a)(1) and (2) of the Tariff Act of 1930, as amended (''the Act''), provide that the Department shall apply ''facts otherwise available'' if necessary information is not on the record or an interested party or any other person: (A) Withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the result is sufficiently adverse ''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.'' *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). The Department's practice also ensures ''that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, vol. 1, at 870 (1994) (''SAA'').

GOI—Measure 3.14 of the POR Sicilia 2000/2006

The Department found that Tomasello received countervailable subsidies under Measure 3.14 of the POR Sicilia 2000/2006 in the preceding

administrative review, relying on adverse facts available due to the GOI's failure to provide certain information about the specificity of this program's benefits. *See Certain Pasta From Italy: Final Results of the 2009 Countervailing Duty Administrative Review,* 77 FR 7129, 7130 (February 10, 2012) (''*Pasta 14 Final Results''*) and accompanying Issues and Decision Memorandum (''IDM'') at 13. For the preliminary results in the instant administrative review, we provided the GOI opportunities to provide necessary information concerning the specificity of this program's benefits.

The GOI reported that Article 38 of Regional Law 32/2000 grants aid to small- and medium-sized enterprises in industry, craft and services sectors located in Sicily for projects of industrial research in the field covered by Measure 3.14 of the POR Sicilia 2000/2006. *See* GOI's February 29, 2012, supplemental questionnaire response. However, the GOI failed to identify the industries or enterprises that received benefits under this program and the corresponding amounts given to them (''usage data''). Because the GOI's response did not provide us with required information to determine specificity for this program, we requested this information a second time. The GOI filed a timely response, but again did not provide the requested information concerning usage data. *See* GOI's May 17, 2012, supplemental questionnaire response.

The statute identifies specificity as one of three necessary elements of a countervailable subsidy. *See* sections 771(5)(A) and 771(5A) of the Act. We normally rely on information from the government to determine whether a program is specific. *See, e.g., Certain Magnesia Carbon Bricks From the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 75 FR 45472 (August 2, 2010) and accompanying IDM at Comment 6. Although it was given multiple opportunities, the GOI's responses left us without the necessary information to determine whether Measure 3.14 of the POR Sicilia 2000/2006 is countervailable.

We preliminarily determine that the GOI has withheld necessary information that was requested of it for this program. Because the record is incomplete for this program, the Department must rely on ''facts available.'' *See* sections 776(a)(1), 776(a)(2)(A) and 776(a)(2)(B) of the Act. Moreover, the GOI has failed to cooperate by not acting to the best of its ability to comply with our request for information, so we are applying an adverse inference in our use of facts available. *See* section 776(b) of the Act. Due to the GOI's failure to provide information necessary for our determination about this program, we are drawing an adverse inference and determine that benefits under Measure 3.14 of the POR Sicilia 2000/2006 are specific. *See* section 771(5A) of the Act. An analysis of this program is found in the ''Analysis of Programs'' section below.

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as ''information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.'' SAA at 870.

The facts available decisions described above do not rely on secondary information. Our determination regarding the specificity of this program is based on the unwillingness of the GOI to provide necessary information pertaining to the access to, or the distribution of, the subsidies. The corroboration requirement of section 776(c) of the Act is, therefore, not applicable to the use of facts available in this review.

Subsidies Valuation Information

Allocation Period

Pursuant to 19 CFR 351.524(b), benefits from non-recurring subsidies are allocated over a period corresponding to the average useful life (''AUL'') of the renewable physical assets used to produce the subject merchandise. The Department's regulations create a rebuttable presumption that the AUL will be taken from the U.S. Internal Revenue Service's Class Life Asset Depreciation Range System (''IRS Tables''). *See* 19 CFR 351.524(d)(2). For pasta, the most recent IRS Tables prescribe an AUL of 12 years. Neither the responding company nor other interested parties objected to this allocation period. Therefore, we have used a 12-year allocation period.

Attribution of Subsidies

Pursuant to 19 CFR 351.525(b)(6), the Department will attribute subsidies received by companies with cross-ownership to the combined sales of those companies. Tomasello reported that all of its shareholders are members of the Tomasello family, either directly or by marriage. *See* Tomasello's October 27, 2011, questionnaire response at 4. Tomasello reports that it has no holding companies or any other affiliated companies. *See id.* at 2. Therefore, we are attributing Tomasello's subsidies to the sales of Tomasello only.

Benchmarks for Long-Term Loans and Discount Rates

Loan Benchmarks

Pursuant to 19 CFR 351.505(a), the Department will use the actual cost of comparable borrowing by a company as a loan benchmark, when available. According to 19 CFR 351.505(a)(2), a comparable commercial loan is defined as one that, when compared to the government-provided loan in question, has similarities in the structure of the loan (*e.g.,* fixed interest rate v. variable interest rate), the maturity of the loan (*e.g.,* short-term v. long-term), and the currency in which the loan is denominated.

Because no comparable commercial loans were taken out by Tomasello in the years in which the GOI agreed to provide the subsidies, we used a national average interest rate for comparable commercial loans, pursuant to 19 CFR 351.505(a)(3)(ii). *See Certain Pasta From Italy: Preliminary Results of the 14th (2009) Countervailing Duty Administrative Review,* 76 FR 48130, 48133 (August 8, 2011) (''*Pasta Prelim 14''),* unchanged in *Certain Pasta From Italy: Final Results of the Countervailing Duty Administrative Review,* 77 FR 7129 (February 10, 2012). Consistent with past practice in this proceeding, for years prior to 1995, we used the Bank of Italy reference rate adjusted upward to reflect the mark-up an Italian commercial bank would charge a corporate customer. *See, e.g., Certain Pasta From Italy: Preliminary Results and Partial Rescission of the Eighth Countervailing Duty Administrative Review,* 70 FR 17971 (April 8, 2005), unchanged in *Certain Pasta from Italy: Final Results of the Eighth Countervailing Duty Administrative Review,* 70 FR 37084 (June 28, 2005). For benefits received in 1995–2004, we used the Italian Bankers' Association (''ABI'') prime interest rate (as reported by the Bank of Italy), increased by the average spread charged by banks on loans to commercial customers plus an amount for bank charges. *See Certain Pasta from Italy: Preliminary Results of the 12th (2007) Countervailing Duty Administrative Review,* 74 FR 25489, 25491 (May 28, 2009) (''*12th (2007) Administrative Review Preliminary Results''*), unchanged in *Certain Pasta*

from Italy: Final Results of the 12th (2007) Countervailing Duty Administrative Review, 74 FR 47204 (September 15, 2009). The Bank of Italy ceased reporting this rate in 2004. *See 12th (2007) Administrative Review Preliminary Results,* 74 FR at 25491, unchanged in the final results. Because the ABI prime rate was no longer reported after 2004, for 2005–2010, we have used the ''Bank Interest Rates on Euro Loans: Outstanding Amounts, Non-Financial Corporations, Loans With Original Maturity More Than Five Years'' published by the Bank of Italy and provided by the GOI in its October 27, 2011, questionnaire response at Exhibits 3–7. We increased this rate by the mark-up and bank charges described above.

Discount Rate Benchmarks

Consistent with 19 CFR 351.524(d)(3)(i)(A), we have used, as our discount rate, the long-term interest rate calculated according to the methodology described above for the year in which the government agreed to provide the subsidy.

Analysis of Programs

Programs Preliminarily Determined To Be Countervailable

A. Industrial Development Grants Under Law 488/92

The Department countervailed this program in the previous administrative review. *See Pasta Prelim 14,* 76 FR at 48134, unchanged in the final results. No new information has been placed on the record of this review that would cause us to depart from this treatment. *See Live Swine from Canada; Final Results of Countervailing Duty Administrative Reviews,* 61 FR 52408, 52420 (October 7, 1996) (''{I}t is well-established that where the Department has determined that a program is (or is not) countervailable, it is the Department's policy not to reexamine the issue of that program's countervailability in subsequent reviews unless new information or evidence of changed circumstances is submitted which warrants reconsideration.'').

Tomasello reported no new grants under this program during the POR. *See* Tomasello's October 27, 2011, questionnaire response at 11. However, we have previously treated the grants under this program as ''non-recurring'' and allocated the benefits over time. *See Pasta Prelim 14,* 76 FR at 48135, unchanged in the final results; and 19 CFR 351.524(b). Consequently, because the grants received by Tomasello under Law 488/92 in prior years exceeded 0.5 percent of its sales in the years in which the grants were approved, we allocated the benefits over time using the grant methodology described in 19 CFR 351.524(d). We divided the amounts allocated to the POR by Tomasello's total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the Law 488/92 industrial development grants to be 1.86 percent *ad valorem* for Tomasello. *See* Memorandum from Joseph Shuler, International Trade Analyst to the File, entitled ''2010 Preliminary Results Calculation Memorandum for Molino e Pastificio Tomasello, S.p.A.,'' dated concurrently with this notice (''Tomasello Preliminary Calc Memo'').

B. Measure 3.14 of the POR Sicilia 2000/2006

Measure 3.14 of the POR Sicilia 2000/2006 is a regional development program designed to encourage stable economic growth in southern Italy. *See* GOI's February 29, 2012, supplemental questionnaire response at 5. Measure 3.14 of the POR Sicilia 2000/2006 provides assistance in the form of grants to companies that undertake approved industrial research projects. Tomasello reported that it received no grants under this program during the POR. *See* Tomasello's October 27, 2011, questionnaire response at 10–11. However, Tomasello received grants under Measure 3.14 of the POR Sicilia 2000/2006 from 2007 to 2009. *See Pasta 14 Final Results,* 77 FR at 7130.

As described above in the ''Use of Facts Otherwise Available and Adverse Inferences'' section, although given opportunities to do so, the GOI has not provided requested information concerning the specificity of this program. Therefore, we preliminarily determine as adverse facts available that grants received by Tomasello under Measure 3.14 of the POR Sicilia 2000/2006 are specific. We also determine preliminarily that these grants are a direct transfer of funds from the GOI bestowing a benefit in the amount of the grant. *See* section 771(5)(D)(i) of the Act and 19 CFR 351.504(a).

Recipients of grants under this program must file a separate application for each project they seek funding for and cannot expect funding on an ongoing basis. *See Pasta Prelim 14,* 76 FR at 48135, unchanged in the final results. Therefore, we are preliminarily treating these grants as ''non-recurring.'' *See* 19 CFR 351.524(b). Consequently, because the grants received by Tomasello under Measure 3.14 of the POR Sicilia 2000/2006 exceeded 0.5 percent of its sales in the years in which the grants were approved, we allocated the benefits over time using the grant methodology described in 19 CFR 351.524(d). We divided the amount allocated to the POR by Tomasello's total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the Measure 3.14 of the POR Sicilia 2000/2006 grants to be 0.23 percent *ad valorem. See* Tomasello Preliminary Calc Memo.

C. European Social Fund

The Department countervailed this program in the previous administrative review. *See Pasta Prelim 14,* 76 FR at 48136, unchanged in the final results. Tomasello reported no new or additional assistance under this program for the POR. *See* Tomasello's October 27, 2011, questionnaire response at 14.

The Department normally considers the benefits from worker training programs to be recurring. *See* CFR 351.524(c)(1). However, consistent with the Department's determination in the countervailing duty investigation of wire rod from Italy that these grants relate to specific, individual projects, and consistent with the previous administrative review of certain pasta from Italy, we have treated these grants as non-recurring because each required separate government approval. *See Pasta Prelim 14,* 76 FR at 48136, unchanged in the final results; *see also Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod From Italy,* 63 FR 40474, 40487 (July 29, 1998).

Accordingly, we have followed the methodology described in 19 CFR 351.524(b) and, because the grants received by Tomasello under this program exceeded 0.5 percent of its sales in the year in which the grants were approved, we used the grant methodology described in 19 CFR 351.524(d) to allocate the benefit. We divided the amount allocated to the POR by Tomasello's total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from the European Social Fund grants to be 0.11 percent *ad valorem* for Tomasello. *See* Tomasello Preliminary Calc Memo.

D. Article 14 of Law 46/1982 (*Fondo Innovazione Tecnologica*)

The Department countervailed this program in the previous administrative review. *See Pasta Prelim 14,* 76 FR at 48137–48138, unchanged in the final results. Tomasello reported no new loans or grants under this program for

the POR. *See* Tomasello's October 27, 2011, questionnaire response at 12.

We have previously treated the grants under this program as ''non-recurring,'' and allocated the benefits over time. *See Pasta 14 Final Results* and accompanying IDM at 17, where we previously found Tomasello's grants under this program to be non-recurring. *See also* 19 CFR 351.524(b). Consequently, because the grant received by Tomasello under Article 14 of Law 46/1982 previously excluded 0.5 percent of its sales in the year the grant was approved, we allocated the benefit over time using the grant methodology described in 19 CFR 351.524(d). We divided the amount allocated to the POR by Tomasello's total sales in the POR. On this basis, we preliminarily determine the countervailable subsidy from Law 46/1982 research grant to be 0.19 percent *ad valorem* for Tomasello. *See* Tomasello Preliminary Calc Memo.

With respect to the loan received by Tomasello under Article 14 of Law 46/1982, we calculated the countervailable benefit by computing the difference between the payments Tomasello made on the loan during the POR and the payments Tomasello would have made on a benchmark loan. *See* the ''Benchmarks for Long-Term Loans and Discount Rates'' section of this notice above. We divided the benefit received by Tomasello by its total sales in the POR. On this basis, we preliminarily determine the countervailable subsidy from Law 46/1982 research loan to be 0.04 percent *ad valorem* for Tomasello. *See* Tomasello Preliminary Calc Memo.

E. Article 23 of Legislative Decree 38/2000

The Department countervailed this loan program in the previous administrative review. *See Pasta Prelim 14,* 76 FR at 48138–48139, unchanged in the final results.

Based on the information submitted by Tomasello about its principal and interest payments during the POR, we calculated the countervailable benefit by computing the difference between the payments Tomasello made and the payments it would have made on a benchmark loan. *See* Tomasello's July 4, 2012, supplemental questionnaire response at Exhibit 1, 19 CFR 351.505(c)(2), and the ''Benchmarks for Long-Term Loans and Discount Rates'' section above. We divided the POR benefit by Tomasello's total sales in the POR.

On this basis, we preliminarily determine the countervailable subsidy from loans under Article 23 of Legislative Decree 38/2000 to be 0.06 percent *ad valorem* for Tomasello. *See* Tomasello Preliminary Calc Memo.

Programs Preliminarily Determined To Not Be Used

We examined the following programs and preliminarily determine that Tomasello did not apply for or receive benefits under these programs during the POR:

A. *Industrial Development Loans Under Law 64/86*
B. *Grant Received Pursuant to the Community Initiative Concerning the Preparation of Enterprises for the Single Market (''PRISMA'')*
C. *European Regional Development Fund (''ERDF'') Programma Operativo Plurifondo (''P.O.P.'') Grant*
D. *European Regional Development Fund (''ERDF'') Programma Operativo Multiregionale (''P.O.M.'') Grant*
E. *Certain Social Security Reductions and Exemptions—Sgravi (including Law 223/91, Article 8, Paragraph 4 and Article 25, Paragraph 9; and Law 196/97)*
F. *Law 236/93 Training Grants*
G. *Law 1329/65 Interest Contributions (''Sabatini Law'') (Formerly Lump-Sum Interest Payment Under the Sabatini Law for Companies in Southern Italy)*
H. *Development Grants Under Law 30 of 1984*
I. *Law 908/55 Fondo di Rotazione Iniziative Economiche (Revolving Fund for Economic Initiatives) Loans*
J. *Brescia Chamber of Commerce Training Grants*
K. *Ministerial Decree 87/02*
L. *Law 10/91 Grants to Fund Energy Conservation*
M. *Export Restitution Payments*
N. *Export Credits Under Law 227/77*
O. *Capital Grants Under Law 675/77*
P. *Retraining Grants Under Law 675/77*
Q. *Interest Contributions on Bank Loans Under Law 675/77*
R. *Preferential Financing for Export Promotion Under Law 394/81*
S. *Urban Redevelopment Under Law 181*
T. *Industrial Development Grants Under Law 183/76*
U. *Interest Subsidies Under Law 598/94*
V. *Duty-Free Import Rights*
W. *Law 113/86 Training Grants*
X. *European Agricultural Guidance and Guarantee Fund*
Y. *Law 341/95 Interest Contributions on Debt Consolidation Loans (Formerly Debt Consolidation Law 341/95)*
Z. *Interest Grants Financed by IRI Bonds*
AA. *Article 44 of Law 448/01*
BB. *Law 289/02*
(1) *Article 63—Increase in Employment*
CC. *Law 662/96—Patti Territoriali*
DD. *Law 662/96—Contratto di Programma*
EE. *Tax Credits Under Article 280 of law 296/2006*
FF. *Interest Contributions Under Regional Law 34/1988*
GG. *Law 317/91 Benefits for Innovative Investments*
HH. *Industrial Development Grants Under Law 341/95*
II. *Industrial Development Grants Under Law 64/86*
JJ. *Interest Contributions Under Law 488/92*
KK. *Law 289/02, Article 62, Investments in Disadvantaged Areas*
LL. *Social Security Reductions and Exemptions—Sgravi*
(1) *Law 407/90*
III. Previously Terminated Programs
A. *Regional Tax Exemptions Under IRAP*
B. *VAT Reductions Under Laws 64/86 and 675/55*
C. *Corporate Income Tax (''IRPEG'') Exemptions*
D. *Remission of Taxes on Export Credit Insurance Under Article 33 of Law 227/77*
E. *Export Marketing Grants Under Law 304/90*
F. *Tremonti Law 383/01*
G. *Social Security Reductions and Exemptions—Sgravi*
(1) *Article 44 of Law 448/01*
(2) *Law 337/90*
(3) *Law 863/84*
(4) *Law 196/97*

Preliminary Results of Review

In accordance with 19 CFR 351.221(b)(4)(i), we calculated an individual subsidy rate for the respondent, Tomasello.

For the period January 1, 2010, through December 31, 2010, we preliminarily find the net subsidy rates for the producers/exporters under review to be as follows:

Producer/exporter	Net subsidy rate
Molino e Pastificio Tomasello S.p.A.	2.49%

Assessment Rates

If these preliminary results are adopted in our final results of this review, the Department will instruct CBP to assess countervailing duties on all shipments at the net subsidy rates listed above for all entries by Tomasello.

For all other companies that were not reviewed (except Barilla G. e R. F.lli S.p.A. and Gruppo Agricoltura Sana

S.r.l., which are excluded from the order, and Pasta Lensi S.r.l., which was revoked from the order), the Department has directed CBP to assess countervailing duties on all entries between January 1, 2010, and December 31, 2010, at the rates in effect at the time of entry.

The Department intends to issue appropriate assessment instructions directly to CBP 15 days after publication of the final results of this review.

Cash Deposit Instructions

The Department also intends to instruct CBP to collect cash deposits of estimated countervailing duties in the amounts shown above. For all non-reviewed firms (except Barilla G. e R. F.lli S.p.A. and Gruppo Agricoltura Sana S.r.l., which are excluded from the order, and Pasta Lensi S.r.l., which was revoked from the order), we will instruct CBP to collect cash deposits of estimated countervailing duties at the most recent company-specific or all-others rate applicable to the company. These rates shall apply to all non-reviewed companies until a review of a company assigned these rates is requested. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Disclosure and Public Comment

Pursuant to 19 CFR 351.224(b), the Department will disclose to parties to the proceeding any calculations performed in connection with these preliminary results within five days after the date of the public announcement of this notice.

Pursuant to 19 CFR 351.309(c)(ii), interested parties may submit written arguments in case briefs within 30 days of the date of publication of this notice. Rebuttal briefs, limited to issues raised in case briefs, may be filed no later than five days after the date of filing the case briefs, in accordance with 19 CFR 351.309(d). Any case briefs and rebuttal briefs must be filed via the Department's electronic records system, IA ACCESS, in accordance with 19 CFR 351.303. Parties who submit case briefs or rebuttal briefs in this proceeding are requested to submit with each argument: (1) A statement of the issue, and (2) a brief summary of the argument with an electronic version included. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 351.303(f).

Interested parties may request a hearing within 30 days after the date of publication of this notice, pursuant to 19 CFR 351.310(c).

The Department will publish a notice of the final results of this administrative review within 120 days from the publication of these preliminary results, in accordance with section 751(a)(3) of the Act.

We are issuing and publishing these results in accordance with sections 751(a)(1) and 777(i)(1) of the Act and 19 CFR 351.221(b)(4).

Dated: July 24, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–18684 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Initiation of Antidumping Duty New Shipper Review

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

SUMMARY: The Department of Commerce (''Department'') has determined that a request for a new shipper review (''NSR'') of the antidumping duty order on tapered roller bearings (''TRBs'') from the People's Republic of China (''PRC'') meets the statutory and regulatory requirements for initiation. The period of review (''POR'') for this NSR is June 1, 2011, through May 31, 2012.

DATES: *Effective Date:* August 1, 2012.

FOR FURTHER INFORMATION CONTACT: Demitri Kalogeropoulos, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230; telephone: 202–482–2623.

SUPPLEMENTARY INFORMATION:

Background

The notice announcing the antidumping duty order on TRBs from the PRC was published in the **Federal Register** on June 15, 1987.[1] On June 28, 2012, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (''Act''), and 19 CFR 351.214(b), the Department received an NSR request from Zhejiang Zhengda Bearing Co., Ltd. (''Zhejiang Zhengda''). Zhejiang Zhengda's request was made in June 2012, which is the anniversary month of the *Order*.[2]

In its submission, Zhejiang Zhengda certified that it is the exporter and producer of the subject merchandise upon which the request was based. Pursuant to section 751(a)(2)(B)(i)(I) of the Act and 19 CFR 351.214(b)(2)(i), Zhejiang Zhengda certified that it did not export TRBs to the United States during the period of investigation (''POI''). In addition, pursuant to section 751(a)(2)(B)(i)(II) of the Act and 19 CFR 351.214(b)(2)(iii)(A), Zhejiang Zhengda certified that, since the initiation of the investigation, it has not been affiliated with a PRC exporter or producer who exported TRBs to the United States during the POI, including those not individually examined during the investigation. As required by 19 CFR 351.214(b)(2)(iii)(B), Zhejiang Zhengda also certified that its export activities were not controlled by the central government of the PRC.

In addition to the certifications described above, pursuant to 19 CFR 351.214(b)(2)(iv), Zhejiang Zhengda submitted documentation establishing the following: (1) The date on which Zhejiang Zhengda first shipped TRBs for export to the United States and the date on which the TRBs were first entered, or withdrawn from warehouse, for consumption; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.

The Department conducted U.S. Customs and Border Protection (''CBP'') database queries in an attempt to confirm that Zhejiang Zhengda's shipments of subject merchandise had entered the United States for consumption and that liquidation of such entries had been properly suspended for antidumping duties.[3] The Department also examined whether the CBP data confirm that such entries were made during the NSR POR. The Department has identified some inconsistencies between the information provided by Zhejiang Zhengda and the CBP data currently on the record. After the initiation of this NSR, the Department intends to place additional CBP data on the record, and, if necessary, request additional information from Zhejiang Zhengda. Due to the proprietary nature of this information, please refer to the Memorandum to the File from John Ditore, ''Initiation of AD New Shipper Review: Tapered Roller Bearings and

[1] *See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China,* 52 FR 22667 (June 15, 1987) (''*Order*'').

[2] *See* 19 CFR 351.214(d).

[3] *See* July 26, 2012 memorandum to the file regarding CBP data.

Parts Thereof from the People's Republic of China (A–570–601)'' dated concurrently with this notice (''Initiation Checklist'').

Period of Review

In accordance with 19 CFR 351.214(g)(1)(i)(A), the POR for an NSR initiated in the month immediately following the anniversary month will be the twelve-month period immediately preceding the anniversary month. Therefore, the POR for this NSR is June 1, 2011, through May 31, 2012. Based on information provided by Zhejiang Zhengda, the sales and entries into the United States of subject merchandise produced and exported by Zhejiang Zhengda occurred during this twelve-month POR.

Initiation of New Shipper Review

Pursuant to section 751(a)(2)(B) of the Act and 19 CFR 351.214(b), the Department finds that the request submitted by Zhejiang Zhengda meets the threshold requirements for initiation of an NSR for the shipment of TRBs from the PRC produced and exported by Zhejiang Zhengda. *See* Initiation Checklist. If the information supplied by Zhejiang Zhengda cannot be verified using CBP import data, or is otherwise found to be incorrect or insufficient during the course of this proceeding, the Department may rescind the review or apply adverse facts available pursuant to section 776 of the Act, depending upon the facts on record.

The Department intends to issue the preliminary results of this NSR no later than 180 days from the date of initiation, and the final results no later than 90 days from the issuance of the preliminary results.[4] It is the Department's usual practice, in cases involving non-market economies, to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate provide evidence of *de jure* and *de facto* absence of government control over the company's export activities. Accordingly, the Department will issue a questionnaire to Zhejiang Zhengda which will include a section requesting information with regard to Zhejiang Zhengda's export activities for separate rates purposes. The review will proceed if the response provides sufficient indication that Zhejiang Zhengda is not subject to either *de jure* or *de facto* government control with respect to its export of subject merchandise.

The Department will instruct CBP to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise from Zhejiang Zhengda in accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 351.214(e). Because Zhejiang Zhengda certified that it produced and exported the subject merchandise, the Department will apply the bonding privilege to Zhejiang Zhengda only for subject merchandise which Zhejiang Zhengda produced and exported.

To assist in its analysis of the *bona fides* of Zhejiang Zhengda's sales, upon initiation of this new shipper review, the Department will require Zhejiang Zhengda to submit on an ongoing basis complete transaction information concerning any sales of subject merchandise to the United States that were made subsequent to the POR.

Interested parties requiring access to proprietary information in this NSR should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 19 CFR 351.306. This initiation and notice are in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 19 CFR 351.221(c)(1)(i).

Dated: July 27, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–18889 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–DS–P

[4] *See* section 751(a)(2)(B)(iv) of the Act.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–601]

Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Initiation of Antidumping Duty New Shipper Review

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

SUMMARY: The Department of Commerce (''Department'') has determined that a request for a new shipper review (''NSR'') of the antidumping duty order on tapered roller bearings from the People's Republic of China (''PRC'') meets the statutory and regulatory requirements for initiation. The period of review (''POR'') for this NSR is June 1, 2011, through May 31, 2012.

DATES: *Effective Date:* August 1, 2012.

FOR FURTHER INFORMATION CONTACT: Demitri Kalogeropoulos, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–2623.

SUPPLEMENTARY INFORMATION:

Background

The notice announcing the antidumping duty order on tapered roller bearings from the PRC was published in the **Federal Register** on June 15, 1987.[1] On June 28, 2012, pursuant to section 751(a)(2)(B)(i) of the Tariff Act of 1930, as amended (''Act''), and 19 CFR 351.214(b), the Department received a NSR request from Haining Automann Parts Co., Ltd. (''Haining Automann''). Haining Automann's request was made in June 2012, which is the anniversary month of the *Order.*[2]

In its submission, Haining Automann certified that it is the exporter and producer of the subject merchandise upon which the request was based. Pursuant to section 751(a)(2)(B)(i)(I) of the Act and 19 CFR 351.214(b)(2)(i), Haining Automann certified that it did not export tapered roller bearings to the United States during the period of investigation (''POI''). In addition, pursuant to section 751(a)(2)(B)(i)(II) of the Act and 19 CFR 351.214(b)(2)(iii)(A), Haining Automann certified that, since the initiation of the investigation, it has not been affiliated with a PRC exporter or producer who exported tapered roller bearings to the United States during the POI, including those not individually examined during the investigation. As required by 19 CFR 351.214(b)(2)(iii)(B), Haining Automann also certified that its export activities were not controlled by the central government of the PRC.

In addition to the certifications described above, pursuant to 19 CFR 351.214(b)(2)(iv), Haining Automann submitted documentation establishing the following: (1) The date on which Haining Automann first shipped tapered roller bearings for export to the United States and the date on which the tapered roller bearings were first entered, or withdrawn from warehouse, for consumption; (2) the volume of its first shipment; and (3) the date of its first sale to an unaffiliated customer in the United States.

The Department conducted U.S. Customs and Border Protection (''CBP'') database queries in an attempt to confirm that Haining Automann's shipments of subject merchandise had

[1] *See Antidumping Duty Order; Tapered Roller Bearingsand Parts Thereof, Finished or Unfinished, From the People's Republic of China,* 52 FR 22667 (June 15, 1987) (''*Order*'').

[2] *See* 19 CFR 351.214(d).

entered the United States for consumption and that liquidation of such entries had been properly suspended for antidumping duties.[3] The Department also examined whether the CBP data confirm that such entries were made during the NSR POR. The Department has identified some inconsistencies between the information provided by Haining Automann and the CBP data currently on the record. After the initiation of this NSR, the Department intends to place additional CBP data on the record, and, if necessary, request additional information from Haining Automann. Due to the proprietary nature of this information, please refer to the Memorandum to the File from John Ditore, ''Initiation of AD New Shipper Review: Tapered Roller Bearings and Parts Thereof from the People's Republic of China (A–570–601)'' dated concurrently with this notice (''Initiation Checklist'').

Period of Review

In accordance with 19 CFR 351.214(g)(1)(i)(A), the POR for a NSR initiated in the month immediately following the anniversary month will be the twelve month period immediately preceding the anniversary month. Therefore, the POR for this NSR is June 1, 2011, through May 31, 2012. Based on the information provided by Haining Automann, the sales and entries into the United States of subject merchandise produced and exported by Haining Automann occurred during this twelve month POR.

Initiation of New Shipper Review

Pursuant to section 751(a)(2)(B) of the Act and 19 CFR 351.214(b), the Department finds that the request submitted by Haining Automann meets the threshold requirements for initiation of a NSR for the shipment of tapered roller bearings from the PRC produced and exported by Haining Automann.[4] If the information supplied by Haining Automann cannot be verified using CBP import data, or is otherwise found to be incorrect or insufficient during the course of this proceeding, the Department may rescind the review or apply adverse facts available pursuant to section 776 of the Act, depending upon the facts on record.

The Department intends to issue the preliminary results of this NSR no later than 180 days from the date of initiation, and the final results no later than 90 days from the issuance of the preliminary results.[5]

It is the Department's usual practice, in cases involving non-market economies, to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate provide evidence of *de jure* and *de facto* absence of government control over the company's export activities. Accordingly, the Department will issue a questionnaire to Haining Automann which will include a section requesting information with regard to Haining Automann's export activities for separate rates purposes. The review will proceed if the response provides sufficient indication that Haining Automann is not subject to either *de jure* or *de facto* government control with respect to its export of subject merchandise.

The Department will instruct CBP to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise from Haining Automann in accordance with section 751(a)(2)(B)(iii) of the Act and 19 CFR 351.214(e). Because Haining Automann certified that it produced and exported the subject merchandise, the Department will apply the bonding privilege to Haining Automann only for subject merchandise which Haining Automann produced and exported.

To assist in its analysis of the *bona fides* of Haining Automann's sales, upon initiation of this new shipper review, the Department will require Haining Automann to submit on an ongoing basis complete transaction information concerning any sales of subject merchandise to the United States that were made subsequent to the POR.

Interested parties requiring access to proprietary information in this NSR should submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 19 CFR 351.306. This initiation and notice are in accordance with section 751(a)(2)(B) of the Act and 19 CFR 351.214 and 19 CFR 351.221(c)(1)(i).

Dated: July 27, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–18890 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–DS–P

[3] *See* July 26, 2012 memorandum to the file regarding CBP data.

[4] *See* Initiation Checklist.

[5] *See* section 751(a)(2)(B)(iv) of the Act.

DEPARTMENT OF COMMERCE

International Trade Administration

Initiation of Five-Year (''Sunset'') Review and Correction

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

SUMMARY: In accordance with section 751(c) of the Tariff Act of 1930, as amended (''the Act''), the Department of Commerce (''the Department'') is automatically initiating a five-year review (''Sunset Review'') of the antidumping duty orders listed below. The International Trade Commission (''the Commission'') is publishing concurrently with this notice its notice of *Institution of Five-Year Review* which covers the same orders.

DATES: *Effective Date:* August 1, 2012.

FOR FURTHER INFORMATION CONTACT: The Department official identified in the *Initiation of Review* section below at AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, DC 20230. For information from the Commission contact Mary Messer, Office of Investigations, U.S. International Trade Commission at (202) 205–3193.

SUPPLEMENTARY INFORMATION:

Background

The Department's procedures for the conduct of Sunset Reviews are set forth in its *Procedures for Conducting Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders,* 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005). Guidance on methodological or analytical issues relevant to the Department's conduct of Sunset Reviews is set forth in the Department's Policy Bulletin 98.3 –*Policies Regarding the Conduct of Five-Year (''Sunset'') Reviews of Antidumping and Countervailing Duty Orders: Policy Bulletin,* 63 FR 18871 (April 16, 1998), and in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14, 2012).

Correction of Case Number From Previous Sunset Review Initiation Notice

In the previous sunset initiation notice,[1] we inadvertently listed the

[1] *See Initiation of Five-Year (''Sunset'') Review,* 77 FR 39218 (July 2, 2012).

incorrect Department case number for the antidumping duty order on steel concrete reinforcing bars from Latvia. The correct Department case number for the antidumping duty order on steel concrete reinforcing bars from Latvia is A–449–804.

Initiation of Review

In accordance with 19 CFR 351.218(c), we are initiating the Sunset Review of the following antidumping duty orders:

DOC case No.	ITC case No.	Country	Product	Department contact
A–357–818	731–TA–1105	Argentina	Lemon Juice (1st Review)	Sally Gannon, (202) 482–0162
A–201–835	731–TA–1106	Mexico	Lemon Juice (1st Review)	Sally Gannon, (202) 482–0162

Filing Information

As a courtesy, we are making information related to Sunset proceedings, including copies of the pertinent statue and Department's regulations, the Department schedule for Sunset Reviews, a listing of past revocations and continuations, and current service lists, available to the public on the Department's Internet Web site at the following address: ''*http://ia.ita.doc.gov/sunset/.*'' All submissions in these Sunset Reviews must be filed in accordance with the Department's regulations regarding format, translation, and service of documents. These rules, including electronic filing requirements via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''), can be found at 19 CFR 351.303. *See also Antidumping and Countervailing Duty Proceedings: Electronic Filling Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011).

This notice serves as a reminder that any party submitting factual information in an AD/CVD proceeding must certify to the accuracy and completeness of that information. *See* section 782(b) of the Act. Parties are hereby reminded that revised certification requirements are in effect for company/government officials as well as their representatives in all AD/CVD investigations or proceedings initiated on or after March 14, 2011. *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule,* 76 FR 7491 (February 10, 2011) (''*Interim Final Rule*'') amending 19 CFR 351.303(g)(1) and (2) and supplemented by *Certification of Factual Information To Import Administration During Antidumping and Countervailing Duty Proceedings: Supplemental Interim Final Rule,* 76 FR 54697 (September 2, 2011). The formats for the revised certifications are provided at the end of the *Interim Final Rule.* The Department intends to reject factual submissions if the submitting party does not comply with the revised certification requirements.

Pursuant to 19 CFR 351.103(d), the Department will maintain and make available a service list for these proceedings. To facilitate the timely preparation of the service list(s), it is requested that those seeking recognition as interested parties to a proceeding contact the Department in writing within 10 days of the publication of the Notice of Initiation.

Because deadlines in Sunset Reviews can be very short, we urge interested parties to apply for access to proprietary information under administrative protective order (''APO'') immediately following publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The Department's regulations on submission of proprietary information and eligibility to receive access to business proprietary information under APO can be found at 19 CFR 351.304–306.

Information Required From Interested Parties

Domestic interested parties defined in section 771(9)(C), (D), (E), (F), and (G) of the Act and 19 CFR 351.102(b) wishing to participate in a Sunset Review must respond not later than 15 days after the date of publication in the **Federal Register** of this notice of initiation by filing a notice of intent to participate. The required contents of the notice of intent to participate are set forth at 19 CFR 351.218(d)(1)(ii). In accordance with the Department's regulations, if we do not receive a notice of intent to participate from at least one domestic interested party by the 15-day deadline, the Department will automatically revoke the order without further review. *See* 19 CFR 351.218(d)(1)(iii).

If we receive an order-specific notice of intent to participate from a domestic interested party, the Department's regulations provide that all parties wishing to participate in the Sunset Review must file complete substantive responses not later than 30 days after the date of publication in the **Federal Register** of this notice of initiation. The required contents of a substantive response, on an order-specific basis, are set forth at 19 CFR 351.218(d)(3). Note that certain information requirements differ for respondent and domestic parties. Also, note that the Department's information requirements are distinct from the Commission's information requirements. Please consult the Department's regulations for information regarding the Department's conduct of Sunset Reviews.[2] Please consult the Department's regulations at 19 CFR Part 351 for definitions of terms and for other general information concerning antidumping and countervailing duty proceedings at the Department.

This notice of initiation is being published in accordance with section 751(c) of the Act and 19 CFR 351.218 (c).

Dated: July 19, 2012.

Christian Marsh,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2012–18820 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

Proposed Information Collection; Comment Request; Hollings Manufacturing Extension Partnership (HMEP) Program Application Requirements

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing

[2] In comments made on the interim final sunset regulations, a number of parties stated that the proposed five-day period for rebuttals to substantive responses to a notice of initiation was insufficient. This requirement was retained in the final sunset regulations at 19 CFR 351.218(d)(4). As provided in 19 CFR 351.302(b), however, the Department will consider individual requests to extend that five-day deadline based upon a showing of good cause.

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 October 1, 2012.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6625, 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 Diane Henderson at 301–975–5105 or by email at *Diane.Henderson@nist.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The objective of NIST HMEP centers is to enhance productivity, technological performance, and strengthen the global competitiveness of small- and medium-sized U.S. based manufacturing firms.

Manufacturing extension centers are part of the HMEP national system of extension service providers. Currently, the HMEP national system consists of over 400 centers and field offices located throughout the United States and Puerto Rico. Information regarding HMEP and these centers is available on-line at *http://www.nist.gov/mep/.*

The objective of the projects funded under this program is to provide manufacturing extension services to primarily small- and medium-sized manufacturers in the United States. These services are provided through the coordinated efforts of a regionally-based manufacturing extension center and local technology resources.

The focus of a center is to provide those manufacturing extension services required by the small- and medium-sized manufacturers in its service region utilizing the most cost effective, local, leveraged resources for those services. It is not the intent of this program that the centers perform research and development.

This request is for the information collection requirements associated with submission of proposals for NIST HMEP funding. The intent of the collection is to meet statutory requirements for NIST HMEP, as well as compliance with 15 U.S.C. 278k, as implemented in 15 CFR Part 290.

II. Method of Collection

Paper or electronically via *www.grants.gov.*

III. Data

OMB Control Number: 0693–0056.
Form Number: None.
Type of Review: Regular submission
Affected Public: U.S.-based not-for-profit institutions or organizations (universities, state and local governments); consortia of non-profit institutions.
Estimated Number of Respondents: 12.
Estimated Time per Response: 112 hours.
Estimated Total Annual Burden Hours: 1,344.
Estimated Total Annual Cost to Public: $100.

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: July 26, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–18706 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC141

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc South of Humbug Pacific Halibut Workgroup (SHPHW) will hold a conference call to finalize a report summarizing the biological, assessment, monitoring, and allocation history of Pacific halibut in the area south of Humbug Mt.

DATES: The conference call will be held Tuesday, August 15, 2012 from 8 a.m. to 10 a.m.

ADDRESSES: The meeting will be held via conference call, with a listening station provided at the Pacific Council Office, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384, telephone: (503) 820–2280.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Staff Officer, Pacific Council; telephone: (503) 820–2280.

SUPPLEMENTARY INFORMATION: The purpose of the work session is to finalize a report relative to the Pacific Halibut stock assessment, catch apportionment process, and catch monitoring in Area 2A, with the objective of reporting how additional information from south of the Oregon/California border could be integrated into existing processes. The report is scheduled to be presented to the Pacific Council at the September, 2012 Pacific Council meeting in Boise, ID.

Although non-emergency issues not contained in the meeting agenda may come before the SHPHW for discussion, those issues may not be the subject of formal SHPHW action during this meeting. SHPHW action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the SHPHW 's intent to take final action to address the emergency.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: July 27, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–18782 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC033

Marine Mammals; File No. 17157

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

ACTION: Notice; issuance of permit.

SUMMARY: Notice is hereby given that a permit has been issued to Stephen John Trumble, Ph.D., Baylor University, 101 Bagby Ave, Waco, TX 76706 to receive, import and export marine mammal parts for scientific research.

ADDRESSES: The permit and related documents are available for review upon written request or by appointment in the following offices:

Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427–8401; fax (301) 713–0376; and

Southeast Region, NMFS, 263 13th Avenue South, Saint Petersburg, FL 33701; phone (727) 824–5312; fax (727) 824–5309.

FOR FURTHER INFORMATION CONTACT: Laura Morse or Jennifer Skidmore, (301) 427–8401.

SUPPLEMENTARY INFORMATION: On May 21, 2012 notice was published in the **Federal Register** (77 FR 29966) that a request for a permit to import specimens for scientific research had been submitted by the above-named applicant. The requested permit has been issued under the authority of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226).

The permit authorizes the receipt, import and export of up to 25 earplugs each of blue whale (*Balaenoptera musculus*), sei whale (*B. borealis*), minke whale (*B. acutorostrata*), humpback whale (*Megaptera novaeangliae*), and gray whale (*Eschrichtius robustus*) from museums worldwide for analysis. No takes of live animals are authorized. The permit will expire July 17, 2017.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, issuance of this permit was based on a finding that such permit: (1) Was applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) is consistent with the purposes and policies set forth in section 2 of the ESA.

Dated: July 26, 2012.

P. Michael Payne,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2012–18770 Filed 7–31–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF EDUCATION

Notice of Submission for OMB Review; Federal Student Aid; Federal Perkins Loan Program Master Promissory Note

SUMMARY: The Federal Perkins Loan Master Promissory Note (MPN) provides the terms and conditions of the Perkins Loan program and is prepared by the participating eligible institution and signed by the borrower.

DATES: Interested persons are invited to submit comments on or before August 31, 2012.

ADDRESSES: Written comments regarding burden and/or the collection activity requirements should be electronically mailed to *ICDocketMgr@ed.gov* or mailed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* by selecting the ''Browse Pending Collections'' link and by clicking on link number 04850. When you access the information collection, click on ''Download Attachments'' to view. Written requests for information should be addressed to U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Washington, DC 20202–4537. Requests may also be electronically mailed to ICDocketMgr@ed.gov or faxed to 202–401–0920. Please specify the complete title of the information collection and OMB Control Number when making your request.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Federal Perkins Loan Program Master Promissory Note.

OMB Control Number: 1845–0074.

Type of Review: Extension.

Total Estimated Number of Annual Responses: 462,922.

Total Estimated Number of Annual Burden Hours: 231,461.

Abstract: The Higher Education Act of 1965, as amended (HEA) established the Federal Perkins Loan Program (Perkins Loan) which provides low cost Title IV, HEA loans for eligible students to pay the costs of a student's attendance at an eligible institution of higher education. The borrower may receive loans for a single academic year or multiple academic years. The adoption of the MPN in the Perkins Loan Program has simplified the loan process by eliminating the need for institutions to prepare, and students to sign, a promissory note each award year.

Dated: July 26, 2012.

Darrin A. King,

Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–18713 Filed 7–31–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

U.S. Energy Information Administration

Proposed Agency Information Collection

AGENCY: U.S. Energy Information Administration (EIA), Department of Energy (DOE).

ACTION: Agency Information Collection Activities: Proposed Collection; Notice and Request for Comments.

SUMMARY: EIA invites public comment on the proposed collection of information for the new Form EIA–915, ''Monthly Gas Processing and Liquids Report'' that EIA is developing for submission to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1995. This new form would replace Form EIA–64A, *Annual Report of the Origin of Natural Gas Liquids,* and Form EIA–816, *Monthly Natural Gas Liquids Report,* as well as obtain crucial data elements that were lost with the recent termination of the Form EIA–895, *Annual Quantity and Value of Natural Gas Production Report.*

With the implementation of the proposed Form EIA–915, the Form EIA–816 will be terminated on Jan 31, 2013 (after collecting monthly data for December 2012), and Form EIA–64A will be terminated in 2014 (after collecting annual data for 2012).

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Comments regarding this proposed information collection must be received on or before October 1, 2012. If you anticipate difficulty in submitting comments within that period, contact the person listed in the below **ADDRESSES** Section as soon as possible.

ADDRESSES: Written comments may be sent to Jeffrey Little, EI–24, U.S. Energy Information Administration, U.S. Department of Energy, 1000 Independence Avenue SW., Washington, DC 20585, or by fax at (202) 586–4420, or by email at *jeffrey.little@eia.gov.* Alternatively, Mr. Little may be contacted by telephone at (202) 586–6284.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jeffrey Little at the address listed above. The collection instrument and instructions are also available on the internet at: *http://www.eia.gov/survey/form/eia_915/proposed/form.pdf.*

SUPPLEMENTARY INFORMATION: This information collection request contains:

(1) *OMB No.:* NEW;

(2) *Information Collection Request Title:* Monthly Gas Processing and Liquids Report;

(3) *Type of Request:* Proposed collection;

(4) *Purpose:* To improve data collection efficiency, EIA proposes a new collection form that is a combination of the Form EIA–64A, *Annual Report of the Origin of Natural Gas Liquids,* Form EIA–816, *Monthly Natural Gas Liquids Report,* and Form EIA–895, *Annual Quantity and Value of Natural Gas Production Report.* The proposed new Form EIA–915 will collect inlet data on natural gas volumes, the final disposition of all plant products including fuel and non-hydrocarbons, and end-of-month plant liquid stocks from natural gas processing plants and fractionators. The data collected are used to obtain an accurate estimate of production of marketed natural gas, dry natural gas, and natural gas plant liquids by geographic region. A summary of the data will appear in the following EIA publications: *Natural Gas Monthly, Natural Gas Annual, Petroleum Supply Monthly, Monthly Energy Review, Annual Energy Review,* the *Annual Energy Outlook,* and the EIA Web site.

The proposed Form EIA–915 will supply crucial data elements from the terminated EIA–895, *Annual Quantity and Value of Natural Gas Production Report,* and Form EIA–64A, *Annual Report of the Origin of Natural Gas Liquids,* and Form EIA–816, *Monthly Natural Gas Liquids Report.* The Form EIA–895 was designed to obtain monthly information on an annual basis from the appropriate state agencies that collect data related to natural gas production. The decision to terminate the EIA–895 form was due to data quality reporting: given that the EIA–895 form was a voluntary survey and the data was requested from state agencies, issues such as the disparity in the quality of the data and the difficulty enforcing the survey became increasingly problematic. Some of the examples of data quality and enforcement issues include: state data collection of natural gas production volumes were often not complete on the due date (90 days after the end of the report year: March 31) and remained incomplete for as many as 14 months past the deadline; components of natural gas gross and marketed production and natural gas lease fuel use that were requested on the form were not collected by all states; comparisons among components collected and published on the form were difficult to compare because states and EIA definitions were not identical; and EIA cannot legally require states to submit a voluntary form.

To avoid the unacceptable loss of data from the termination of the Form EIA–895, the new Form EIA–915 is proposed to include information from this form and to also efficiently consolidate the Forms EIA–64A and EIA–816. The EIA–915 form will collect data from the universe of facilities that extract liquid hydrocarbons from a natural gas stream (i.e., natural gas processing plants) and/or separate a liquid hydrocarbon stream into its component products (i.e., fractionators). In addition, gas sweetening plants (plants that extract CO_2, H_2S, sulfur, etc.) will be required to submit this form. Approximately 550 respondents will be included in the sample survey frame for the Form EIA–915.

With the forms consolidated, EIA will provide monthly marketed and dry natural gas production values for Texas, Louisiana, Oklahoma, Wyoming, the Federal offshore Gulf of Mexico, Other States, and Alaska. Monthly Gross production values for these EIA-defined geographical regions would continue to be populated from the EIA–914, *Monthly Natural Gas Production Report.* On an annual basis EIA will provide gross, marketed, and dry natural gas production values for the 31 producing states. Information currently collected on forms EIA–64A and EIA–816 will be available from Form EIA–915.

The information requested on the Form EIA–915 must be provided on a monthly basis within 20 days after the end of the report period (e.g., the form EIA–915 covering the January 2013 report period must be received by February 20, 2013). When the 20th day of a calendar month falls on a weekend or national holiday, the reports are to be filed by the next business day. Previously, the information requested on the Form EIA–895 was due by the

90th day after the end of the report year (March 31), Form EIA 64A information was due by April 11 following the end of the calendar year, and Form 816 information was due within 20 days of the end of the report period.

Pending authorization to administer the proposed new form, EIA has terminated the EIA–895. Thus, the following items will no longer be collected: gas well gas, oil well gas, coalbed methane wells, shale gas, gross withdrawals, repressured gas, natural gas vented and flared, nonhydrocarbon gases removed, marketed production, natural gas used as fuel on leases, wellhead price, and number of producing gas wells. However, through the EIA–914 and the new form EIA–915 the following products will be made accessible with caveats:

- Total gross withdrawals: The monthly data will be supplied from the EIA–914
- Total dry production: The monthly data will be provided by a calculation from the EIA–914 and EIA–915 as follows:
  - Form EIA–914 will provide natural gas lease production
  - Form EIA–915 will provide the total plant intake and natural gas sent to transmission lines (pipelines)
  - The actual value of the dry natural gas production will have two steps:
    1. The difference of subtracting natural gas lease production from the total plant inlet will result in pipeline quality gas that does not require processing
    2. The value of total natural gas sent to a transmission lines (pipelines) will be added to pipeline quality gas resulting in dry production
- Total marketed production is calculated by adding together the dry production value and the extraction loss value

Better quality data should result in the new form, because dry production will be calculated as a result of metered production from the EIA–915 and EIA–914 (Note, the EIA–914 value is estimated from a statistical sample). All data elements collected from the Form EIA–816 are to be transferred to the Form EIA–915. Form EIA–64A elements will also be collected through the Form EIA–915 with the addition of data elements such as:

Volume of Natural Gas Intake Processed

- Gas Received from Operators and Gas Gatherers Within a Processor's State Boundaries
- Gas Received From Other Processing Plants (provide the plant and state where the gas was previously processed)

Disposition of Plant Intake

- Plant Outlet (from plant meters)
- Extraction Loss
- Non-Hydrocarbons
- Vented and Flared Hydrocarbon Gas from the Processing Plant

Disposition of Plant Outlet

- Repressuring/Cycled
- Returned For Lease Fuel
- Natural Gas Sent to Fractionators for Fuel Use
- Delivered To Other Process Plant
- Transmission Line

Form EIA–915 is mandatory and must be completed by the operators of ALL facilities that extract liquid hydrocarbons from a natural gas stream (natural gas processing plants) and/or separate a liquid hydrocarbon stream into its component products (fractionators). In addition, gas sweetening plants (plants that extract CO_2, H_2S, sulfur, etc.) will be required to submit this form.

EIA proposes that company-identifiable data from Form EIA–915 be released to the public in order to meet increasing data user needs for more company-level data. (Currently, 10 states release the gas plant data for free, while Bentek Energy releases the data for a fee.) EIA also proposes that the survey frame administrative data (e.g., company's name, county) from the EIA–915 be available to the public. This information can currently be obtained free on 10 states agencies' Web pages, the Office of Natural Resources Revenue, or for a fee from Bentek Energy and Sulpetro Inc.;

(5) *Annual Estimated Number of Respondents:* 550 monthly respondents;

(6) *Annual Estimated Number of Total Responses:* 6,660 responses on an annual basis;

(7) *Annual Estimated Number of Burden Hours:* 13,200;

(8) *Annual Estimated Reporting and Recordkeeping Cost Burden:* No additional costs beyond burden hours are anticipated from the proposed new collection instrument.

Statutory Authority: Section 13(b) of the Federal Energy Administration Act of 1974, Pub. L. 93–275, codified at 15 U.S.C. 772(b).

Issued in Washington, DC, July 26, 2012.

Richard Reeves,

Acting Director, Office of Survey Development and Statistical Integration, U. S. Energy Information Administration.

[FR Doc. 2012–18751 Filed 7–31–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 14406–000]

San Francisco Public Utilities Commission; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, Protests, Recommendations, and Terms and Conditions

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Type of Application:* Conduit Exemption.

b. *Project No.:* 14406–000.

c. *Date filed*: May 9, 2012, and supplemented on July 11 and July 25, 2012.

d. *Applicant:* San Francisco Public Utilities Commission (San Francisco PUC).

e. *Name of Project:* University Mound Reservoir Renewable Hydroelectric Project.

f. *Location:* The proposed University Mound Reservoir Renewable Hydroelectric Project would be located adjacent to the existing McLaren Pumping Plant which is located at the Northwest corner of the intersection at Bowdoin Street and Woosley Street in San Francisco, California. The project would use the existing Crystal Springs Pipelines (CSPL1 and CSPL2), which ultimately deliver water from the San Francisco Public Utilities Commission's Water Supply and Treatment Divisions transmission system (located in San Mateo County on the San Francisco peninsula) to the University Mound Reservoir south and north basins (located in San Francisco). The land on which all the project structures are located is owned by the applicant.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791a–825r.

h. *Applicant Contact:* Mr. John Doyle, Manager Energy Infrastructure, Planning and Development, San Francisco Public Utilities Commission, Power Enterprise Division, 1155 Market Street, 4th Floor, San Francisco, California 94103; telephone (415) 554–0725.

i. *FERC Contact:* Kim Carter, telephone (202) 502–6486, and email address *Kim.Carter@ferc.gov.*

j. *Status of Environmental Analysis:* This application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

k. Deadline for filing responsive documents: Due to the small size of the proposed project, as wells as the resource agency consultation letters filed with the application, the 60-day timeframe specified in 18 CFR 4.43(b) for filing all comments, motions to intervene, protests, recommendations, terms and conditions, and prescriptions is shortened to 30 days from the issuance date of this notice. All reply comments filed in response to comments submitted by any resource agency, Indian tribe, or person, must be filed with the Commission within 45 days from the issuance date of this notice.

Comments, protests, and interventions may be filed electronically via the Internet in lieu of paper; see 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person in the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Project:* The proposed University Mound Reservoir Renewable Hydroelectric Project would consist of: (1) A new intake on the San Francisco Public Utilities Commission's existing 42-inch-diameter Crystal Springs Pipeline No. 1, connecting to a new 24-inch-diameter, 68-feet-long intake pipeline; (2) a new intake on the San Francisco Public Utilities Commission's existing 60-inch-diameter Crystal Springs Pipeline No. 2, connecting to a new 36-inch-diameter, approximately 40-feet-long intake pipeline; (3) a new, 36.5 feet-wide by 41.5 feet-long, 1-story Mission Style powerhouse, containing 3 turbine/generator units, each rated 80.3 kW, for a total installed capacity of 240.9 kW; (4) a new 36-inch-diameter, 40-feet-long pipeline that discharges to the 60-inch-diameter Crystal Springs Pipeline No. 2; (5) a new 24-inch-diameter, 67-feet-long pipeline that discharges to the 42-inch-diameter Crystal Springs Pipeline No. 1; and (6) appurtenant facilities. The project would have an estimated annual generation of 1,586,494 kilowatt-hours.

m. This filing is available for review and reproduction at the Commission in the Public Reference Room, Room 2A, 888 First Street NE., Washington, DC 20426. The filing may also be viewed on the Web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, here P–14406, in the docket number field to access the document. For assistance, call toll-free 1–866–208–3676 or email *FERCOnlineSupport@ferc.gov.* For TTY, call (202) 502–8659. A copy is also available for review and reproduction at the address in item h above.

n. *Development Application*—Any qualified applicant desiring to file a competing application must submit to the Commission, on or before the specified deadline date for the particular application, a competing development application, or a notice of intent to file such an application. Submission of a timely notice of intent allows an interested person to file the competing development application no later than 120 days after the specified deadline date for the particular application. Applications for preliminary permits will not be accepted in response to this notice.

o. *Notice of Intent* — A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit a competing development application. A notice of intent must be served on the applicant(s) named in this public notice.

p. *Protests or Motions To Intervene*—Anyone may submit a protest or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, and 385.214. In determining the appropriate action to take, the Commission will consider all protests filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any protests or motions to intervene must be received on or before the specified deadline date for the particular application.

q. All filings must (1) bear in all capital letters the title ''PROTEST'', ''MOTION TO INTERVENE'', ''NOTICE OF INTENT TO FILE COMPETING APPLICATION'', ''COMPETING APPLICATION'', ''COMMENTS'', ''REPLY COMMENTS,'' ''RECOMMENDATIONS,'' ''TERMS AND CONDITIONS,'' or ''PRESCRIPTIONS;'' (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions, or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and eight copies to: The Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Hydropower Administration and Compliance, Office of Energy Projects, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

r. *Waiver of Pre-filing Consultation:* The applicant requested agencies to support the waiver of the Commission's consultation requirements under 18 CFR 4.38(c). In June 2011, the National Park Service and the U.S. Fish and Wildlife Service advised by written correspondence that they do not require further consultation. The Bay Area Regional Water Quality Control Board advised that they had no plans to send comments. The Office of Historic Preservation, U.S. Environmental Protection Agency—Region 9, California Department of Fish and Game, National Marine Fisheries Service, Department of Water Resources Division of Dam Safety, and the California Division of Dam Safety and Inspections were contacted by phone and verbally responded that they will not be replying in writing, nor would they comment on the application. Therefore, we intend to accept the consultation that has occurred on this project during the pre-filing period and we intend to waive pre-filing consultation under section 4.38(c), which requires, among other things, conducting studies requested by resource agencies, and distributing and consulting on a draft exemption application.

Dated: July 26, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18773 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP12–881–000.

Applicants: Gulf South Pipeline Company, LP.

Description: EOG 34687–9 Superseding Amendment to Neg Rate Agmt to be effective 7/1/2012.

Filed Date: 7/24/12.

Accession Number: 20120724–5047.

Comments Due: 5 p.m. ET 8/6/12.

Docket Numbers: RP12–882–000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: Clean Up—LLC and Definitions JUL 2012 to be effective 11/10/2011.

Filed Date: 7/24/12.

Accession Number: 20120724–5107.

Comments Due: 5 p.m. ET 8/6/12.

Docket Numbers: RP12–883–000.

Applicants: Trailblazer Pipeline Company LLC.

Description: 2012–07–24 NC Mieco, CIMA to be effective 7/25/2012.

Filed Date: 7/24/12.

Accession Number: 20120724–5109.

Comments Due: 5 p.m. ET 8/6/12.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, and service can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 25, 2012.

Nathaniel J. Davis, Sr.

Deputy Secretary

[FR Doc. 2012–18677 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL12–88 -000]

Shell Energy North America (US), L.P. v. California Independent System Operator Corporation; Notice of Complaint

Take notice that on July 25, 2012, pursuant to Rule 206 of the Federal Energy Regulatory Commission's (Commission) Rules of Practice and Procedure, 18 CFR 385.206, Shell Energy North America (US), L.P. (Complainant) filed a formal complaint against the California Independent System Operator, Inc. (Respondent) alleging that the imposition of a penalty on Complainant through application of certain provisions of the Respondent's Tariff is unjust and unreasonable.

The Complainant certifies that copies of the complaint were served on the contacts for the Respondent as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5 p.m. Eastern Time on August 14, 2012.

Dated: July 26, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18774 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP12–11–000; CP12–11–001]

Elba Express Company, L.L.C.; Notice of Availability of the Environmental Assessment for the Proposed Hartwell Compressor Station Project

The staff of the Federal Energy Regulatory Commission (FERC or Commission) has prepared an environmental assessment (EA) for the Hartwell Compressor Station Project, proposed by Elba Express Company, L.L.C. (Elba Express) in the above-referenced dockets. Elba Express requests authorization to construct new natural gas facilities in Hart County, Georgia. The Hartwell Compressor Station Project would provide up to 220 million cubic feet per day of natural gas transportation capacity.

The EA assesses the potential environmental effects of the construction and operation of the Hartwell Compressor Station Project in accordance with the requirements of the National Environmental Policy Act (NEPA). The FERC staff concludes that approval of the proposed project, with appropriate mitigating measures, would not constitute a major federal action significantly affecting the quality of the human environment.

Elba Express seeks to amend its authorization in Docket No. CP06–471 for the Elba Express Pipeline Project by proposing to move the previously approved compressor station in Jenkins County, Georgia. Elba Express now proposes to construct the 10,000-horsepower Hartwell Compressor Station on a 30.0-acre site at approximate milepost 186 on Elba Express' pipeline in Hart County, Georgia.

The FERC staff mailed copies of the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; potentially affected landowners and other interested individuals and groups;

newspapers and libraries in the project area; and parties to these proceedings. In addition, the EA is available for public viewing on the FERC's Web site (*www.ferc.gov*) using the eLibrary link. A limited number of copies of the EA are available for distribution and public inspection at: Federal Energy Regulatory Commission, Public Reference Room, 888 First Street NE., Room 2A, Washington, DC 20426, (202) 502–8371.

Any person wishing to comment on the EA may do so. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that the Commission has the opportunity to consider your comments prior to making its decision on this project, it is important that we receive your comments in Washington, DC on or before August 23, 2012.

For your convenience, there are three methods you can use to file your comments to the Commission. In all instances, please reference the project docket number (CP12–11–001) with your submission. The Commission encourages electronic filing of comments and has expert staff available to assist you at (202) 502–8258 or *efiling@ferc.gov.*

(1) You can file your comments electronically using the eComment feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. This is an easy method for submitting brief, text-only comments on a project;

(2) You can also file your comments electronically using the eFiling feature on the Commission's Web site (*www.ferc.gov*) under the link to Documents and Filings. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''eRegister.'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing''; or

(3) You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Any person seeking to become a party to the proceeding must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedures (18 CFR 385.214).[1] Only intervenors have the right to seek rehearing of the Commission's decision. The Commission grants affected landowners and others with environmental concerns intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding which no other party can adequately represent. Simply filing environmental comments will not give you intervenor status, but you do not need intervenor status to have your comments considered.

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search,'' and enter the docket number excluding the last three digits in the Docket Number field (i.e., CP12–11). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Dated: July 24, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18735 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2079–069]

Middle Fork American River Project; Notice of Availability of the Draft Environmental Impact Statement for the Middle Fork American River Hydrolectric Project and Intention To Hold Public Meetings

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission (Commission or FERC) regulations contained in the Code of Federal Regulations (CFR) (18 CFR part 380 [FERC Order No. 486, 52 FR 47897]), the Office of Energy Projects has reviewed the application for license for the Middle Fork American River Hydroelectric Project (FERC No. 2079), located on the Middle Fork of the American and Rubicon Rivers and Duncan and North and South Fork Long Canyon Creeks in Placer and El Dorado Counties, California, and has prepared a draft environmental impact statement (EIS) for the project. The project occupies 3,268 acres of federal lands administered by the U.S. Department of Agriculture—Forest Service.

The draft EIS contains staff's analysis of the applicant's proposal and the alternatives for relicensing the Middle Fork American River Hydroelectric Project. The draft EIS documents the views of governmental agencies, non-governmental organizations, affected Indian tribes, the public, the license applicant, and Commission staff.

A copy of the draft EIS is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov,* using the ''e-Library'' link. Enter the docket number, excluding the last three digits, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

All comments must be filed by Tuesday, October 2, 2012, and should reference Project No. 2079–069. Comments may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site (*http://www.ferc.gov/docs-filing/ferconline.asp*) under the ''eFiling'' link. For a simpler method of submitting text only comments, click on ''Quick Comment.'' For assistance, please contact FERC Online Support. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and eight copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Anyone may intervene in this proceeding based on this draft EIS (18 CFR § 380.10). You must file your

[1] See the previous discussion on the methods for filing comments.

request to intervene as specified above.[1] You do not need intervenor status to have your comments considered.

Commission staff will hold two public meetings for the purpose of receiving comments on the draft EIS. The daytime meeting will focus on resource agency, Indian tribes, and non-governmental organization comments, while the evening meeting is primarily for receiving input from the public. All interested individuals and entities will be invited to attend one or both of the public meetings. A notice detailing the exact date, time, and location of the public meetings will be forthcoming.

For further information, please contact Carolyn Templeton at (202) 502–8785 or at *carolyn.templeton@ferc.gov.*

Dated: July 23, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18733 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

[1] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR10–93–001]

Enogex LLC; Notice of Filing

Take notice that on July 19, 2012, Enogex LLC filed to revise its Storage Statement of Operating Conditions as more fully described in the filing.

Any person desiring to participate in this rate filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the date as indicated below. Anyone filing an intervention or protest must serve a copy of that document on the Applicant. Anyone filing an intervention or protest on or before the intervention or protest date need not serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 7 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on Tuesday, July 31, 2012.

Dated: July 23, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18737 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ12–11–000]

Oncor Electric Delivery Company LLC; Notice of Filing

Take notice that on June 15, 2012, Oncor Electric Delivery Company LLC submitted its tariff filing per 35.28(e): Baseline Tariff Filing to be effective March 2, 2011.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on July 31, 2012.

Dated: July 24, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18736 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RM06–16–000]

North American Electric Reliability Corporation; Notice of Filing

Take notice that on March 16, 2012, the North American Electric Reliability Corporation (NERC) submitted a filing proposing to amend the NERC Glossary Definition by modifying reference to the defined term ''Cascading Outages'' to ''Cascading outages'' within the definition of Interconnection Reliability Operating Limit, approved in the Commission's Final Rule issued December 27, 2007 on NERC's Proposed Facilities Design, Connections and Maintenance Reliability Standards.[1]

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to

[1] *Facilities Design, Connections and Maintenance Reliability Standards,* Order No. 705, 121 FERC ¶ 61,296 (2007).

serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on August 15, 2012.

Dated: July 25, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18705 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. NJ12–12–000]

Oncor Electric Delivery Company LLC; Notice of Filing

Take notice that on June 19, 2012, Oncor Electric Delivery Company LLC submitted its tariff filing per 35.28(e): Oncor Tex-La Tariff Rate Changes effective September 29, 2010 to be effective October 7, 2010.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 14 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on August 2, 2012.

Dated: July 26, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18777 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER12–1633–001]

U.S. Energy Partners, LLC; Supplemental Notice Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding, of U.S. Energy Partners, LLC's application for market-based rate authority, with an accompanying rate schedule, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability is August 2, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above-referenced proceeding(s) are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 26, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18776 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. ER02–2546–000; ER02–2546–001]

CED Rock Springs, Inc.; Supplemental Notice That Revised Market-Based Rate Tariff Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of CED Rock Springs, Inc.'s tariff revision filing, noting that such filing includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214

of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is August 7, 2012.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov*. To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 14 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: July 26, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18775 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. AD12–12–000]

Coordination Between Natural Gas and Electricity Markets; Supplemental Notice of Technical Conference

As announced in the Notices issued on July 5, 2012 [1] and July 17, 2012,[2] the Federal Energy Regulatory Commission (Commission) staff will hold a technical conference on Monday, August 6, 2012, from 9:00 a.m. to approximately 5:30 p.m. to discuss gas-electric coordination issues in the Central region. The agenda and list of roundtable participants for this conference is attached. This conference is free of charge and open to the public. Commission members may participate in the conference.

The Central region technical conference will be held at the following venue: St. Louis, MO, Hilton St. Louis at the Ballpark, 1 South Broadway, St. Louis, MO 63102, USA, Tel (reservations and other information): 1–314–421–1776, 1–877–845–7354 (toll free).

If you have not already done so, those who plan to attend the Central region technical conference are strongly encouraged to complete the registration form located at: *www.ferc.gov/whats-new/registration/nat-gas-elec-mkts-form.asp.* There is no deadline to register to attend the conference. The dress code for the conference will be business casual. The agenda and roundtable participants for the remaining four technical conferences will be issued in supplemental notices at later dates.

The Central region technical conference will not be transcribed. However, there will be a free audiocast of the conference. The audiocast will allow persons to listen to the Central region technical conference, but not participate. Anyone with Internet access who desires to listen to the Central region conference can do so by navigating to *www.ferc.gov's* Calendar of Events and locating the Central region technical conference in the Calendar. The Central region technical conference will contain a link to its audiocast. The Capitol Connection provides technical support for audiocasts and offers the option of listening to the meeting via phone-bridge for a fee. If you have any questions, visit *www.CapitolConnection.org* or call 703–993–3100.[3]

Information on this and the other regional technical conferences will also be posted on the Web site *www.ferc.gov/industries/electric/indus-act/electric-coord.asp,* as well as the Calendar of Events on the Commission's Web site www.ferc.gov. Changes to the agenda or list of roundtable participants for the Central region technical conference, if any, will be posted on the Web site *www.ferc.gov/industries/electric/indus-act/electric-coord.asp* prior to the conference.

Commission conferences are accessible under section 508 of the Rehabilitation Act of 1973. For accessibility accommodations, please send an email to *accessibility@ferc.gov* or call toll free 1–866–208–3372 (voice) or 202–502–8659 (TTY), or send a FAX to 202–208–2106 with the required accommodations.

For more information about this and the other regional technical conferences, please contact:

Pamela Silberstein, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8938, *Pamela.Silberstein@ferc.gov*

Sarah McKinley, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, (202) 502–8004, *Sarah.McKinley@ferc.gov*

Dated: July 24, 2012.

Kimberly D. Bose,

Secretary.

[FR Doc. 2012–18734 Filed 7–31–12; 8:45 am]

BILLING CODE 6717–01–P

[1] Coordination between Natural Gas and Electricity Markets, Docket No. AD12–12–000 (July 5, 2012) (Notice of Technical Conferences) (*http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13023450*); 77 FR 41184 (July 12, 2012) (*http://www.gpo.gov/fdsys/pkg/FR-2012-07-12/pdf/2012-16997.pdf*).

[2] Coordination between Natural Gas and Electricity Markets, Docket No. AD12–12–000 (July 17, 2012) (Supplemental Notice of Technical Conferences) (*http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13029403*).

[3] The audiocast will continue to be available on the Calendar of Events on the Commission's Web site *www.ferc.gov* for three months after the conference.

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2012–0437; FRL–9354–4]

Certain New Chemicals; Receipt and Status Information

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5 of the Toxic Substances Control Act (TSCA) requires

any person who intends to manufacture (defined by statute to include import) a new chemical (i.e., a chemical not on the TSCA Chemical Substances Inventory (TSCA Inventory)) to notify EPA and comply with the statutory provisions pertaining to the manufacture of new chemicals. Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a premanufacture notice (PMN) or an application for a test marketing exemption (TME), and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of notices of commencement (NOC) to manufacture those chemicals. This document, which covers the period from May 29, 2011 to June 15, 2012, and provides the required notice and status report, consists of the PMNs pending or expired, and the NOC to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

DATES: Comments identified by the specific PMN number or TME number, must be received on or before August 31, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPPT–2012–0437, and the specific PMN number or TME number for the chemical related to your comment, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the on-line 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 Bldg., Rm. 6428, 1201 Constitution Ave. NW., Washington, DC. 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: EPA's policy is that all comments received will be included in the docket without change and may be made available on-line 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:* Bernice Mudd, Information Management Division (7407M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8951; fax number: (202) 564–8955; email address: *mudd.bernice@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. General Information

A. Does this action apply to me?

This action is directed to the public in general. As such, the Agency has not attempted to describe the specific entities that this action may apply to. Although others may be affected, this action applies directly to the submitter of the PMNs addressed in this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. What should I consider as I prepare my comments for EPA?

1. *Submitting CBI.* Do not submit this information to EPA through regulations.gov or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When submitting comments, remember to:

i. Identify the document by docket ID number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions. The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at

your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns and suggest alternatives.

vii. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

viii. Make sure to submit your comments by the comment period deadline identified.

II. Why is EPA taking this action?

EPA classifies a chemical substance as either an ''existing'' chemical or a ''new'' chemical. Any chemical substance that is not on EPA's TSCA Inventory is classified as a ''new chemical,'' while those that are on the TSCA Inventory are classified as an ''existing chemical.'' For more information about the TSCA Inventory go to: *http://www.epa.gov/opptintr/newchems/pubs/inventory.htm.* Anyone who plans to manufacture or import a new chemical substance for a non-exempt commercial purpose is required by TSCA section 5 to provide EPA with a PMN, before initiating the activity. Section 5(h)(1) of TSCA authorizes EPA to allow persons, upon application, to manufacture (includes import) or process a new chemical substance, or a chemical substance subject to a significant new use rule (SNUR) issued under TSCA section 5(a), for ''test marketing'' purposes, which is referred to as a test marketing exemption, or TME. For more information about the requirements applicable to a new chemical go to: *http://ww.epa.gov/opt/newchems.*

Under TSCA sections 5(d)(2) and 5(d)(3), EPA is required to publish in the **Federal Register** a notice of receipt of a PMN or an application for a TME and to publish in the **Federal Register** periodic status reports on the new chemicals under review and the receipt of NOCs to manufacture those chemicals. This status report, which covers the period from May 29, 2012 to June 15, 2012, consists of the PMNs pending or expired, and the NOCs to manufacture a new chemical that the Agency has received under TSCA section 5 during this time period.

III. Receipt and Status Reports

In Table I. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the PMNs received by EPA during this period: The EPA case number assigned to the PMN, the date the PMN was received by EPA, the projected end date for EPA's review of the PMN, the submitting manufacturer/importer, the potential uses identified by the manufacturer/importer in the PMN, and the chemical identity.

TABLE I—31 PMNS RECEIVED FROM MAY 29, 2012 TO JUNE 15, 2012

Case No.	Received date	Projected notice end date	Manufacturer/ Importer	Use	Chemical
P–12–0373	05/25/2012	08/22/2012	CBI	(G) Abrasion resistant, formable dual-cure laquer for screen printing.	(G) 1,4-butanediol, polymer with substituted alkane and substituted methylene biscarbomonocycle 2-hydroxyalkyl acrylate-blocked.
P–12–0374	05/25/2012	08/22/2012	CBI	(G) A component in paints/coatings- function as a dispersing agent/stabilizer.	(G) Quaternary ammonium compound.
P–12–0375	05/29/2012	08/26/2012	CBI	(G) Water treatment product for cooling water.	(G) Alkenedioic acid (2*Z*)-, sodium salt (1:1), polymer with sodium phosphinate (1:1), hydrolyzed.
P–12–0376	05/29/2012	08/26/2012	CBI	(G) Lubricant additive	(G) 2,5-furandione, polymer with ethane and 1-propene, and substituted aryl amines.
P–12–0377	05/29/2012	08/26/2012	CBI	(G) Catalyst for chemical industry.	(G) Mixed metallic oxides.
P–12–0378	05/29/2012	08/26/2012	CBI	(G) The new substance is intended for use as a raw material for industrial waterborne coating applications.	(G) Diacrylate polymer with alkane esterdiol, alkane diol, alkane acid diol and diisocyanates.
P–12–0379	05/29/2012	08/26/2012	CBI	(G) Destructive use	(G) Alkyl zinc halide.
P–12–0380	06/01/2012	08/29/2012	CBI	(G) The PMN substance is used as plastic additive. It is imported in pigment formulation to be incorporated into plastic parts in concentration range 0.1–2%.	(G) Monoazo compound.
P–12–0381	05/30/2012	08/27/2012	3M Company	(G) Curative	(G) Amido amine polyether polymer.
P–12–0382	06/05/2012	09/02/2012	CBI	(G) Open, non-dispersive use in printing applications and a dispersive use in consumer products.	(G) Alkenes.
P–12–0383	06/05/2012	09/02/2012	CBI	(G) Open, non-dispersive use in printing applications and a dispersive use in consumer products.	(G) Alkanes.

TABLE I—31 PMNS RECEIVED FROM MAY 29, 2012 TO JUNE 15, 2012—Continued

Case No.	Received date	Projected notice end date	Manufacturer/ Importer	Use	Chemical
P–12–0384	06/07/2012	09/04/2012	Royal adhesives and sealants.	(S) Crosslinking agent for isocyanate-tipped resins used as adhesives and sealants.	(G) Secondary amine-terminated polyether triol.
P–12–0385	06/08/2012	09/05/2012	CBI	(G) Coating for plastics	(G) Lightly branched polyester resin salt.
P–12–0386	06/08/2012	09/05/2012	CBI	(G) Coating for plastics	(G) Lightly branched polyester resin salt.
P–12–0387	06/11/2012	09/08/2012	CBI	(G) Resin for composite manufacture.	(G) Modified polyester.
P–12–0388	06/11/2012	09/08/2012	CBI	(G) Resin for refinish automotive coatings.	(G) Methacrylate, acrylate, styrene, hydroxy & acid functional acrylic copolymer.
P–12–0389	06/11/2012	09/08/2012	CBI	(G) Resin for refinish automotive coatings.	(G) Methacrylate, acrylate, styrene, hydroxy & acid functional acrylic copolymer.
P–12–0390	06/11/2012	09/08/2012	CBI	(G) Resin for refinish automotive coatings.	(G) Methacrylate, acrylate, styrene, hydroxy & acid functional acrylic copolymer.
P–12–0391	06/11/2012	09/08/2012	CBI	(G) Resin for refinish automotive coatings.	(G) Methacrylate, acrylate, styrene, hydroxy & acid functional acrylic copolymer.
P–12–0392	06/11/2012	09/08/2012	CBI	(G) Fragrance material for highly dispersive use.	(G) Mix of isomers of substituted cyclohexyl carboxaldehyde.
P–12–0393	06/11/2012	09/08/2012	Lubrigreen Biosynthetics.	(G) Lubricant base oil	(S) Fatty acids, C_{8-18} and C_{18}-unsaturated., reaction products with isomerized oleic acid homopolymer 2-propylheptyl ester.
P–12–0394	06/11/2012	09/08/2012	Lubrigreen Biosynthetics.	(G) Lubricant base oil	(S) Fatty acids, coco, reaction products with isomerized oleic acid homopolymer 2-propylheptyl ester.
P–12–0395	06/11/2012	09/08/2012	Lubrigreen Biosynthetics.	(G) Lubricant base oil	(S) 9-octadecenoic acid (9*Z*)-, homopolymer, 2-propylheptyl ester, isomerized.
P–12–0396	06/11/2012	09/08/2012	CBI	(S) Polymer for flexographic and gravure lamination inks.	(G) Solvent-based urethane dispersion.
P–12–0397	06/12/2012	09/09/2012	Cray Valley USA, LLC.	(S) Reinforcing additive in polyolefins.	(S) 3-phenyl-2-propenoic acid, zinc salt (2:1).
P–12–0398	06/12/2012	09/09/2012	Sasol North America.	(S) Lubricant in special chain oils for conveyor belts.	(S) 1,2,4-benzenetricarboxylic acid, mixed lauryl and octyl triesters.
P–12–0399	06/12/2012	09/09/2012	CBI	(G) Paper treatment	(G) Perfluoroalkylethyl methacrylate copolymer, sodium salt.
P–12–0400	06/12/2012	09/09/2012	CBI	(G) Coating for beverage cans.	(G) Neutralized epoxy phosphate.
P–12–0401	06/12/2012	09/09/2012	CBI	(G) External can coating	(G) Water reducible polyester resin.
P–12–0402	06/13/2012	09/10/2012	CBI	(G) Pigment formulation additive.	(S) 2-oxepanone, polymer with aziridine, dodecanoate (ester).
P–12–0403	05/30/2012	08/27/2012	CBI	(G) Coating for plastics	(G) Aqueous polyester polyurethane dispersion.

In Table II. of this unit, EPA provides the following information (to the extent that such information is not claimed as CBI) on the NOCs received by EPA during this period: The EPA case number assigned to the NOC, the date the NOC was received by EPA, the projected end date for EPA's review of the NOC, and chemical identity.

TABLE II—26 NOCS RECEIVED FROM MAY 29, 2012 TO JUNE 15, 2012

Case No.	Received date	Commencement notice end date	Chemical
P–06–0726	06/15/2012	05/31/2012	(G) Cyclical acid, polymer with isocyanate, diols, diacids, alkanolamine, amine salt.
P–07–0721	06/07/2012	05/21/2012	(S) 1,3-cyclohexadiene-1-carboxylic acid, 4,6,6-trimethyl-, ethyl ester.
P–08–0355	05/30/2012	05/25/2012	(G) Polymer of alkanedioic acid and alkane diamine.
P–08–0638	05/31/2012	05/16/2012	(G) Mixed titanate.

TABLE II—26 NOCS RECEIVED FROM MAY 29, 2012 TO JUNE 15, 2012—Continued

Case No.	Received date	Commencement notice end date	Chemical
P–08–0639	05/31/2012	05/16/2012	(G) Mixed titanate.
P–09–0398	06/01/2012	05/14/2012	(G) Polyitaconic acid.
P–10–0135	05/25/2012	05/23/2012	(G) Fluoroketone.
P–10–0462	06/14/2012	06/07/2012	(G) Isocyanate functional polyester urethane polymer.
P–11–0435	06/14/2012	06/08/2012	(G) Alkoxylated amine derivative.
P–11–0436	06/15/2012	06/11/2012	(G) Polyether sulfate salt derivative.
P–11–0456	06/06/2012	05/15/2012	(G) Thermoset acrylic polymer.
P–11–0466	06/15/2012	06/06/2012	(G) Alkoxylated amine derivative.
P–11–0508	06/05/2012	05/07/2012	(G) Acrylic polymer.
P–11–0561	06/06/2012	05/18/2012	(G) Tetrafluoroethylene chlorotrifluoroethylene copolymer.
P–11–0623	06/01/2012	05/31/2012	(G) Heteromonocycle, homopolymer, disubstituted carbomonocycle, substituted alkyl ester.
P–11–0629	06/11/2012	04/19/2012	(G) Carbodiimide crosslinker.
P–11–0646	05/30/2012	04/30/2012	(G) Perfluoroalkylethyl methacrylate copolymer.
P–11–0655	06/13/2012	06/11/2012	(G) Aliphatic epoxy acrylate.
P–12–0019	06/08/2012	06/05/2012	(S) Starch carboxymethyl 2-hydroxypropyl ether.
P–12–0072	06/12/2012	05/19/2012	(G) Quaternary ammonium compound.
P–12–0103	05/25/2012	04/30/2012	(G) Alkene-substituted fatty acid methyl ester polymer.
P–12–0135	06/04/2012	05/05/2012	(G) Epoxy amine polymer.
P–12–0151	06/01/2012	05/04/2012	(G) Glycol substituted bicyclic olefin.
P–12–0157	06/12/2012	05/31/2012	(G) Acrylic copolymer.
P–12–0221	06/06/2012	06/04/2012	(G) Acrylic polymer.
P–96–0550	06/14/2012	06/12/2012	(G) Metallo, dihydro hydroxy, hydroxyethylsulfonyl, alkylether, azo, sulfo, polycarbocycle, substituted heterocycle, carboxylate, salt.

If you are interested in information that is not included in these tables, you may contact EPA as described in Unit II. to access additional non-CBI information that may be available.

List of Subjects

Environmental protection, Chemicals, Hazardous substances, Imports, Notice of commencement, Premanufacturer, Reporting and recordkeeping requirements, Test marketing exemptions.

Dated: July 10, 2012.

Chandler Sirmons,

Acting Director, Information Management Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2012–18654 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9707–9]

Notification of Two Public Teleconferences of the Science Advisory Board; Environmental Economics Advisory Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announces two public teleconferences of the SAB Environmental Economics Advisory Committee to discuss its draft review of EPA's White Paper ''Retrospective Study of the Costs of EPA Regulations: An Interim Report'' (March 2012 draft).

DATES: The public teleconferences will be held on Friday, September 7, 2012 from 11 a.m. to 3 p.m. (Eastern Daylight Time) and Friday, November 2, 2012 from 11 a.m. to 3 p.m. (Eastern Daylight Time).

ADDRESSES: The teleconferences will be conducted by telephone only.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the meeting may contact Dr. Holly Stallworth, Designated Federal Officer (DFO), EPA Science Advisory Board (1400R), U.S. Environmental Protection Agency, 1300 Pennsylvania Avenue NW., Washington, DC 20460; via telephone/voice mail (202) 564–2073; fax (202) 565–2098; or email at *stallworth.holly@epa.gov*. General information concerning the SAB can be found on the SAB Web site at *http://www.epa.gov/sab*.

SUPPLEMENTARY INFORMATION:

Background: Pursuant to the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App., notice is hereby given that the SAB Environmental Economics Advisory Committee (EEAC) will hold public teleconference to discuss its draft report reviewing the EPA report ''Retrospective Study of the Costs of EPA Regulations: An Interim Report'' (March 2012 draft). The SAB was established pursuant to 42 U.S.C. 4365 to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under FACA. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies.

EPA's white paper ''Retrospective Study of the Costs of EPA Regulations: An Interim Report'' (March 2012 draft) summarizes EPA's initial findings from a small number of pilot case studies that attempt to evaluate the costs of EPA's regulations after they were implemented (ex post). To improve future benefit-cost analyses, EPA is seeking to compare its predictions of costs (ex ante costs) with actual (ex post) costs and, if they differ substantially, to understand why. EPA has requested the SAB's review of its approach to assessing ex post costs as detailed in its draft paper. Additional background on this SAB EEAC review and announcement of two previous teleconferences is provided in 77 FR 17475–17476. The most current SAB EEAC draft report will be posted on the SAB Web site prior to each teleconference. These draft reports, meeting agendas and any other meeting materials may be found at *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/Retrospective%20Cost%20Study?OpenDocument*.

Technical Contacts: Any questions concerning EPA's White Paper should be directed to Dr. Nathalie Simon, NCEE at (202) 566–2347 or *simon.nathalie@epa.gov*.

Availability of Meeting Materials: A meeting agenda, charge questions, and other materials for the teleconferences will be placed on the SAB Web site at *www.epa.gov/sab*.

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Members of the public can submit relevant comments pertaining to the group conducting this advisory activity, EPA's charge, or meeting materials. Input from the public to the SAB will have the most impact if it consists of comments that provide specific scientific or technical information or analysis for the SAB to consider. Members of the public wishing to provide comment should contact the Designated Federal Officer for the relevant advisory committee directly.

Oral Statements: In general, individuals or groups requesting an oral presentation at a public teleconference will be limited to five minutes per speaker. To be placed on the public speaker list for the September 7, 2012 meeting, interested parties should notify Dr. Holly Stallworth, DFO, by email no later than August 31, 2012. To be placed on the public speaker list for the November 2, 2012 teleconference, interested parties should notify Dr. Holly Stallworth by October 26, 2012.

Written Statements: Written statements for these teleconferences should be received in the SAB Staff Office by the same deadlines given above for requesting oral comments. Written statements should be supplied to the DFO via email (acceptable file format: Adobe Acrobat PDF, MS Word, WordPerfect, MS PowerPoint, or Rich Text files in IBM-PC/Windows 98/2000/XP format).

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Stallworth at the phone number or email address noted above, preferably at least ten days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: July 23, 2012.

Thomas H. Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2012–18796 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL 9709–3]

Proposed Consent Decree, Clean Air Act Citizen Suit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Proposed Consent Decree; Request for Public Comment.

SUMMARY: In accordance with section 113(g) of the Clean Air Act, as amended (''CAA'' or the ''Act''), 42 U.S.C. 7413(g), notice is hereby given of a proposed consent decree to address a lawsuit filed by Sierra Club in the United States District Court for the District of Columbia: *Sierra Club* v. *Jackson,* No. 1:11-cv-2000 (RMC) (D. DC). On January 16, 2012, Plaintiff filed a First Amended complaint alleging that EPA failed to take action on certain state implementation plan (''SIP'') submissions for the States of Georgia and Alabama by the statutory deadline established by CAA section 110(k)(2), 42 U.S.C. 7410(k)(2). The proposed consent decree establishes deadlines for EPA to take action on the SIP submittals.

DATES: Written comments on the proposed consent decree must be received by August 31, 2012.

ADDRESSES: Submit your comments, identified by Docket ID number EPA–HQ–OGC–2012–0597, online at *www.regulations.gov* (EPA's preferred method); by email to *oei.docket@epa.gov;* by mail to EPA Docket Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; or by hand delivery or courier to EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC, between 8:30 a.m. and 4:30 p.m. Monday through Friday, excluding legal holidays. Comments on a disk or CD–ROM should be formatted in Word or ASCII file, avoiding the use of special characters and any form of encryption, and may be mailed to the mailing address above.

FOR FURTHER INFORMATION CONTACT: Steven Anderson, Air and Radiation Law Office (2344A), Office of General Counsel, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone: (202) 564–3137; fax number (202) 564–5603; email address: *anderson.steve@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Additional Information About the Proposed Consent Decree

The proposed consent decree would resolve a lawsuit filed by the Sierra Club seeking to compel the Administrator to take final action under sections 110(k)(2) and (3) of the CAA, 42 U.S.C. 7410(k)(2) and (3), to approve or disapprove, in whole or in part, numerous SIP submittals in the States of Georgia and Alabama identified in the proposed consent decree. EPA has taken final action to approve several SIP submissions from the States of Georgia and Alabama. On December 29, 2011, the State of Georgia withdrew its previously submitted 1997 annual particulate matter (''PM2.5'') National Ambient Air Quality Standard (''NAAQS'') attainment demonstration, contingency measures, reasonably available control measures/reasonably available control technology (''RACM/RACT'') and reasonable further progress (''RFP'') requirements for the Metro Atlanta area. The State of Georgia did not withdraw any portions of its previous submittal for the Metro Atlanta area that pertain to emissions inventories. On February 16, 2012 the State of Georgia withdrew its previously submitted 1997 8-hour ozone NAAQS attainment demonstration and volatile organic compound (''VOC'') and nitrogen oxides (''NO_X'') contingency measures for the Metro Atlanta area.

The proposed consent decree provides various dates by which EPA shall sign one or more final rules to approve or disapprove, in whole or in part, pursuant to CAA section 110(k)(2) and (3), each SIP submission or portion thereof on which EPA has not yet taken final action. If any State withdraws any of the SIP submittals described in the proposed consent decree, then EPA's obligation to take the corresponding action on such SIP submittal is automatically terminated.

The proposed consent decree requires that, following signature of each final rule described in the proposed consent decree, EPA shall promptly deliver the notice to the Office of the Federal Register for review and publication in the **Federal Register**. After EPA fulfills its obligations under the proposed consent decree, the consent decree shall be terminated and the case dismissed with prejudice.

For a period of thirty (30) days following the date of publication of this notice, the Agency will accept written comments relating to the proposed

consent decree from persons who were not named as parties or intervenors to the litigation in question. EPA or the Department of Justice may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that such consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the Act. Unless EPA or the Department of Justice determines that consent to this consent decree should be withdrawn, the terms of the decree will be affirmed.

II. Additional Information About Commenting on the Proposed Consent Decree

A. How can I get a copy of the consent decree?

The official public docket for this action (identified by Docket ID No. EPA–HQ–OGC–2012–0597) contains a copy of the proposed consent decree. The official public docket is available for public viewing at the Office of Environmental Information (OEI) Docket in the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. 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, and the telephone number for the OEI Docket is (202) 566–1752.

An electronic version of the public docket is available through *www.regulations.gov.* You may use *www.regulations.gov* to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, key in the appropriate docket identification number then select ''search''.

It is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing online at *www.regulations.gov* without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. Information claimed as CBI and other information whose disclosure is restricted by statute is not included in the official public docket or in the electronic public docket. EPA's policy is that copyrighted material, including copyrighted material contained in a public comment, will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the EPA Docket Center.

B. How and to whom do I submit comments?

You may submit comments as provided in the **ADDRESSES** section. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments.

If you submit an electronic comment, EPA recommends that you include your name, mailing address, and an email address or other contact information in the body of your comment and with any disk or CD ROM you submit. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. Any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. 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.

Use of the *www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an ''anonymous access'' system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an ''anonymous access'' system. If you send an email comment directly to the Docket without going through *www.regulations.gov*, your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: July 26, 2012.

Lorie J. Schmidt,

Associate General Counsel.

[FR Doc. 2012–18794 Filed 7–31–12; 8:45 am]

BILLING CODE 6560–50–P

FARM CREDIT SYSTEM INSURANCE CORPORATION

Policy Statement Concerning Assistance to Troubled Farm Credit System Institutions

AGENCY: Farm Credit System Insurance Corporation.

ACTION: Policy statement; extension of comment period.

SUMMARY: The Farm Credit System Insurance Corporation (Corporation or FCSIC) published for comment a draft Policy Statement Concerning Assistance to Troubled Farm Credit System (System) Institutions to replace the Corporation's present Policy Statement Concerning Stand-Alone Assistance. The draft revised policy statement provides additional transparency concerning the Corporation's authority to provide assistance, discusses how the least-cost test might be performed, enhances the criteria of what is to be included in assistance proposals, and adds a new section discussing assistance agreements. We are extending the comment period so that all interested parties will have additional time to provide comments.

DATES: Written comments must be submitted on or before October 22, 2012.

ADDRESSES: Comments should be mailed or delivered to James M. Morris, General Counsel, Farm Credit System Insurance Corporation, McLean, Virginia 22102. Copies of all comments will be available for examination by interested parties in the offices of the Farm Credit System Insurance Corporation.

FOR FURTHER INFORMATION CONTACT: Wade Wynn, Senior Risk Analyst, and James M. Morris, General Counsel, Farm Credit System Insurance Corporation, 1501 Farm Credit Drive, McLean, Virginia 22102, (703) 883–4380, TDD (703) 883–4390.

SUPPLEMENTARY INFORMATION: On June 21, 2012, the FCSIC published for comment a draft Policy Statement Concerning Assistance to Troubled System Institutions to replace the Corporation's present Policy Statement Concerning Stand-Alone Assistance.[1] The FCSIC received several comment letters, including the Farm Credit Council and two System banks requesting that the Corporation extend the comment period by 90 days. Because of the significance and complexity of the issues and the implications associated with providing

[1] *See* 77 FR 37399.

assistance to troubled System institutions, the commenters have asked the Corporation to extend the comment period to further evaluate the draft policy statement. In view of the comment letters, the FCSIC has decided to extend the comment period by 90 days. The FCSIC supports public involvement and participation in the development of this policy statement and invites all interested parties to review and provide comments.

Dated: July 26, 2012.

Dale L. Aultman,

Secretary to the Board, Farm Credit System Insurance Corporation.

[FR Doc. 2012–18692 Filed 7–31–12; 8:45 am]

BILLING CODE 6710–01–P

FEDERAL COMMUNICATIONS COMMISSION

[PS Docket No. 11–60; DA 12–1153]

9–1–1 Resiliency and Reliability In Wake of, June 29, 2012, Derecho Storm In Central, Mid-Atlantic, and Northeastern United States; Public Safety and Homeland Security Bureau Seeks Comment

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: The Federal Communications Commission (FCC or Commission) is seeking comment on the background, causes, and restoration efforts related to communications services and facilities impacted directly or indirectly by the storm and after. The FCC also seeks comment on the impact these outages had on the various segments of the public, including consumers, hospitals, and public safety entities. This information will develop the record in the Commission's ongoing examination of issues in the April 2011 Notice of Inquiry (NOI) on the resiliency, reliability and continuity abilities of communications network, including broadband technologies. Comments received in response to this public notice will become part of the record of the NOI.

DATES: Comments may be filed in the docket for this proceeding on or before August 17, 2012. Reply comments may be filed on or before September 4, 2012.

ADDRESSES: Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before August 17, 2012 (comments) and September 4, 2012 (reply comments). Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/.* Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail to FCC Headquarters at 445 12th St. SW., Room TW–A325, Washington, DC 20554.

- The filing hours are 8:00 a.m. to 7:00 p.m.
- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted.
- Originals and copies of each official filing must continue to be held together with rubber bands or fasteners. All filings must be submitted without envelopes. See *www.fcc.gov/osec/* for further information on filing instructions.
- Documents sent by overnight mail (other than United States Postal Service (USPS) Express Mail) must be addressed to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- All USPS First Class Mail, Express Mail and Priority Mail should be addressed to FCC Headquarters at 445 12th Street SW., Washington, DC 20554.
- 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 and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (tty).
- Parties wishing to file materials with a claim of confidentiality should follow the procedures set forth in section 0.459 of the Commission's rules. Casual claims of confidentiality are not accepted. Confidential submissions may not be filed via ECFS but rather should be filed with the Secretary's Office following the procedures set forth in 47 CFR 0.459. Redacted versions of confidential submissions may be filed via ECFS. Parties are advised that the Commission looks with disfavor on claims of confidentiality for entire documents. When a claim of confidentiality is made, a public, redacted version of the document should also be filed.

FOR FURTHER INFORMATION CONTACT: Michael Connelly, Attorney, Cybersecurity and Communications Reliability Division, Public Safety and Homeland Security Bureau, (202) 418–0132 or *michael.connelly@fcc.gov.*

SUPPLEMENTARY INFORMATION:

Questions Regarding Derecho Impact, Effects, and Restoration Efforts

The Commission poses a series of questions related to the impact of the storm on emergency and 9–1–1 communications accessed by traditional communications networks, broadband communications networks, and wireless communications networks. It also requests comment on the storm's impact on various user groups. The FCC seeks comment on the following issues:

Causes of Outages. What were the specific causes of the outages that occurred during or after the storms? Which network elements and components, such as Public Switched Telephone Network (PSTN) trunks, Internet-Protocol (IP) broadband access lines, databases and PSTN switches, were out of service and for how long? For example, to what extent were issues like powering, physical damage, and power surges contributing factors to the outages? To what extent are there industry best practices that address these, and any other, contributing causes? To what extent were they followed?

In what ways was physical damage due to the storm a major cause of outages? What could be done to improve the resiliency of communications infrastructure in the face of physical damage like what was seen during the storm? Are there actions the communications industry can take to avoid or mitigate these outages in future similar events? Should the FCC take other steps to improve communications resiliency during strong storms like this?

In what ways was the derecho an ''extraordinary'' event? For example, compared to other types of disasters, did it occur with unusually short notice, affect an unusually large area, and was it unusually intense? How did these factors inhibit service providers in responding to the event and restoring service? How did these factors affect consumers' need for communications services and ability to obtain emergency services? What could be done to better prepare for events like this in the future? Specifically, what actions should communications service providers and PSAPs take to better prepare for similar events in the future?

How did service providers become aware that 9–1–1 outages had occurred? What types of monitoring systems were in place for various types of assets, both in the field and inside buildings? How

well did these monitoring systems perform during the storm?

What role did the availability or absence of back-up power for network equipment play in the 9–1–1 outages that occurred during the storm? What could be done to improve the ability of communications assets to operate longer when commercial power is lost? Are there new technologies, such as solar and fuel cells, which provide promise in this area? What maintenance practices are in place to compensate for the loss of commercial power? How did these methods perform during the storm? Are there actions the FCC should take to improve the ability of communications networks to survive commercial power outages? What types of measures could be taken to improve the robustness of communications infrastructure in response to failures of commercial power? Should the Commission consider taking action, either voluntary or mandatory, that would address back-up power?

What forms of network interconnection, both PSTN and IP, were affected by the storm or loss of power? How and why were they affected? Did these disruptions affect communications seeking 911 or other emergency assistance and how? What carrier and public safety facilities have multiple means or forms of interconnection and which do not? Which of these facilities are essential for 911 communications? What monitoring of interconnection was in place and how did it perform? To what extent are there industry best practices addressing forms of interconnection and diversity and redundancy? To what extent were they followed?

Effect on 9–1–1 Systems and Services. What could be done to improve the reliability of the 9–1–1 network when faced with storms like the derecho or other threats? Are there actions the FCC should take to improve the reliability of 9–1–1 services during strong storms like this? What actions should communications service providers take? Are there actions that communications service providers and/or PSAPs should take to improve the 9–1–1-restoration process? What, if anything, can the FCC do to better assist communications service providers and PSAPs in the restoration process?

How was 9–1–1 call completion affected by outages caused by the storm? Is there an estimate of how many 911 calls could not be completed at all or only through alternate means, such as ten-digit numbers? To what extent do industry best practices exist that relate to these events, and were these best practices followed? Were there instances where PSAPs went offline due to failures on their own premises? To what extent did the storm affect Automatic Number Identification (ANI) and Automatic Location Identification (ALI)? What were the primary causes of failures to ANI and ALI services? To what extent were vital 9–1–1 facilities and network elements deployed redundantly by service providers? For example, were selective routers routinely deployed in a diverse manner? Likewise, were facilities that carry ALI and ANI information routed in a diverse manner? What should be done to improve the diverse provisioning of 9–1–1 facilities and elements? [1]

Effect of 9–1–1 Outages. What impact did the 9–1–1 outages have on the public? For example, how were consumers affected? How did the outages affect the ability of public safety officials to perform their duties? How was the public alerted of the 9–1–1 outages and what alternatives were provided? How effective were these alternatives? To what extent was social media used to spread the word about the 9–1–1 outages and alternatives? What impact did the 9–1–1 outages have on other sectors of the user community, including businesses and providers of critical services, such as hospitals?

Effect of Communications Outages on Access to 9–1–1 Services. Outages in the 9–1–1 network itself are only one way that users can be denied access to 9–1–1 services. For example, if the PSAP is operational and the 9–1–1 network is functioning, users in a local area will still be unable to reach the PSAP if they lack access to the communications network due to a local outage. To what extent did users find that the general unavailability of communications service impaired their ability to access 9–1–1 service? In these instances, were multiple methods of reaching the PSAP available, like cell phones or other types of communications services? How effective were these alternative communications services in overcoming outages affecting one access platform? What should be done to improve the diversity of access to 9–1–1 services so that communications outages are less likely to result in an inability to access 9–1–1?

Questions Regarding 9–1–1 Resiliency and Reliability Generally

The 9–1–1 communications failures experienced as a result of the derecho also give rise to concerns and questions about the reliability and resiliency of our 9–1–1 communications networks nationwide, particularly in the event of a severe weather or other type of high-impact natural disaster. The FCC seeks comment on how 9–1–1 communications has fared during other recent natural disaster events. Please describe any lessons learned from those events, in particular improvements that were recommended to improve 9–1–1 service reliability and survivability. Commenters should address the impact on communications relying on the PSTN- and IP-based communications, as well as fixed and mobile wireless communications.

The FCC also seeks comment on the most common causes of failure in the 9–1–1 network that result in the following types of 9–1–1 outages: (i) Complete isolation of the PSAP; (ii) failure to pass ALI and/or ANI; (iii) loss of the ability to re-route traffic to an alternate PSAP or administrative lines. What could be done to reduce the incidence of outages in each category? What actions, if any, should the FCC take to address this problem?

In what ways does the practice of deploying redundant facilities or systems used in the 9–1–1 network promote 9–1–1 reliability? How does the service provider ensure that these practices are followed routinely and remain in place over time, even as changes are made to the networks? What, if anything, should the FCC do to promote the application of such methods?

How do service providers routinely monitor 9–1–1 facilities and the availability of 9–1–1 service? How quickly do service providers become aware of 9–1–1 failures of various kinds? Do service providers routinely notify PSAPs of 9–1–1 outages? How are they alerted, under what conditions, and how quickly? What steps does the service provider take routinely to prioritize restoration of 9–1–1 service? What standard operating procedures and systems does the service provider have in place to facilitate the detection and restoration of 9–1–1 service after an outage? Are these resources adequate?

PSAPs are typically small operations playing a large role in protecting the safety of the public. The failure of a few trunks into a PSAP could affect public safety for an entire community, but the failure of just a few trunks might not attract much attention from a service provider. Do provider alarm systems provide adequate visibility to relatively small outages that can have a large impact on PSAPs, especially when demand may spike, such as during or

[1] *Public Notice,* FCC's Public Safety and Homeland Security Bureau Reminds Telecommunications Service Providers of the Importance of Implementing Established 9–1–1 and Enhanced 9–1–1 Best Practices, DA 12–891, rel. June 6, 2012.

after a major storm? Do providers provide appropriate urgency to handling such outages?

To what extent is the availability of multiple access platforms (e.g., residential telephone line, whether legacy or IP-based, cell phone, etc.) to reach networks services creating greater richness of diversity that would tend to improve 9–1–1 reliability? Stated differently, to what extent does the public have more than one way to reach 9–1–1 that are not reliant on each other? To what extent are available access platforms reliant on each other or another common point of failure?

The legacy communications network uses a hierarchical architecture, whereby failures of network elements located deeper in the network will result in a larger number of customers being denied network service. For this reason, elements deeper in the network (e.g., switches) were often designed to very high reliability specifications. To what extent has the legacy infrastructure retained this characteristic? Today's networks are quickly migrating to broadband IP technology. To what extent does the migration to IP-based networks reduce or increase the level of concentration deeper in the network? What is the resultant impact on communications reliability?

What other steps might service providers take? What actions should PSAPs take? What other actions, if any, should the Commission take to encourage those steps? What actions should the public and other institutions like hospitals take, if any? We seek comment on whether the deployment of Next Generation (NG911) will improve the reliability of 9–1–1 services and, if so, how? Would NG911 make it easier to have more than one backup PSAP and provide additional redundancy of transmission facilities, e.g., via satellite or microwave point-to-point links? Did commercial data centers in the affected areas experience outages and for how long? Would it increase reliability if critical components of the NG911 system are housed or replicated in commercial data centers?

NG911 will create the ability to utilize a ''virtual PSAP.'' Today's 9–1–1 system generally requires a call taker to answer a 9–1–1 call from within the walls of a single physical (''brick and mortar'') PSAP. In a NG911 network, however, a call taker will be able to answer a 9–1–1 call from virtually any location. The FCC seeks comment on the potential for development of virtual PSAPs. Are current technologies sufficient to support virtual PSAPs? Are there specific steps that service providers should take to ensure that they have adequate reliability when implementing NG9–1–1? How would the addition of a 9–1–1 text capability provide substantial improvement in the ability of consumers to contact PSAPs?

Federal Communications Commission.

David S. Turetsky,

Chief, Public Safety and Homeland Security Bureau.

[FR Doc. 2012–18805 Filed 7–31–12; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Proposed Collection Renewal; Comment Request (3064–0172)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on the renewal of an existing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). Currently, the FDIC is soliciting comment on renewal of the information collection described below.

DATES: Comments must be submitted on or before October 1, 2012.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov.* Include the name of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper (202.898.3877), Counsel, Room NYA–5046, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently-approved collection of information:

Title: Temporary Liquidity Guarantee Program-Emergency Guarantee Facility.

OMB Number: 3064–0172.

Estimated Number of Respondents:

Application to access emergency guarantee facility submitted by IDIs—8.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—4.

Frequency of Response:

Application to access emergency guarantee facility submitted by IDIs—once.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—once.

Affected Public:

IDIs; thrift holding companies, bank and financial holding companies, and affiliates of IDIs that issued debt under the DGP.

Average Time per Response:

Application to access emergency guarantee facility submitted by IDIs—4 hours.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—4 hours.

Estimated Annual Burden:

Application to access emergency guarantee facility submitted by IDIs—32 hours.

Application to access emergency guarantee facility submitted by non-IDIs that issued FDIC-guaranteed debt under the DGP—16 hours.

Total Annual Burden—48 hours.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 27th day of July 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–18738 Filed 7–31–12; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS12–15]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of Meeting.

Description: In accordance with Section 1104 (b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in closed session:

Location: OCC—250 E Street SW., Room 8C, Washington, DC 20219.

Date: August 8, 2012.

Time: Immediately following the ASC open session.

Status: Closed.

Matters to be Considered:

July 11, 2012 minutes—Closed Session.

Preliminary discussion of State Compliance Reviews.

Dated: July 26, 2012.

James R. Park,

Executive Director.

[FR Doc. 2012–18760 Filed 7–31–12; 8:45 am]

BILLING CODE P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS12–14]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

Description: In accordance with Section 1104 (b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

Location: OCC—250 E Street SW., Room 8C, Washington, DC 20219.

Date: August 8, 2012.

Time: 10:30 a.m.

Status: Open.

Matters to be Considered:

Summary Agenda

July 11, 2012 minutes—Open Session.

(No substantive discussion of the above items is anticipated. These matters will be resolved with a single vote unless a member of the ASC requests that an item be moved to the discussion agenda.)

Discussion Agenda

Appraisal Foundation April and May 2012 Grant Reimbursement Requests; Arkansas Compliance Review; Maryland Compliance Review.

How To Attend and Observe an ASC Meeting

Email your name, organization and contact information to *meetings@asc.gov.* You may also send a written request via U.S. Mail, fax or commercial carrier to the Executive Director of the ASC, 1401 H Street NW., Ste 760, Washington, DC 20005. The fax number is 202–289–4101. Your request must be received no later than 4:30 p.m., ET, on the Monday prior to the meeting. Attendees must have a valid government-issued photo ID and must agree to submit to reasonable security measures. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis. The use of any video or audio tape recording device, photographing device, or any other electronic or mechanical device designed for similar purposes is prohibited at ASC meetings.

Dated: July 26, 2012.

James R. Park,

Executive Director.

[FR Doc. 2012–18761 Filed 7–31–12; 8:45 am]

BILLING CODE P

FEDERAL MARITIME COMMISSION

Notice of Agreement Filed

The Commission hereby gives notice of the filing of the following agreement under the Shipping Act of 1984. Interested parties may submit comments on the agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within ten days of the date this notice appears in the **Federal Register**. Copies of the agreement are available through the Commission's Web site (*www.fmc.gov*) or by contacting the Office of Agreements at (202) 523–5793 or *tradeanalysis@fmc.gov.*

Agreement No.: 012125–001.

Title: Maersk/Evergreen Slot Exchange Agreement.

Parties: A.P. Moller-Maersk A/S and Evergreen Line Joint Service Agreement.

Filing Parties: Wayne Rohde, Esq.; Cozen O'Connor; 1627 I Street NW.; Suite 1100; Washington, DC 20006.

Synopsis: The amendment adds China to the geographic scope of the Agreement.

By Order of the Federal Maritime Commission.

Dated: July 27, 2012.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–18803 Filed 7–31–12; 8:45 am]

BILLING CODE 6730–01–P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License; Applicants

The Commission gives notice that the following applicants have filed an application for an Ocean Transportation Intermediary (OTI) license as a Non-Vessel-Operating Common Carrier (NVO) and/or Ocean Freight Forwarder (OFF) pursuant to section 40901 of the Shipping Act of 1984 (46 U.S.C. 40101). Notice is also given of the filing of applications to amend an existing OTI license or the Qualifying Individual (QI) for a licensee.

Interested persons may contact the Office of Ocean Transportation Intermediaries, Federal Maritime Commission, Washington, DC 20573, by telephone at (202) 523–5843 or by email at *OTI@fmc.gov*.

Access Supply Chain Services LLC (NVO), 65 West 5th Avenue #415, San Mateo, CA 94402, Officer: Christopher P. Kammer, Member, (Qualifying Individual), Application Type: New NVO License.

All Boat Shipping, Inc (NVO), 20505 E. Country Club Drive #2032, Aventura, FL 33180, Officers:, Igors Tjutins, President, (Qualifying Individual), Richard A. Arkey, Vice President, Application Type: New NVO License.

Aequus Worldwide Logistics Inc. (NVO), 319 E. Butterfield Road, Elmhurst, IL 60126, Officer: Sergio N. Steagall, President, (Qualifying Individual), Application Type: New NVO License.

C.R.C. Universal, Inc. (NVO), 7957 NW 67th Street, Miami, FL 33166, Officers: Raul Solar, President, (Qualifying Individual), Carlo L. Mulet, Vice President, Application Type: New NVO License.

Cima Cargo Corp. (NVO & OFF), 10813 NW 30th Street #115, Doral, FL 33172, Officers: Maribel Moreira,

Secretary, (Qualifying Individual), Asma Aftimos, President, Application Type: Name Change to Concepts in Freight, Inc.

FGN Global Logistics, Inc. (NVO & OFF), 4770 Highway 165, Meggett, SC 29449, Officers: Hugh R. Parrish, President, (Qualifying Individual), Thomas C. Sasser, Treasurer, Application Type: New NVO & OFF License.

Green Shipping, Inc. (NVO & OFF), 16012 S. Western Avenue #302, Gardena, CA 90247, Officers: Gina Choi, Secretary, (Qualifying Individual), Byung Chung, President, Application Type: New NVO & OFF License.

Luzviminda Cargo Express LLC (NVO), 706 Union Street Suite 410, Seattle, WA 98101, Officers: Rodolfo Mendoza II, Member, (Qualifying Individual), Ronald A. Bermoy, Member, Application Type: New NVO License.

Montgomery International, Inc. (NVO & OFF), 341 Erickson Avenue, P.O. Box 124, Essington, PA 19029, Officers: Ari M. Bobrow, Export Manager, (Qualifying Individual), Romas Krilavicius, Vice President, Application Type: Add NVO Service.

Pacific Crossing Logistics, Inc. (NVO & OFF), 5343 W. Imperial Highway #200, Los Angeles, CA 90045, Officers: Oh Y. Hwang, CFO, (Qualifying Individual), Bong H. Ryon, CEO, Application Type: New NVO & OFF.

Pacific Global Logistics, Inc. (NVO & OFF), 1500 Pumphrey Avenue #105–106, Auburn, AL 36832, Officers: Hyung Tae Kim, COO, (Qualifying Individual), Kee T. Choi, CEO, Application Type: QI Change.

Walmay Logistics Inc. (OFF), 5171 Via Marcos, Yorba Linda, CA 92887, Officers: Shifeng Hou, President, (Qualifying Individual), Song Yang, Managing Director, Application Type: New OFF License.

By the Commission.

Dated: July 27, 2012.

Karen V. Gregory,

Secretary.

[FR Doc. 2012–18801 Filed 7–31–12; 8:45 am]

BILLING CODE 6730–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0055; Docket 2012–0076; Sequence 7]

Federal Acquisition Regulation; Submission for OMB Review; Freight Classification Description

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning freight classification description. A notice was published in the **Federal Register** at 77 FR 22768, on April 17, 2012. No comments were received.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulations (FAR), 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; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before August 31, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0055, Freight Classification Description, 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 9000–0055, Freight Classification Description''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0055, Freight Classification Description'' 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 9000–0055, Freight Classification Description.

Instructions: Please submit comments only and cite Information Collection 9000–0055, Freight Classification Description, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr., Procurement Analyst, Office of Acquisition Policy, at (202) 501–1448 or via email at *Curtis.glover@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

The Government is required to provide, in solicitations, a complete description of the supplies to be acquired and the packing requirements to determine transportation (freight rate) charges for the evaluation of offers. Generally, the freight rate for supplies is based on the ratings applicable to the freight classification description published in the National Motor Freight Classification (for carriers) and the Uniform Freight Classification (for rail) filed with Federal and State regulatory bodies. When the Government purchases supplies that are new to the supply system, nonstandard, or modifications of previously shipped supplies, and different freight classifications may apply, per FAR clause 52.247–53, offerors are requested to indicate the full Uniform Freight Classification or National Motor Freight Classification description applicable to the supplies. The Government will use these descriptions as well as other information available to determine the classification description most appropriate and advantageous to the government.

B. Annual Reporting Burden

Respondents: 3,000.
Responses per Respondent: 3.
Annual Responses: 9,000.
Hours per Response: .167.
Total Burden Hours: 1,503.

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. 9000–0055, Freight Classification Description, in all correspondence.

Dated: July 20, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–18694 Filed 7–31–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Docket 2012–0076; Sequence 38; OMB Control No. 9000–0066]

Federal Acquisition Regulation; Information Collection; Professional Employee Compensation Plan

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the reinstatement of a previously 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 concerning submission of a Professional Employee Compensation Plan.

Public comments are particularly invited on: Whether this collection of information is necessary; 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; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before October 1, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0066, Professional Employee Compensation Plan 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 9000–0066, Professional Employee Compensation Plan''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0066, Professional Employee Compensation Plan'' 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 9000–0066, Professional Employee Compensation Plan.

Instructions: Please submit comments only and cite Information Collection 9000–0066, Professional Employee Compensation Plan, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, Office of Acquisition Policy, GSA, (202) 501–3775 or email *Edward.loeb@gsa.gov.*

A. Purpose

FAR 22.1103 requires that all professional employees are compensated fairly and properly. Accordingly, under certain solicitations for service contracts, a total compensation plan setting forth proposed salaries and fringe benefits for professional employees with supporting data must be submitted to the contracting officer for evaluation.

B. Annual Reporting Burden

Respondents: 8450.

Responses per Respondent: 1.

Total Responses: 8450.

Hours per Response: .5.

Total Burden Hours: 4225.

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. 9000–0066, Professional Employee Compensation Plan, in all correspondence.

Dated: July 20, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–18695 Filed 7–31–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Docket 2012–0076; Sequence 50; OMB Control No. 9000–0107]

Federal Acquisition Regulation; Information Collection; Notice of Radioactive Materials

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for comments regarding the extension of a previously 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 concerning Notice of Radioactive Materials.

Public comments are particularly invited on: Whether this collection of information is necessary; 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; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before October 1, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0107, Notice of Radioactive Materials, 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 9000–0107, Notice of Radioactive Materials''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0107, Notice of Radioactive Materials'' 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 9000–0107, Notice of Radioactive Materials.

Instructions: Please submit comments only and cite Information Collection 9000–0107, Notice of Radioactive Materials, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Marissa Petrusek, Procurement Analyst, Office of Acquisition Policy, GSA, (202) 501–0136 or email *marissa.petrusek@gsa.gov.*

A. Purpose

The clause at FAR 52.223–7, Notice of Radioactive Materials, requires contractors to notify the Government prior to delivery of items containing radioactive materials. The purpose of the notification is to alert receiving activities that appropriate safeguards may need to be instituted. The notice shall specify the part or parts of the items which contain radioactive materials, a description of the materials, the name and activity of the isotope, the manufacturer of the materials, and any other information known to the contractor which will put users of the items on notice as to the hazards involved.

B. Annual Reporting Burden

Respondents: 535.

Responses per Respondent: 5.

Annual Responses: 2,675.

Hours per Response: 1.

Total Burden Hours: 2,675.

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. 9000–0107, Notice of Radioactive Materials, in all correspondence.

Dated: July 26, 2012.

William Clark,

Acting Director, Federal Acquisition Policy Division, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–18725 Filed 7–31–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Docket 2012–0076; Sequence 29; OMB Control No. 9000–0048]

Federal Acquisition Regulation; Information Collection; Authorized Negotiators

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement regarding Authorized Negotiators.

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the Federal Acquisition Regulations (FAR), 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; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

DATES: Submit comments on or before October 1, 2012.

ADDRESSES: Submit comments identified by Information Collection 9000–0048, Authorized Negotiators, 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 9000–0048, Authorized Negotiators''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0048, Authorized Negotiators'' 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 9000–0048, Authorized Negotiators.

Instructions: Please submit comments only and cite Information Collection 9000–0048, Authorized Negotiators, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, Office of Governmentwide Acquisition Policy, GSA, (202) 501–0650 or via email to *Edward.loeb@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Per FAR 52.219–1(c)(2)(iv), firms offering supplies or services to the Government under negotiated solicitations must provide the names, titles, and telephone numbers of authorized negotiators to assure that discussions are held with authorized individuals. The information collected is referred to before contract negotiations and it becomes part of the official contract file.

B. Annual Reporting Burden

Respondents: 68,000.

Responses per Respondent: 8.

Total Responses: 544,000.

Hours per Response: .017.

Total Burden Hours: 9248.

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. 9000–0048, Authorized Negotiator, in all correspondence.

Dated: July 20, 2012.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2012–18696 Filed 7–31–12; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day 12–0843]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Kimberly S. Lane, at CDC 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Field Evaluation of Prototype Kneel-assist Devices in Low-seam Mining (0920–0843, Expiration 1/31/2013)—Extension—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

NIOSH, under Public Law 91–596, Sections 20 and 22 (Section 20–22, Occupational Safety and Health Act of 1970) has the responsibility to conduct research relating to innovative methods, techniques, and approaches dealing with occupational safety and health problems.

According to the Mining Safety and Health Administration (MSHA) injury database, 227 knee injuries were reported in underground coal mining in 2007. With data from the National Institute for Occupational Safety and Health (NIOSH), it can be estimated that the financial burden of knee injuries was nearly three million dollars in 2007.

Typically, mine workers utilize kneepads to better distribute the pressures at the knee. The effectiveness of these kneepads was only recently investigated in a study by NIOSH that has not yet been published. The results of this study demonstrated that kneepads do decrease the maximum stress applied to the knee, albeit, not drastically. Additionally, the average pressure across the knee remains similar to the case where subjects wore no kneepads at all. Thus, the injury data and the results of this study suggest the need for the improved design of kneel-assist devices such as kneepads. NIOSH is currently undertaking the task of designing more effective kneel-assist devices such as a kneepad and a padded support worn at the ankle where mine workers can comfortably rest their body weight.

These devices must also be field tested to verify they do not result in body discomfort or inadvertent accidents. It is also important to determine how usable and durable these devices are in the harsh mining environment. In order to quantitatively demonstrate that these prototype devices are superior to their predecessors, mine workers using these prototypes must be interviewed. Their feedback will identify any necessary changes to the design of the devices such that NIOSH can ensure the prototypes will be well-accepted by the mining community.

To collect this type of information, a field study must be conducted where kneel-assist devices currently used in the mining industry (i.e. kneepads) are compared to the new prototype designs. The study suggested here would take approximately 13 months. NIOSH received OMB approval in 2010 in order to conduct the study. However, an extension is being requested for this project, as the kneepad prototype is still under development and to date, no data has been collected. Once a viable prototype is available, testing will commence and miners will start by evaluating a control kneepad.

A pilot mine will be identified to test the prototype kneel-assist devices prior to commencing a full study. The data collected at this pilot mine will ensure that the prototype kneel-assist devices are likely to be successful. Data will be collected via interviews with individual mine workers and through a focus group where all mine workers come together to express their opinions about the devices. If the prototype kneel-assist devices do not appear to be successful, the data collected will be used to adequately redesign them and the above described process will begin again. If the prototype kneel-assist devices appear to be successful, the full study will commence.

Once the full study is ready to commence, cooperating mines will be identified. Every month, the section foreman at the cooperating mines will be asked to supply some information regarding the current mine environment.

Initially, the mine workers will be given a control kneel-assist device. Currently, mine workers only utilize kneepads as a kneel-assist device. Therefore, only a control kneepad will be provided. They will then be asked some basic demographics information such as their age and time in the mining industry. Additional data will then be collected at 1, 3, and 6 months after the study commences. The mine workers will be asked to provide their feedback regarding factors such as body part discomfort, usability, durability, and ease of movement. There is no cost to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Section Foreman (pilot mine)	Section Foreman Form	1	1	10/60	0.2
Mine Workers (pilot mine—baseline)	Baseline Form	9	1	20/60	3
Mine Workers (pilot mine—one month).	1, 3, and 6 months forms	9	1	30/60	5

ESTIMATED ANNUALIZED BURDEN HOURS—Continued

Respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Mine Workers (pilot mine—focus group).	Focus Group Questions	9	1	1	9
Section Foreman (full study)	Section Foreman Form	6	12	10/60	12
Mine Workers (full study—baseline)	Baseline Form	54	1	20/60	18
Mine Workers (full study—1, 3, and 6 months for control and prototypes).	1, 3, and 6 months forms	54	6	25/60	135
Total					182

Kimberly S. Lane,

Deputy Director, Office of Science Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–18745 Filed 7–31–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–12–12QI]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Kimberly Lane, at 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov.*

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

The National Voluntary Environmental Assessment Information System (NVEAIS)—New—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The CDC is requesting OMB approval for the National Voluntary Environmental Assessment Information System (NVEAIS) to collect data from foodborne illness outbreak environmental assessments routinely conducted by local, state, territorial, or tribal food safety programs during outbreak investigations. Environmental assessment data are not currently collected at the national level. The data reported through this information system will provide timely data on the causes of outbreaks, including environmental factors associated with outbreaks, and are essential to environmental public health regulators' efforts to respond more effectively to outbreaks and prevent future, similar outbreaks. This information system is specifically designed to link to CDC's existing disease outbreak surveillance system (National Outbreak Reporting System).

The information system was developed by the Environmental Health Specialists Network (EHS–Net), a collaborative project of CDC, the U.S. Food and Drug Administration (FDA), the U.S. Department of Agriculture (USDA), and nine states (California, Connecticut, Georgia, Iowa, New York, Minnesota, Oregon, Rhode Island, and Tennessee). The network consists of environmental health specialists (EHSs), epidemiologists, and laboratorians. The EHS–Net has developed a standardized protocol for identifying, reporting, and analyzing data relevant to foodborne illness outbreak environmental assessments.

While conducting environmental assessments during outbreak investigations is routine for food safety program officials, reporting information from the environmental assessments to CDC is not routine. Thus, state, local, tribal, and territorial food safety program officials are the respondents for this data collection—one official from each participating program will report environmental assessment data on outbreaks. These programs are typically located in public health or agriculture agencies. There are approximately 3,000 such agencies in the United States. Thus, although it is not possible to determine how many programs will choose to participate, as NVEAIS is voluntary, the maximum potential number of program respondents is approximately 3,000.

These programs will be reporting data on outbreaks, not their programs or personnel. It is not possible to determine exactly how many outbreaks will occur in the future, nor where they will occur. However, we can estimate that, based on existing data, a maximum of 1,400 foodborne illness outbreaks will occur annually. Only programs in the jurisdictions in which these outbreaks occur would report to NVEAIS. Thus, not every program will respond every year. Consequently, the respondent burden estimate is based on the number of outbreaks likely to occur each year. Assuming each outbreak occurs in a different jurisdiction, there will be one respondent per outbreak.

There are two activities associated with NVEAIS that require a burden estimate. The first is entering all requested environmental assessment data into NVEAIS. This will be done once for each outbreak. This will take approximately 2 hours per outbreak.

The second activity is the manager interview that will be conducted at each establishment associated with an outbreak. Most outbreaks are associated

with only one establishment; however, some are associated with multiple establishments. We estimate that a maximum average of four manager interviews will be conducted per outbreak. Each interview will take about 20 minutes.

The total estimated annual burden is 4,667 hours. There is no cost to the respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondent	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
Food safety program personnel	Reporting environmental assessment data into NVEAIS.	1,400	1	2	2,800
Retail food personnel	Manager interview	1,400	4	20/60	1,867
Total					4,667

Kimberly S. Lane,

Deputy Director, Office of Scientific Integrity, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–18744 Filed 7–31–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30Day–12–12IN]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these requests, call (404) 639–7570 or send an email to *omb@cdc.gov.* Send written comments to CDC Desk Officer, Office of Management and Budget, Washington, DC 20503 or by fax to (202) 395–5806. Written comments should be received within 30 days of this notice.

Proposed Project

Developing a Responsive Plan for Building the Capacity of Community Based Organizations (CBOs) to Implement HIV Prevention Services—New—National Center for HIV/AIDS, Viral Hepatitis, STD, and TB Prevention (NCHHSTP), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The Centers for Disease Control and Prevention (CDC) estimates that over 1 million people in the United States are living with HIV. Each year, approximately 50,000 people in the United States become newly infected. Some groups are disproportionately affected by this epidemic. For example, between 2006 and 2009, there was an almost 50% increase in the number of new HIV infections among young Black men who have sex with men (MSM). In order to address these health disparities, the CDC funded 34 community-based organizations via cooperative agreement PS11–1113 to implement HIV prevention programs targeting young MSM of color and young transgender persons of color.

Building the capacity of community based organizations (CBOs) is a priority to ensure effective and efficient delivery of HIV prevention services. Since the late 1980s, CDC has been working with CBOs to broaden the reach of HIV prevention efforts. Over time, the CDC's program for HIV prevention has grown in size, scope, and complexity, responding to changes in approaches to addressing the epidemic, including the introduction of new guidances; effective behavioral, biomedical, and structural interventions; and public health strategies. The Capacity Building Branch within the Division of HIV/AIDS Prevention (DHAP) provides national leadership and support for capacity building assistance (CBA) to help improve the performance of the HIV prevention workforce. One way that it accomplishes this task is by funding CBA providers via cooperative agreement PS09–906 to work with CBOS, health departments, and communities to increase their knowledge, skills, technology, and infrastructure to implement and sustain science-based, culturally appropriate interventions and public health strategies.

CBOs funded under PS11–1113 will collaborate with CBA providers to develop *Strategic Plans for Enhanced CBO Capacity.* CBA providers will conduct face-to-face field visits with the CBOs utilizing a structured organizational needs assessment tool that was developed in collaboration with CDC. This comprehensive tool offers a mixed-methods data collection approach consisting of checklists, close-ended (quantitative) questions, and open-ended (qualitative) questions. CBOs will be asked to complete the tool prior to the field visits in order to maximize time during the visits for discussion and strategic planning.

Findings from this project will be used by the participating CBOs, the CBA providers, and the Capacity Building Branch. By the end of the project, the participating CBOs will have CBA strategic plans that will help guide the success of their programs. Based on these plans, the CBA providers (in collaboration with CDC) will be able to better identify and address those needs most reported by CBOs. Finally, the Capacity Building Branch will be able to refine its approach to conceptualizing and providing CBA on a national level in the most cost-effective manner possible.

There is no cost to respondents other than their time. The CBA providers will complete their field visits in one day (8 hours). Eighteen of the participating CBOs are dually funded under both PS11–1113 and PS10–1003; they participated in a similar process under the earlier cooperative agreement. Therefore, they will not need to complete the full tool nor participate in a full-day field visit; the burden will be reduced for these respondents.

ESTIMATED ANNUALIZED BURDEN HOURS

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)
CBOs only funded under PS11–1113	CBO/CBA Needs Assessment	16	1	3
Dually funded CBOs (funded under both PS11–1113 and PS10–1003).	CBO/CBA Needs Assessment	18	1	1.5

Dated: July 25, 2012.

Kimberly S. Lane,

Deputy Director, Office of Science Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–18746 Filed 7–31–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60-Day 12–0914]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call 404–639–7570 and send comments to Kimberly S. Lane, at 1600 Clifton Road, MS–D74, Atlanta, GA 30333 or send an email to *omb@cdc.gov*.

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Written comments should be received within 60 days of this notice.

Proposed Project

Workplace Violence Prevention Programs in NJ Healthcare Facilities (0920–0914, Expiration 1/31/2015)—Revision—National Institute for Occupational Safety and Health (NIOSH), Centers for Disease Control and Prevention (CDC).

Background and Brief Description

The long-term goal of the proposed project is to reduce violence against healthcare workers. The objective of the proposed study is two-fold: (1) To examine healthcare facility compliance with the New Jersey Violence Prevention in Health Care Facilities Act, and (2) to evaluate the effectiveness of the regulations in this Act in reducing assault injuries to workers. Our central hypothesis is that facilities with high compliance with the regulations will have lower rates of employee violence-related injury. NIOSH received OMB approval (0920–0914) to evaluate the legislation at hospitals and to conduct a nurse survey. Data collection is ongoing at the hospitals and for the nurse survey. We are revising our existing ICR to include 2 new respondents which are nursing homes and home healthcare aides.

First, we will conduct face-to-face interviews with the Chairs of the Violence Prevention Committees in 20 nursing homes who are in charge of overseeing compliance efforts. The purpose of the interviews is to measure compliance to the state regulations (violence prevention policies, reporting systems for violent events, violence prevention committee, written violence prevention plan, violence risk assessments, post incident response and violence prevention training). The details of their Workplace Violence Prevention Program are in their existing policies and procedures. Second, we will also collect assault injury data from nursing home's violent event reports 3 years pre-regulation (2009–2011) and 3 years post-regulation (2012–2014).This data is captured in existing OSHA logs and is publicly available. The purpose of collecting these data is to evaluate changes in assault injury rates before and after enactment of the regulations. A contractor will conduct the interviews, collect the nursing home's policies and procedures, and collect the assault injury data. Third, we will also conduct a home healthcare aide survey (4000 respondents or 1333 annually). This survey will describe the workplace violence prevention training home healthcare aides receive. Healthcare workers are nearly five times more likely to be victims of violence than workers in all industries combined. While healthcare workers are not at particularly high risk for job-related homicide, nearly 60% of all nonfatal assaults occurring in private industry are experienced in healthcare. Six states have enacted laws to reduce violence against healthcare workers by requiring workplace violence prevention programs. However, little is understood about how effective these laws are in reducing violence against healthcare workers. We will test our central hypothesis by accomplishing the following specific aims:

1. Compare the comprehensiveness of nursing home workplace violence prevention programs before and after enactment of the New Jersey regulations in nursing homes; *Working hypothesis:* Based on our preliminary research, we hypothesize that enactment of the regulations will improve the comprehensiveness of nursing home workplace violence prevention program policies, procedures and training.

2. Describe the workplace violence prevention training home healthcare aides receive following enactment of the New Jersey regulations; *Working hypothesis:* Based on our preliminary research, we hypothesize that home healthcare aides receive at least 80% of the workplace violence prevention training components mandated in the New Jersey regulations.

3. Examine patterns of assault injuries to nursing home workers before and after enactment of the regulations; *Working hypothesis:* Based on our preliminary research, we hypothesize that rates of assault injuries to nursing home workers will decrease following enactment of the regulations.

Healthcare facilities falling under the regulations are eligible for study

inclusion (i.e., nursing homes). A contractor will conduct face-to-face interviews with the chairs of the Violence Prevention Committees at 20 nursing homes, who as stated in regulations, are in charge of overseeing compliance efforts. These individuals will include nursing home administrators. The purpose of the interviews is to measure compliance to the state regulations (Aim 1). The interview form was pilot-tested by the study team in the Fall 2010 and includes the following components as mandated in the regulations: violence prevention policies, reporting systems for violent events, violence prevention committee, written violence prevention plan, violence risk assessments, post incident response and violence prevention training. The nursing home's policy and procedures documents will be obtained by the contractor to provide details about their workplace violence prevention program. Questions will also be asked about barriers and facilitators to developing the violence prevention program. These data will be collected in the post-regulation time period.

A contractor will also collect assault injury data from nursing home violent event reports 3 years pre-regulation (2009–2011) and 3 years post-regulation (2012–2014). This data will be collected from existing OSHA logs. The purpose of collecting these data is to evaluate changes in assault injury rates before and after enactment of the regulations (Aim 3). The following information will be abstracted from the OSHA logs: date, time and location of the incident; identity, job title and job task of the victim; identity of the perpetrator; description of the violent act, including whether a weapon was used; description of physical injuries; number of employees in the vicinity when the incident occurred, and their actions in response to the incident; recommendations of police advisors, employees or consultants, and; actions taken by the facility in response to the incident. No employee or perpetrator identifiable information will be collected.

In addition to nursing homes, home healthcare aides will also be recruited. These home healthcare aides will be recruited from a mailing list of home healthcare aides certified from the State of New Jersey Division of Consumer Affairs Board of Nursing. The mailing list was selected as the population source of workers due to the ability to capture all home healthcare aides in New Jersey. Therefore, a sampling frame based on home healthcare aides will be used to select workers to participate in the study. A random sample of 4000 (1333 annually) home healthcare aides will be recruited for study participation. A third-party contractor will be responsible for sending the survey to the random sample of 4000 home healthcare aides (1333 annually). The Health Professionals and Allied Employees union will promote the survey to their members. To maintain the worker's anonymity, the home healthcare agency in which he/she works will not be identified. The survey will describe the workplace violence prevention training home healthcare aides receive following enactment of the New Jersey regulations (Aim 2). There are no costs to respondents other than their time.

ESTIMATED ANNUALIZED BURDEN HOURS

Respondents	Form	No. of respondents	No. of responses per respondent	Average burden per response (in hrs)	Total burden (in hrs)
Hospital Administrator	Interview	17	1	1	17
Nursing Administrator	Interview	7	1	1	7
Nurse Survey	Survey	1333	1	20/60	445
Home Healthcare Aides	Survey	1333	1	20/60	445
Total					914

Kimberly S. Lane,

Deputy Director, Office of Science Integrity, Office of the Associate Director for Science, Office of the Director, Centers for Disease Control and Prevention.

[FR Doc. 2012–18742 Filed 7–31–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Proposed Information Collection Activity; Comment Request

Title: Mother and Infant Home Visiting Program Evaluation: Follow-up data collection on family outcomes.

OMB No.: 0970–0402.

Description: In 2011, the Administration for Children and Families (ACF) and Health Resources and Services Administration (HRSA) within the U.S. Department of Health and Human Services (HHS) launched a national evaluation called the Mother and Infant Home Visiting Program Evaluation (MIHOPE). This evaluation, mandated by the Affordable Care Act, will inform the federal government about the effectiveness of the Maternal, Infant, and Early Childhood Home Visiting (MIECHV) program in its first few years of operation, and provide information to help states develop and strengthen home visiting programs in the future. MIHOPE has two phases. Phase 1 includes baseline data collection and implementation data; Phase 2 includes follow up data collection. OMB approved a data collection package for Phase 1 in July 2012. The purpose of the current document is to request approval of data collection efforts for Phase 2.

Data collected during Phase 2 will include the following: (1) A one-hour interview with the parent, (2) 30-minutes of observed interactions between the parent and child, (3) a direct assessment of child development, and (4) collection of saliva from the parent or child for purposes of measuring cotinine, an indicator of smoking behavior and exposure to second-hand smoke, and other health and stress indicators. Saliva analysis would not include assessment for illegal drug use or DNA.

Data collected during Phase 2 will be used to estimate the effects of MIECHV-funded programs on seven domains specified for the evaluation in the ACA: (1) Prenatal, maternal, and newborn health; (2) child health and development, including maltreatment, injuries, and development; (3) parenting; (4) school readiness and academic achievement; (5) crime or domestic violence; (6) family economic self-sufficiency; and (7) coordination of referrals for and provision of other community resources. Data collected

during Phase 2 will also be used to assess the differences in services used between families who receive home visiting and a comparison group.

Respondents: Respondents in Phase 2 will include parents and children who are enrolled in the study. Data collection activities will take place over a three-year period.

ANNUAL BURDEN ESTIMATES

Instrument	Annual number of respondents	Number of responses per respondent	Average burden hours per response	Total annual burden hours
Survey of parents in the study	1360	1	1.0	1360
Observed parent-child interactions	2720	1	0.5	1360
Direct assessments of children	2720	1	0.7	1904
Collecting saliva to measure cotinine	2720	1	0.1	272
Estimated Total Annual Burden Hours				4896

In compliance with the requirements of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Administration for Children and Families is soliciting public comment on the specific aspects of the information collection described above. Copies of the proposed collection of information can be obtained and comments may be forwarded by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: OPRE Reports Clearance Officer. Email address: *OPREinfocollection@acf.hhs.gov.* All requests should be identified by the title of the information collection.

The Department specifically requests comments on (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted within 60 days of this publication.

Steven M. Hanmer,

Reports Clearance Officer.

[FR Doc. 2012–18702 Filed 7–31–12; 8:45 am]

BILLING CODE 4184–22–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0813]

Agency Information Collection Activities; Proposed Collection; Comment Request; Applications for Food and Drug Administration Approval To Market a New Drug; Revision of Postmarketing Reporting Requirements—Discontinuance

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (the PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information including each proposed extension of an existing collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on the reporting requirements contained in FDA's regulations on postmarketing reporting of information pertaining to drug shortages.

DATES: Submit either electronic or written comments on the collection of information by October 1, 2012.

ADDRESSES: Submit electronic comments on the collection of information to *http://www.regulations.gov.* Submit written comments on the collection of information to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Juanmanuel Vilela, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–7651, *juanmanuel.vilela@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information [,including each proposed [extension/reinstatement] of an existing collection of information,] before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques,

when appropriate, and other forms of information technology.

Applications for Food and Drug Administration Approval To Market a New Drug; Revision of Postmarketing Reporting Requirements—Discontinuance (OMB Control Number 0910–0699)—Extension

FDA published an interim final rule on December 19, 2011 (76 FR 78530) amending its postmarketing reporting regulations implementing certain provisions of the Federal Food, Drug and Cosmetic Act. The provisions of the Federal Food, Drug and Cosmetic Act require manufacturers who are the sole manufacturers of certain drug products to notify FDA at least 6 months before discontinuance of manufacture of the products. The interim final rule modified the term ''discontinuance'' and clarified the term ''sole manufacturer'' with respect to notification of discontinuance requirements. The broader reporting resulting from these changes will enable FDA to improve its collection and distribution of drug shortage information to physician and patient organizations and to work with manufacturers and other stakeholders to respond to potential drug shortages.

Sections 314.81(b)(3)(iii) and 314.91 of FDA's regulations implement section 506C of the Federal Food, Drug and Cosmetic Act. Section 314.81(b)(3)(iii) requires entities who are the sole manufacturers of certain drug products to notify us at least 6 months before discontinuance of manufacture of the product. For the regulations to apply, a product must meet the following three criteria:

1. The product must be life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition;
2. The product must have been approved by FDA under section 505(b) or 505(j) of the Federal Food, Drug, and Cosmetic Act; and
3. The product must not have been originally derived from human tissue and replaced by a recombinant product.

Under § 314.81(b)(3)(iii)(c), FDA will publicly disclose information about drug products subject to section 506C that are to be discontinued. Section 314.91 allows us to reduce the 6-month notification period if we find that good cause exists for the reduction. A manufacturer may request that we reduce the notification period by certifying that good cause for the reduction exists.

FDA added §§ 314.81(b)(3)(iii) and 314.91 to its regulations in the **Federal Register** of October 18, 2007 (72 FR 58993). Sections 314.81(b)(3)(iii) and 314.91 require two new reporting requirements to FDA that are subject to OMB approval under the PRA: Notification of Discontinuance and Certification of Good Cause. The December 19, 2011, interim final rule added two new definitions to § 314.81(b)(3)(iii): ''Discontinuance'' and ''sole manufacturer.'' The interim final rule clarified the scope of manufacturers required to report and expanded the range of circumstances required to be reported to the Agency under § 314.81(b)(3)(iii), but did not change the substantive content of the reports required to be submitted to the Agency. This PRA analysis covers the information collection resulting from the October 18, 2007, final rule and also includes estimates of how the number of Notifications of Discontinuance and Certifications of Good Cause may increase as a result of the interim final rule.

A. Notification of Discontinuance

Under § 314.81(b)(3)(iii), at least 6 months before a sole manufacturer intends to discontinue manufacture of a drug product subject to section 506C, the manufacturer must send us notification of the discontinuance. The notification of discontinuance generally contains the name of the manufacturer, the name of the product to be discontinued, the reason for the discontinuance, and the date of discontinuance. FDA will work with relevant manufacturers during the 6-month notification period to help minimize the effect of the discontinuance on patients and health care providers, and to distribute appropriate information about the discontinuance to physician and patient organizations. The interim final rule added definitions of ''discontinuance'' and ''sole manufacturer'' to § 314.81(b)(3)(iii). The inclusion of these definitions expands notification requirements under § 314.81(b)(3)(iii) to additional discontinuance circumstances and clarifies the scope of manufacturers who must report discontinuances. The interim final rule also required that notifications of discontinuance be submitted either electronically or by telephone according to instructions on FDA's Drug Shortage Web site at *http://www.fda.gov/Drugs/DrugSafety/DrugShortages*. This change ensures that the appropriate offices are timely notified of all relevant discontinuances. It also reflects existing practice for submitting notices of discontinuance, and reduces the burden on industry to submit multiple copies of the notification.

B. Certification of Good Cause

FDA may reduce the 6-month notification period if we find good cause for the reduction. As described in § 314.91, a manufacturer can request a reduction in the notification period by submitting written certification that good cause exists to the following designated offices: (1) The CDER Drug Shortage Coordinator at the address of the Director of CDER; (2) the CDER Drug Registration and Listing Team, Division of Compliance Risk Management and Surveillance in CDER; and (3) the director of either the CDER division or the CBER office that is responsible for reviewing the application. The following circumstances may establish good cause:

- A public health problem may result from continuation of manufacturing for the 6-month period (§ 314.91(d)(1));
- A biomaterials shortage prevents the continuation of manufacturing for the 6-month period (§ 314.91(d)(2));
- A liability problem may exist for the manufacturer if the manufacturing is continued for the 6-month period (§ 314.91(d)(3));
- Continuation of the manufacturing for the 6-month period may cause substantial economic hardship for the manufacturer (§ 314.91(d)(4));
- The manufacturer has filed for bankruptcy under chapter 7 or 11 of title 11, United States Code (§ 314.91(d)(5));
- The manufacturer can stop making the product but still distribute it to satisfy existing market need for 6 months (§ 314.91(d)(6)); or
- Other good cause exists for a reduction in the notification period (§ 314.91(d)(7)).

With each certification described previously, the manufacturer must describe in detail the basis for its conclusion that such circumstances exist. We require that the written certification that good cause exists be submitted to the offices identified previously to ensure that our efforts to address the discontinuance take place in a timely manner. The interim final rule made no changes to the requirements or process for certification of good cause.

Description of Respondents: An applicant that is the sole manufacturer and who is discontinuing manufacture of a drug product that meets the following criteria: (1) Is life supporting, life sustaining, or intended for use in the prevention of a debilitating disease or condition; (2) was approved by FDA under section 505(b) or (j) of the Federal Food, Drug, and Cosmetic Act; and (3) was not originally derived from human tissue and replaced by a recombinant product.

Burden Estimate: The table below provides an estimate of the annual reporting burden for notification of a product discontinuance and certification of good cause under §§ 314.81(b)(3)(iii) and 314.91, as amended by the interim final rule.

Notification of Discontinuance: Based on data collected from the CDER Drug Shortage Coordinator since December 17, 2007, when §§ 314.81(b)(3)(iii) and 314.91 went into effect, one manufacturer during each year reported to FDA a discontinuance of one drug product meeting the criteria of section 506C and its implementing regulations (i.e., the drug product was approved under section 505(b) or (j) of the Federal Food, Drug, and Cosmetic Act, the drug product was ''life-supporting, life-sustaining or intended for use in the prevention of a debilitating disease or condition,'' the drug product was produced by a sole manufacturer, and the drug product was permanently discontinued). CDER's Drug Shortages Coordinator tracked 220 drug shortages between January and October of 2011. The Agency estimates that 30 percent (66) of these shortages would relate to discontinuances subject to mandatory reporting under section 506C as a result of the interim final rule. Adjusting to include an additional two months of reporting (November and December), we estimate that FDA will receive a total of 80 notifications of a discontinuance per year under section 506C, as amended by the interim final rule. Based on experience, a manufacturer submits only one notification of a discontinuance per year, thus the total number of manufacturers who would be required to notify us of a discontinuance would be 80. Therefore, the number of respondents is estimated to be 80. The hours per response is the estimated number of hours that a respondent would spend preparing the information to be submitted with a notification of product discontinuance, including the time it takes to gather and copy the statement. Based on experience in working with manufacturers to submit notifications under § 314.81(b)(3)(iii), we estimate that approximately 2 hours on average are needed per response. We do not expect the changes in the interim final rule to affect the number of hours per response. Therefore, we estimate that respondents will spend 160 hours per year notifying us of a product discontinuance under these regulations.

Certification of Good Cause: Based on data collected from the CDER drug shortage coordinator since 2007, one manufacturer each year reported a discontinuance of one drug product under section 506C and its implementing regulations. Each manufacturer has the opportunity under § 314.91 to request a reduction in the 6-month notification period by certifying to us that good cause exists for the reduction. The Agency has received no certifications of good cause since 2007. Although we expect we will receive an increase in the number of reports of discontinuances as a result of the changes in the interim final rule, because of the limited circumstances under which good cause can be requested or would be appropriately granted, we do not expect a correspondingly large increase in the number of manufacturers requesting a certification of good cause. We estimate that only 5 manufacturers will request a certification of good cause each year. Therefore, the number of respondents is estimated to be 5. The total annual responses are the total number of certifications of good cause that are expected to be submitted to us in a year. We estimate that the total annual responses will remain small, averaging one response per respondent. The hours per response is the estimated number of hours that a respondent spends preparing the detailed information certifying that good cause exists for a reduction in the notification period, including the time it takes to gather and copy the documents. We estimate that approximately 16 hours on average are needed per response. Therefore, we estimate that 80 hours will be spent per year by respondents certifying that good cause exists for a reduction in the 6-month notification period under § 314.91.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Notification of Discontinuance (314.81(b)(3)(iii)	80	1	80	2	160
Certification of Good Cause (314.91)	5	1	5	16	80
Total					240

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Dated: July 27, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18771 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2011–N–0776]

Agency Information Collection Activities; Announcement of Office of Management and Budget Approval; Reclassification Petitions for Medical Devices

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a collection of information entitled ''Reclassification Petitions for Medical Devices'' has been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Daniel Gittleson, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400B, Rockville, MD 20850, 301–796–5156, *Daniel.Gittleson@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION: On March 29, 2012, the Agency submitted a proposed collection of information entitled ''Reclassification Petitions for Medical Devices'' to OMB for review

and clearance under 44 U.S.C. 3507. An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has now approved the information collection and has assigned OMB control number 0910–0138. The approval expires on June 30, 2015. A copy of the supporting statement for this information collection is available on the Internet at *http://www.reginfo.gov/public/do/PRAMain.*

Dated: July 27, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18772 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0438]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Early Food Safety Evaluation of New Non-Pesticidal Proteins Produced by New Plant Varieties Intended for Food Use

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by August 31, 2012.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0583. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Information Management, Food and Drug Administration, 1350 Piccard Dr., PI50–400T, Rockville, MD 20850, 301–796–5733, *domini.bean@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Early Food Safety Evaluation of New Non-Pesticidal Proteins Produced by New Plant Varieties Intended for Food Use (OMB Control Number 0910–0583)—Revision

I. Background

Since May 29, 1992, when FDA issued a policy statement on foods derived from new plant varieties, FDA has encouraged developers of new plant varieties, including those varieties that are developed through biotechnology, to consult with FDA early in the development process to discuss possible scientific and regulatory issues that might arise (57 FR 22984). The guidance, entitled ''Recommendations for the Early Food Safety Evaluation of New Non-Pesticidal Proteins Produced by New Plant Varieties Intended for Food Use,'' continues to foster early communication by encouraging developers to submit to FDA their evaluation of the food safety of their new protein. Such communication helps to ensure that any potential food safety issues regarding a new protein in a new plant variety are resolved early in development, prior to any possible inadvertent introduction into the food supply of material from that plant variety.

FDA believes that any food safety concern related to such material entering the food supply would be limited to the potential that a new protein in food from the plant variety could cause an allergic reaction in susceptible individuals or could be a toxin. The guidance describes the procedures for early food safety evaluation of new proteins in new plant varieties, including bioengineered food plants, and the procedures for communicating with FDA about the safety evaluation.

FDA has recently developed a form that interested persons may use to transmit their submission to the Office of Food Additive Safety in the Center for Food Safety and Applied Nutrition. New Form FDA 3666, a draft of which is available at *http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodIngredientsandPackaging/RegulatorySubmissions/UCM199325.pdf,* is entitled, ''Early Food Safety Evaluation of a New Non-Pesticidal Protein Produced by a New Plant Variety (New Protein Consultation)'' and may be used in lieu of a cover letter for a New Protein Consultation (NPC). Form FDA 3666 prompts a submitter to include certain elements of a NPC in a standard format and helps the respondent organize their submission to focus on the information needed for FDA's safety review. The form, and elements that would be prepared as attachments to the form, may be submitted in electronic format via the Electronic Submission Gateway (ESG), or may be submitted in paper format, or as electronic files on physical media with paper signature page. The information is used by FDA to evaluate the food safety of a specific new protein produced by a new plant variety.

II. NPC Information Submitted on Form FDA 3666

The NPC submitted to FDA includes the following information on Form FDA 3666 and in attachments to the form:

A. Introductory Information About the Submission

- Whether the NPC submission is a new submission, or an amendment or supplement to a previously established NPC;
- Whether the submitter has determined that all files provided in an electronic transmission are free of computer viruses;
- The date of the submitter's most recent meeting (if any) with FDA before transmitting a new NPC submission; and
- The date of any correspondence, sent to the submitter by FDA, relevant to an amendment or supplement the submitter is transmitting.

B. Information About the Submitter

- The name of and contact information for the submitter, including the identity of the contact person and the company name (if applicable); and
- The name of and contact information for any agent or attorney who is authorized to act on behalf of the submitter.

C. General Administrative Information

- The title of the submission;
- The format of the submission (i.e., paper, electronic, or electronic with a paper signature page);
- The mode of transmission of any electronic submission (i.e., ESG or transmission on physical media such as CD–ROM or DVD);
- Whether the submitter is referring us to information already in our files;
- Whether the submitter has designated in its submission any information as trade secret or as confidential commercial or financial information; and

• Whether the submitter has attached a redacted copy of some or all of the submission.

D. Information About the New Protein

• The name of the new protein;
• Any requested registry designations for the new protein; and
• The purpose or intended technical effect of the new protein.

E. Information about Genetic Material

• Information about the introduced genetic material (including identity and source).

F. The Scientific Evaluation of the Food Safety of the New Protein

The submitter indicates:

• Whether there is a history of safe use of the new protein in food or feed;
• Whether the submitter has included an assessment of the amino acid similarity between the new protein and known allergens and toxins;
• Whether the submitter has included information about the overall stability of the protein, and the resistance of the protein to enzymatic degradation using appropriate *in vitro* assays; and
• Whether the submitter has included any other information for FDA to consider in evaluating a NPC.

Form FDA 3666 also requires the signature of a responsible official (or agent or attorney) and a list of attachments.

III. Public Comment

In the **Federal Register** of May 15, 2012 (77 FR 28603), FDA published a 60-day notice requesting public comment on the proposed collection of information. No comments were received.

IV. Burden Estimate

Description of Respondents: The respondents to this collection of information are developers of new plant varieties intended for food use.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Category	FDA Form No. [2]	No. of respondents	No. of responses per respondent	Total annual responses	Average burden per response	Total hours
First four data components	Form FDA 3666	20	1	20	4	80
Two other data components	Form FDA 3666	20	1	20	16	320
Total						400

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.
[2] Form FDA 3666 may be submitted electronically via the ESG.

The estimated number of annual responses and average burden per response are based on FDA's experience with early food safety evaluations submitted in the past 3 years. Completing an early food safety evaluation for a new protein from a new plant variety is a one-time burden (one evaluation per new protein). Based on its experience over the past 3 years, FDA estimates that approximately 20 developers will choose to complete an early food safety evaluation for their new plant protein, for a total of 20 responses annually. Many developers of novel plants may choose not to submit an evaluation because the field testing of a plant containing a new protein is conducted in such a way (e.g., on such a small scale, or in such isolated conditions, etc.) that cross-pollination with traditional crops or commingling of plant material is not likely to be an issue. Also, other developers may have previously communicated with FDA about the food safety of a new plant protein, for example, when the same protein was expressed in a different crop.

The early food safety evaluation for new proteins includes six main data components. Four of these data components are easily and quickly obtainable, having to do with the identity and source of the protein. FDA estimates that completing these data components will take about 4 hours per NPC. FDA estimates the reporting burden for the first four data components to be 80 hours (4 hours × 20 responses).

Two data components ask for original data to be generated. One data component consists of a bioinformatics analysis which can be performed using publicly available databases. The other data component involves ''wet'' lab work to assess the new protein's stability and the resistance of the protein to enzymatic degradation using appropriate in vitro assays (protein digestibility study). The paperwork burden of these two data components consists of the time it takes the company to assemble the information on these two data components and include it in a NPC. FDA estimates that completing these data components will take about 16 hours per NPC. FDA estimates the reporting burden for the two other data components to be 320 hours (16 hours × 20 responses). Thus, FDA estimates the total annual hour burden for this collection of information to be 400 hours.

FDA expects that most if not all businesses filing NPCs in the next 3 years will choose to take advantage of the option of electronic submission via the ESG. Thus, the burden estimates in table 1 of this document are based on the expectation of 100 percent participation in the electronic submission process. The opportunity to provide the information in electronic format could reduce the agency's previous estimates for the time to prepare each submission. However, as a conservative approach for the purpose of this analysis, FDA is assuming that the availability of new Form FDA 3666 and the opportunity to submit the information in electronic format will have no effect on the average time to prepare a submission. While FDA does not charge for the use of the ESG, FDA requires respondents to obtain a public key infrastructure (PKI) certificate in order to set up the account. This can be obtained in-house or outsourced by purchasing a public key certificate that is valid for 1 year to 3 years. The certificate typically costs from $20 to $30.

Dated: July 27, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18765 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0806]

Animal Drug User Fee Rates and Payment Procedures for Fiscal Year 2013

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the rates and payment procedures for fiscal year (FY) 2013 animal drug user fees. The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Animal Drug User Fee Act of 2003 (ADUFA) and the Animal Drug User Fee Amendments of 2008 (ADUFA II), authorizes FDA to collect user fees for certain animal drug applications and supplements, for certain animal drug products, for certain establishments where such products are made, and for certain sponsors of such animal drug applications and/or investigational animal drug submissions. This notice establishes the fee rates for FY 2013.

FOR FURTHER INFORMATION CONTACT: Visit FDA's Web site at *http://www.fda.gov/ForIndustry/UserFees/AnimalDrugUserFeeActADUFA/default.htm,* or contact Lisa Kable, Center for Veterinary Medicine (HFV–10), Food and Drug Administration, 7529 Standish Pl., Rockville, MD 20855, 240–276–9718. For general questions, you may also email the Center for Veterinary Medicine (CVM) at: *cvmadufa@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 740 of the FD&C Act (21 U.S.C. 379j–12) establishes four different types of user fees: (1) Fees for certain types of animal drug applications and supplements, (2) annual fees for certain animal drug products, (3) annual fees for certain establishments where such products are made, and (4) annual fees for certain sponsors of animal drug applications and/or investigational animal drug submissions (21 U.S.C. 379j–12(a)). When certain conditions are met, FDA will waive or reduce fees (21 U.S.C. 379j–12(d)).

For FY 2009 through FY 2013, the FD&C Act establishes aggregate yearly base revenue amounts for each of these fee categories. Base revenue amounts established for years after FY 2009 are subject to adjustment for workload. Fees for applications, establishments, products, and sponsors are to be established each year by FDA so that the revenue for each fee category will approximate the level established in the statute, after the level has been adjusted for workload.

For FY 2013, the animal drug user fee rates are: $435,200 for an animal drug application; $217,600 for a supplemental animal drug application for which safety or effectiveness data is required and for an animal drug application subject to the criteria set forth in section 512(d)(4) of the FD&C Act (21 U.S.C. 360b(d)(4)); $8,640 for an annual product fee; $104,600 for an annual establishment fee; and $87,700 for an annual sponsor fee. FDA will issue invoices for FY 2013 product, establishment, and sponsor fees by December 31, 2012, and these invoices will be due and payable within 30 days of issuance of the invoice. The application fee rates are effective for applications submitted on or after October 1, 2012, and will remain in effect through September 30, 2013. Applications will not be accepted for review until FDA has received full payment of application fees and any other animal drug user fees owed.

II. Revenue Amount for FY 2013

A. Statutory Fee Revenue Amounts

ADUFA II (Pub. L. 110–316 signed by the President on August 14, 2008) specifies that the aggregate revenue amount for FY 2013 for each of the four animal drug user fee categories is $6,061,000 before any adjustment for workload is made. (See 21 U.S.C. 379j–12(b)(1) through (b)(4).)

B. Inflation Adjustment to Fee Revenue Amount

The amounts established in ADUFA II for each year for FY 2009 through FY 2013 include an inflation adjustment; therefore, no further inflation adjustment is required.

C. Workload Adjustment to Inflation Adjusted Fee Revenue Amount

For each FY beginning in FY 2010, ADUFA provides that fee revenue amounts shall be further adjusted to reflect changes in review workload (21 U.S.C. 379j–12(c)(1)).

FDA calculated the average number of each of the five types of applications and submissions specified in the workload adjustment provision (animal drug applications, supplemental animal drug applications for which data with respect to safety or efficacy are required, manufacturing supplemental animal drug applications, investigational animal drug study submissions, and investigational animal drug protocol submissions) received over the 5-year period that ended on September 30, 2002 (the base years), and the average number of each of these types of applications and submissions over the most recent 5-year period that ended June 30, 2012.

The results of these calculations are presented in the first two columns of table 1 of this document. Column 3 reflects the percent change in workload over the two 5-year periods. Column 4 shows the weighting factor for each type of application, reflecting how much of the total FDA animal drug review workload was accounted for by each type of application or submission in the table during the most recent 5 years. Column 5 of table 1 of this document is the weighted percent change in each category of workload and was derived by multiplying the weighting factor in each line in column 4 by the percent change from the base years in column 3. At the bottom right of the table the sum of the values in column 5 is added, reflecting a total change in workload of −32% percent for FY 2013. This is the workload adjuster for FY 2013.

TABLE 1—WORKLOAD ADJUSTER CALCULATION (NUMBERS MAY NOT ADD DUE TO ROUNDING)

Application type	Column 1 5-year Avg. (base years)	Column 2 latest 5-year avg.	Column 3 percent change	Column 4 weighting factor	Column 5 weighted percent change
New Animal Drug Applications (NADAs)	28.8	11.4	−60	0.0229	−1
Supplemental NADAs With Safety or Efficacy Data	23.4	11.4	−51	0.0275	−1
Manufacturing Supplements	366.6	394.2	8	0.1222	1
Investigational Study Submissions	336.6	224.0	−33	0.6435	−22
Investigational Protocol Submissions	292.4	148.6	−49	0.1838	−9

TABLE 1—WORKLOAD ADJUSTER CALCULATION (NUMBERS MAY NOT ADD DUE TO ROUNDING)—Continued

Application type	Column 1 5-year Avg. (base years)	Column 2 latest 5-year avg.	Column 3 percent change	Column 4 weighting factor	Column 5 weighted percent change
FY 2013 Workload Adjuster					−32

ADUFA specifies that the workload adjuster may not result in fees that are less than the fee revenue amount in the statute (21 U.S.C. 379j–12(c)(1)(B)). Because applying the FY 2013 workload adjuster would result in fees less than the statutory amount, the workload adjustment will not be applied in FY 2013. As a result, the statutory revenue target amount for each of the four categories of fees remains at $6,061,000 with the new total revenue target for fees in FY 2013 being $24,244,000.

D. Offset for Excess Collections Through FY 2012

Under the provisions of ADUFA I, which apply to fees collected for FY 2004 through FY 2008, if the amount of fees collected for a FY exceeds the amount of fees specified in appropriation acts for that FY, the excess amount shall be credited to FDA's appropriation account and shall be subtracted from the amount of fees that would otherwise be authorized to be collected in a subsequent FY. (See section 740(g)(4) of the FD&C Act as originally enacted in Public Law 108–130 on November 18, 2003.) In setting ADUFA fees for FY 2008 and FY 2009, offsets totaling $1,664,000 were made under these provisions ($320,000 when FY 2008 fees were set and another $1,344,000 when fees for FY 2009 were set), but offsets totaling $394,256 for this period still need to be made. Table 2 shows the amount of fees specified in FDA's annual appropriation for each year from 2004 through 2008, the amounts FDA has collected for each year; the amount of offset previously taken, and the cumulative difference. FDA will take this difference as an offset against FY 2013 fee collections.

TABLE 2—OFFSETS REMAINING TO BE TAKEN FOR ADUFA I, FY 2004–2008

Fiscal year	Fees appropriated	Fees collected as of 3/31/2012	Excess collections offset when fees were set	Remaining excess collections to be offset
2004	$5,000,000	$5,154,700		$154,700
2005	8,354,000	8,519,101		165,101
2006	11,318,000	10,901,466		0
2007	11,604,000	13,342,455		1,738,455
2008	13,696,000	11,577,312	320,000	0
Totals				[1] 2,058,256
Net Excess Appropriations, to be Offset Against 2013 Collections				394,256

[1] See table 3 of this document for information on additional offset taken in FY 2009.

In addition, under the provisions of ADUFA, as amended by ADUFA II, if the cumulative amount of the fees collected for fiscal years 2009 through 2011, and the amount of fees estimated to be collected under this section for FY 2012, exceeds the cumulative amount appropriated for fees for fiscal years 2009 through 2012, the excess will be subtracted from the amount of fees that FDA would otherwise be authorized to collect for FY 2013 under the FD&C Act (21 U.S.C. 379j–12(g)(4) as amended by ADUFA II).

Table 3 shows the amounts appropriated for each year from FY 2009 through FY 2012, and the amounts FDA has collected for fiscal years 2009, 2010, and 2011 as of March 31, 2012, and the amount that FDA estimated it would collect in FY 2012 when it published the notice of FY 2012 fees in the **Federal Register** on August 1, 2011 (76 FR 45811). The bottom line of Table 3 shows the estimated cumulative amount by which fees collected fell below amounts appropriated for FY 2009 through FY 2012.

TABLE 3—OFFSETS TO BE TAKEN FOR THE ADUFA II PERIOD, FISCAL YEARS 2009–2012

[for FY 2009–2011, fees collected through March 31, 2012; for FY 2012, estimate as August 1, 2011]

Fiscal year	Fees appropriated	Fees collected	Excess collections offset when fees were set	Difference
2009	$15,260,000	$12,893,721	$1,344,000	($2,366,279)
2010	17,280,000	16,609,805		(670,195)
2011	19,448,000	18,342,199		(1,105,801)
2012 estimated	21,768,000	21,768,000		0
Cumulative Difference Less Than Appropriations				(4,142,275)

As can be seen from table 3, no further offset is required for the period 2009 through 2012 since collections have fallen substantially below the amounts appropriated each year and in aggregate. The only offset required at this time is the $394,256 from the ADUFA I period.

E. Final Year Adjustment

Under the provisions of ADUFA, as amended, the Secretary may, in addition to the workload adjustment and offset, further increase the fees and fee revenues if such an adjustment is necessary to provide up to 3 months of operating reserves of carryover user fees for the process for the review of animal drug applications for the first 3 months of FY 2014. (See 21 U.S.C. 379j–12(c)(2).) The rationale for the amount of this increase shall be contained in the annual notice establishing fee revenues and fees for FY 2013 (See section 740(c)(2) of the FD&C Act.) Table 4 in this document estimates the amount of carryover reserve FDA currently estimates to have available at the end of FY 2013. It begins with the balance available at the end of FY 2011, rounded to the nearest thousand dollars, adds the net prior year collections for the 6 months ending March 31, 2012, and subtracts the amount it will have to use to cover the offset it will make when 2013 fees are set. In addition, FDA is keeping aside a reserve of $1,400,000 for potential refunds, and a net of $379,000 for the last 2 years of ADUFA II. The amount of carry-over balance FDA expects to have available for obligation at the end of FY 2013 is $3,694,000, as shown in the last line of table 4.

TABLE 4—ESTIMATED CARRYOVER BALANCE AT THE END OF FY 2013, AFTER ADJUSTMENTS

Total Carryover Balance End of FY 2011	$4,664,000
Net Prior Year Fees Collected After 9/30/2011 (3/31/2012)	445,000
Used for Offset in 2013	(394,000)
Reserve for Refunds in 2012 and 2013	(1,400,000)
Estimated Change to Carryover Balance at the End of FY 2012	636,000
Estimated Change to Carryover Balance at the End of FY 2013	(257,000)
Estimated 2013 End of FY Carryover Balance	3,694,000

Table 5 estimates the amount of funds FDA anticipates that it will need from animal drug user fees in order to operate for the first 3 months of FY 2014.

TABLE 5—ESTIMATED FEE REVENUE NEEDED TO SUSTAIN FY 2013 OPERATIONS FOR THE FIRST 3 MONTHS OF FY 2014

Estimated Total Spending from Fees in FY 2013	$19,652,000
Estimated FY 2014 Inflation Costs at 2.01%	395,000
Estimated FY 2014 Funds to Sustain FY 2013 Operations	20,047,000
Estimated Fees Needed for 3 Months in FY 2014	5,012,000
Estimated End-of-FY 2013 Carryover Balance	3,694,000
Additional Revenue Needed for 3 Months in FY 2013	1,318,000

FDA expects to collect and spend a total of $19,652,000 in FY 2013, rounding to the nearest thousand dollars, after making adjustments for the offset of $394,256 and for likely revenue shortfalls below the $24,244,000 amount authorized for collection from ADUFA fee in that year. To maintain FY 2013 operations in FY 2014, FDA is applying an anticipated inflation rate of 2.01 percent to the amount of fee revenues FDA expects to obligate in FY 2013. This 2.01 percent is the statutory inflation adjustment to be applied to PDUFA and several other user fee programs in FY 2013, and the only statutory inflation adjustment for FDA available at this time; its derivation is published elsewhere in this issue of the **Federal Register** where the FY 2013 fees for the PDUFA user fee program is published. FDA expects to obligate a total of $20,047,000 in FY 2014—or a total of about $5,012,000 during the first 3 months of FY 2014, rounded to the nearest thousand dollars. The available carryover balance at the beginning of FY 2013 is estimated at $3,694,000 (rounded to the nearest thousand dollars). Thus FDA would need an additional $1,318,000 ($5,012,000 minus $3,694,000 rounded to the nearest thousand dollars) as the final year adjustment to assure sufficient operating reserves for the first 3 months of FY 2014.

FDA recognizes that adding $1,318,000 to the fee revenue costs in FY 2013 poses a substantial burden on the regulated industry at a time when it is undergoing financial strain. In light of this, and in light of the fact that the legislative language authorizing the final year adjustment allows FDA discretion in whether to make this adjustment for a full 3 months of operating reserves or for a shorter period, FDA has decided to balance its own risks with the amount of burden the final year adjustment would place on the industry. In making this decision, FDA has decided to assume more risk, making the final year adjustment to allow for only 2 months of operating reserves instead of 3 months. Accordingly FDA will make the final year adjustment for a lesser amount, as derived in table 6 of this document.

TABLE 6—ESTIMATED FEE REVENUE NEEDED TO SUSTAIN FY 2013 OPERATIONS FOR THE FIRST 2 MONTHS OF FY 2014

Estimated Total Spending from Fees in FY 2013	$19,652,000
Estimated FY 2014 Inflation Costs at 2.01%	395,000
Estimated FY 2014 Funds to Sustain FY 2013 Operations	20,047,000
Estimated Fees Needed for 2 Months in FY 2014	3,341,000
Estimated End-of-FY 2013 Carryover Balance	3,694,000
Additional Revenue Needed for 2 Months in FY 2013	0

Accordingly FDA will make no final year adjustment in the ADUFA fee revenue amount. In making this decision, FDA is assuming that it will have the revenues to operate in FY 2013 as proposed in the President's budget request for FDA. Should a significant reduction below that amount occur, FDA will have to make larger expenditures of user fee reserves to sustain the animal drug review program in FY 2013, to make up for appropriation reductions, and will have less carryover balance at the end of FY 2013 than estimated in this document. If such a reduction in appropriated funds should occur, FDA is reserving the right to revise the fees it is setting for FY 2013, due to the need to assess a final year adjustment in such circumstances. If that fact only becomes known after the start of FY 2013, FDA may publish a revised fee schedule with increased FY 2013 fees, and advise any who have paid fees at the lower rate that they will have to make another payment to make up the difference between the fees published in this document and the higher fees necessitated by the need to impose a final year adjustment.

F. FY 2013 Fee Revenue Amounts

The final estimate of fee revenue for ADUFA fees for FY 2013 is shown in table 7 in this document. The statutory amount of $6,061,000 for each of the fee components is reduced by a total of $98,564—one fourth of the total offset amount of $394,256. No final year adjustment is made. The total is then rounded to the nearest thousand dollars,

for a total of $5,962,000 to come from each fee component.

TABLE 7—ESTIMATE OF TOTAL ADUFA FEE REVENUE FOR FY 2013

Fee components	Application fees	Establishment fees	Product fees	Sponsor fees	Total
Amount in ADUFA II	$6,061,000	$6,061,000	$6,061,000	$6,061,000	$24,244,000
Reduction for Offset	(98,564)	(98,564)	(98,564)	(98,564)	(394,256)
Final Year Adjustment	0	0	0	0	0
Total	5,962,436	5,962,436	5,962,436	5,962,436	23,849,744
Total Rounded	5,962,000	5,962,000	5,962,000	5,962,000	23,848,000

III. Application Fee Calculations for FY 2013

The terms ''animal drug application'' and ''supplemental animal drug application'' are defined in section 739 of the FD&C Act (21 U.S.C. 379j–11(1) and (2)).

A. Application Fee Revenues and Numbers of Fee-Paying Applications

The application fee must be paid for any animal drug application or supplemental animal drug application that is subject to fees under ADUFA and that is submitted on or after September 1, 2003. The application fees are to be set so that they will generate $5,962,000 in fee revenue for FY 2013. This is the amount set out in the statute and adjusted for the offset with no final year adjustment. The fee for a supplemental animal drug application for which safety or effectiveness data are required and for an animal drug application subject to criteria set forth in section 512(d)(4) of the FD&C Act is to be set at 50 percent of the animal drug application fee. (See 21 U.S.C. 379j–12(a)(1)(A)(ii), as amended by ADUFA II.)

To set animal drug application fees and supplemental animal drug application fees to realize $5,962,000, FDA must first make some assumptions about the number of fee-paying applications and supplements the Agency will receive in FY 2013.

The Agency knows the number of applications that have been submitted in previous years. That number fluctuates significantly from year to year. In estimating the fee revenue to be generated by animal drug application fees in FY 2013, FDA is assuming that the number of applications that will pay fees in FY 2013 will equal the average number of submissions over the 5 most recent completed years (FY 2007–FY 2011). This may not fully account for possible year to year fluctuations in numbers of fee-paying applications, but FDA believes that this is a reasonable approach after 9 years of experience with this program.

Over the 5 most recent completed years, the average number of animal drug applications that would have been subject to the full fee was 8.2. Over this same period, the average number of supplemental applications and applications subject to the criteria set forth in section 512(d)(4) of the FD&C Act that would have been subject to half of the full fee was 11.0.

B. Fee Rates for FY 2013

FDA must set the fee rates for FY 2013 so that the estimated 8.2 applications that pay the full fee and the estimated 11.0 supplemental applications and applications subject to the criteria set forth in section 512(d)(4) of the FD&C Act that pay half of the full fee will generate a total of $5,962,000. To generate this amount, the fee for an animal drug application, rounded to the nearest hundred dollars, will have to be $435,200, and the fee for a supplemental animal drug application for which safety or effectiveness data are required and for applications subject to the criteria set forth in section 512(d)(4) of the FD&C Act will have to be $217,600.

IV. Product Fee Calculations for FY 2013

A. Product Fee Revenues and Numbers of Fee-Paying Products

The animal drug product fee (also referred to as the product fee) must be paid annually by the person named as the applicant in a new animal drug application or supplemental new animal drug application for an animal drug product submitted for listing under section 510 of the FD&C Act (21 U.S.C. 360), and who had an animal drug application or supplemental animal drug application pending at FDA after September 1, 2003. (See 21 U.S.C. 379j–12(a)(2).) The term ''animal drug product'' is defined in 21 U.S.C. 379j–11(3). The product fees are to be set so that they will generate $5,962,000 in fee revenue for FY 2013. This is the amount set out in the statute and adjusted for the offset with no final year adjustment.

To set animal drug product fees to realize $5,962,000, FDA must make some assumptions about the number of products for which these fees will be paid in FY 2013. FDA developed data on all animal drug products that have been submitted for listing under section 510 of the FD&C Act and matched this to the list of all persons who had an animal drug application or supplement pending after September 1, 2003. As of June 2012, FDA estimates that there are a total of 767 products submitted for listing by persons who had an animal drug application or supplemental animal drug application pending after September 1, 2003. Based on this, FDA estimates that a total of 767 products will be subject to this fee in FY 2013.

In estimating the fee revenue to be generated by animal drug product fees in FY 2013, FDA is again assuming that 10 percent of the products invoiced, or 77, will not pay fees in FY 2013 due to fee waivers and reductions. Based on experience with other user fee programs and the first 9 years of ADUFA, FDA believes that this is a reasonable basis for estimating the number of fee-paying products in FY 2013.

Accordingly, the Agency estimates that a total of 690 (767 minus 77) products will be subject to product fees in FY 2013.

B. Product Fee Rates for FY 2013

FDA must set the fee rates for FY 2013 so that the estimated 690 products that pay fees will generate a total of $5,962,000. To generate this amount will require the fee for an animal drug product, rounded to the nearest 5 dollars, to be $8,640.

V. Establishment Fee Calculations for FY 2013

A. Establishment Fee Revenues and Numbers of Fee-Paying Establishments

The animal drug establishment fee (also referred to as the establishment fee) must be paid annually by the person who: (1) Owns or operates, directly or through an affiliate, an animal drug establishment; (2) is named as the applicant in an animal drug application or supplemental animal drug application for an animal drug product submitted for listing under section 510 of the FD&C Act; (3) had an animal drug application or supplemental animal drug application pending at FDA after September 1, 2003; and (4) whose establishment engaged in the manufacture of the animal drug product during the fiscal year. (See 21 U.S.C. 379j–12(a)(3).) An establishment subject to animal drug establishment fees is assessed only one such fee per fiscal year. (See 21 U.S.C. 379j–12(a)(3).) The term ''animal drug establishment'' is defined in 21 U.S.C. 379j–11(4). The establishment fees are to be set so that they will generate $5,962,000 in fee revenue for FY 2013. This is the amount set out in the statute and adjusted for the offset with no final year adjustment.

To set animal drug establishment fees to realize $5,962,000, FDA must make some assumptions about the number of establishments for which these fees will be paid in FY 2013. FDA developed data on all animal drug establishments and matched this to the list of all persons who had an animal drug application or supplement pending after September 1, 2003. As of June 2012, FDA estimates that there are a total of 63 establishments owned or operated by persons who had an animal drug application or supplemental animal drug application pending after September 1, 2003. Based on this, FDA believes that 63 establishments will be subject to this fee in FY 2013.

In estimating the fee revenue to be generated by animal drug establishment fees in FY 2013, FDA is assuming that 10 percent of the establishments invoiced, or 6, will not pay fees in FY 2013 due to fee waivers and reductions. Based on experience with the first 9 years of ADUFA, FDA believes that this is a reasonable basis for estimating the number of fee-paying establishments in FY 2013.

Accordingly, the Agency estimates that a total of 57 establishments (63 minus 6) will be subject to establishment fees in FY 2013.

B. Establishment Fee Rates for FY 2013

FDA must set the fee rates for FY 2013 so that the estimated 57 establishments that pay fees will generate a total of $5,962,000. To generate this amount will require the fee for an animal drug establishment, rounded to the nearest 50 dollars, to be $104,600.

VI. Sponsor Fee Calculations for FY 2013

A. Sponsor Fee Revenues and Numbers of Fee-Paying Sponsors

The animal drug sponsor fee (also referred to as the sponsor fee) must be paid annually by each person who: (1) Is named as the applicant in an animal drug application, except for an approved application for which all subject products have been removed from listing under section 510 of the FD&C Act, or has submitted an investigational animal drug submission that has not been terminated or otherwise rendered inactive; and (2) had an animal drug application, supplemental animal drug application, or investigational animal drug submission pending at FDA after September 1, 2003. (See 21 U.S.C. 379j–11(6) and 379j–12(a)(4).) An animal drug sponsor is subject to only one such fee each fiscal year. (See 21 U.S.C. 379j–12(a)(4).) The sponsor fees are to be set so that they will generate $5,962,000 in fee revenue for FY 2013. This is the amount set out in the statute and adjusted for the offset with no final year adjustment.

To set animal drug sponsor fees to realize $5,962,000, FDA must make some assumptions about the number of sponsors who will pay these fees in FY 2013. Based on the number of firms that would have met this definition in each of the past 9 years, FDA estimates that a total of 171 sponsors will meet this definition in FY 2013.

Careful review indicates that about one third or 33 percent of all of these sponsors will qualify for minor use/minor species waiver or reduction (21 U.S.C. 379j–12(d)(1)(D)). Based on the Agency's experience to date with sponsor fees, FDA's current best estimate is that an additional 27 percent will qualify for other waivers or reductions, for a total of 60 percent of the sponsors invoiced, or 103, who will not pay fees in FY 2013 due to fee waivers and reductions. FDA believes that this is a reasonable basis for estimating the number of fee-paying sponsors in FY 2013.

Accordingly, the Agency estimates that a total of 68 sponsors (171 minus 103) will be subject to and pay sponsor fees in FY 2013.

B. Sponsor Fee Rates for FY 2013

FDA must set the fee rates for FY 2013 so that the estimated 68 sponsors that pay fees will generate a total of $5,962,000. To generate this amount will require the fee for an animal drug sponsor, rounded to the nearest 50 dollars, to be $87,700.

VII. Fee Schedule for FY 2013

The fee rates for FY 2013 are summarized in table 8 of this document.

TABLE 8—FY 2013 FEE RATES

Animal drug user fee category	Fee rate for FY 2013
Animal Drug Application Fees:	
Animal Drug Application	$435,200
Supplemental Animal Drug Application for which Safety or Effectiveness Data are Required or Animal Drug Application Subject to the Criteria Set Forth in Section 512(d)(4) of the FD&C Act	217,600
Animal Drug Product Fee	8,640
Animal Drug Establishment Fee [1]	104,600
Animal Drug Sponsor Fee [2]	87,700

[1] An animal drug establishment is subject to only one such fee each fiscal year.

[2] An animal drug sponsor is subject to only one such fee each fiscal year.

VIII. Procedures for Paying the FY 2013 Fees

A. Application Fees and Payment Instructions

The appropriate application fee established in the new fee schedule must be paid for an animal drug application or supplement subject to fees under ADUFA that is submitted after September 30, 2012. Payment must be made in U.S. currency by check, bank draft, or U.S. postal money order payable to the order of the Food and Drug Administration, by wire transfer, or electronically using Pay.gov. (The Pay.gov payment option is available to you after you submit a cover sheet. Click the ''Pay Now'' button.) On your check, bank draft, or U.S. postal money order, please write your application's unique Payment Identification Number (PIN), beginning with the letters AD, from the upper right-hand corner of your completed Animal Drug User Fee Cover Sheet. Also write the FDA post office box number (P.O. Box 953877) on the enclosed check, bank draft, or money order. Your payment and a copy of the completed Animal Drug User Fee Cover Sheet can be mailed to: Food and Drug

Administration, P.O. Box 953877, St. Louis, MO 63195–3877.

If payment is made by wire transfer, send payment to: U.S. Department of Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, FDA Deposit Account Number: 75060099, U.S. Department of Treasury routing/transit number: 021030004, SWIFT Number: FRNYUS33. You are responsible for any administrative costs associated with the processing of a wire transfer. Contact your bank or financial institution regarding additional fees.

If you prefer to send a check by a courier such as Federal Express or United Parcel Service, the courier may deliver the check and printed copy of the cover sheet to: U.S. Bank, Attn: Government Lockbox 953877, 1005 Convention Plaza, St. Louis, MO 63101. (**NOTE:** This address is for courier delivery only. If you have any questions concerning courier delivery contact the U.S. Bank at 314–418–4013. This telephone number is only for questions about courier delivery.)

The tax identification number of the Food and Drug Administration is 530196965. (**NOTE:** In no case should the payment for the fee be submitted to FDA with the application.)

It is helpful if the fee arrives at the bank at least a day or two before the application arrives at FDA's CVM. FDA records the official application receipt date as the later of the following: The date the application was received by FDA's CVM, or the date U.S. Bank notifies FDA that your payment in the full amount has been received, or when the U.S. Treasury notifies FDA of receipt of an electronic or wire transfer payment. U.S. Bank and the U.S. Treasury are required to notify FDA within 1 working day, using the PIN described previously.

B. Application Cover Sheet Procedures

Step One—Create a user account and password. Log on to the ADUFA Web site at *http://www.fda.gov/ForIndustry/UserFees/AnimalDrugUserFeeActADUFA/default.htm* and, under Tools and Resources click ''The Animal Drug User Fee Cover Sheet'' and then click ''Create ADUFA User Fee Cover Sheet.'' For security reasons, each firm submitting an application will be assigned an organization identification number, and each user will also be required to set up a user account and password the first time you use this site. Online instructions will walk you through this process.

Step Two—Create an Animal Drug User Cover Sheet, transmit it to FDA, and print a copy. After logging into your account with your user name and password, complete the steps required to create an Animal Drug User Fee Cover Sheet. One cover sheet is needed for each animal drug application or supplement. Once you are satisfied that the data on the cover sheet is accurate and you have finalized the cover sheet, you will be able to transmit it electronically to FDA and you will be able to print a copy of your cover sheet showing your unique PIN.

Step Three—Send the payment for your application as described in section VIII.A of this document.

Step Four—Please submit your application and a copy of the completed Animal Drug User Fee Cover Sheet to the following address: Food and Drug Administration, Center for Veterinary Medicine, Document Control Unit (HFV–199), 7500 Standish Pl., Rockville, MD 20855.

C. Product, Establishment, and Sponsor Fees

By December 31, 2012, FDA will issue invoices and payment instructions for product, establishment, and sponsor fees for FY 2013 using this Fee Schedule. Payment will be due and payable within 30 days of issuance of the invoice. FDA will issue invoices in November 2013 for any products, establishments, and sponsors subject to fees for FY 2013 that qualify for fees after the December 2012 billing.

Dated: July 26, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18709 Filed 7–31–12; 8:45 am]

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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0807]

Animal Generic Drug User Fee Rates and Payment Procedures for Fiscal Year 2013

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the rates and payment procedures for fiscal year (FY) 2013 generic new animal drug user fees. The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Animal Generic Drug User Fee Act of 2008 (AGDUFA), authorizes FDA to collect user fees for certain abbreviated applications for generic new animal drugs, for certain generic new animal drug products, and for certain sponsors of such abbreviated applications for generic new animal drugs and/or investigational submissions for generic new animal drugs. This notice establishes the fee rates for FY 2013.

FOR FURTHER INFORMATION CONTACT: Visit the FDA Web site at *http://www.fda.gov/ForIndustry/UserFees/AnimalGenericDrugUserFeeActAGDUFA/default.htm* or contact Lisa Kable, Center for Veterinary Medicine (HFV–10), Food and Drug Administration, 7529 Standish Pl., Rockville, MD 20855, 240–276–9718. For general questions, you may also email the Center for Veterinary Medicine (CVM) at: *cvmagdufa@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Section 741 of the FD&C Act (21 U.S.C. 379j–21) establishes three different types of user fees: (1) Fees for certain types of abbreviated applications for generic new animal drugs, (2) annual fees for certain generic new animal drug products, and (3) annual fees for certain sponsors of abbreviated applications for generic new animal drugs and/or investigational submissions for generic new animal drugs (21 U.S.C. 379j–21(a)). When certain conditions are met, FDA will waive or reduce fees for generic new animal drugs intended solely to provide for a minor use or minor species indication (21 U.S.C. 379j–21(d)).

For FY 2009 through FY 2013, the FD&C Act establishes aggregate yearly base revenue amounts for each of these fee categories. Base revenue amounts established for years after FY 2009 may be adjusted for workload. Fees for applications, products, and sponsors are to be established each year by FDA so that the revenue for each fee category will approximate the level established in the statute, after the level has been adjusted for workload.

For FY 2013, the generic new animal drug user fee rates are: $148,300 for each abbreviated application for a generic new animal drug; $6,515 for each generic new animal drug product; $63,000 for each generic new animal drug sponsor paying 100 percent of the sponsor fee; $47,250 for each generic new animal drug sponsor paying 75 percent of the sponsor fee; and $31,500 for each generic new animal drug sponsor paying 50 percent of the sponsor fee. FDA will issue invoices for FY 2013 product and sponsor fees by December 31, 2012. These fees will be due and payable within 30 days of the issuance of the invoices. The

application fee rates are effective for all abbreviated applications for a generic new animal drug submitted on or after October 1, 2012, and will remain in effect through September 30, 2013. Applications will not be accepted for review until FDA has received full payment of related application fees and any other fees owed under the Animal Generic Drug User Fee program.

II. Revenue Amount for FY 2013

A. Statutory Fee Revenue Amounts

AGDUFA (Title II of Pub. L. 110–316 signed by the President on August 14, 2008) specifies that the aggregate revenue amount for FY 2013 for abbreviated application fees is $1,809,000 and each of the other two generic new animal drug user fee categories, annual product fees and annual sponsor fees, is $2,111,000 each, before any adjustment for workload is made (see 21 U.S.C. 379j–21(b)).

B. Inflation Adjustment to Fee Revenue Amount

The amounts established in AGDUFA for each year for FY 2009 through FY 2013 include an inflation adjustment; therefore, no inflation adjustment is required.

C. Workload Adjustment Fee Revenue Amount

For each FY beginning after FY 2009, AGDUFA provides that statutory fee revenue amounts shall be further adjusted to reflect changes in review workload (21 U.S.C. 379j–21(c)(1)).

FDA calculated the average number of each of the four types of applications and submissions specified in the workload adjustment provision (abbreviated applications for generic new animal drugs, manufacturing supplemental abbreviated applications for generic new animal drugs, investigational generic new animal drug study submissions, and investigational generic new animal drug protocol submissions) received over the 5-year period that ended on September 30, 2008 (the base years), and the average number of each of these types of applications and submissions over the most recent 5-year period that ended on June 30, 2012.

The results of these calculations are presented in the first two columns of table 1 of this document. Column 3 reflects the percent change in workload over the two 5-year periods. Column 4 shows the weighting factor for each type of application, reflecting how much of the total FDA generic new animal drug review workload was accounted for by each type of application or submission in the table during the most recent 5 years. Column 5 of table 1 is the weighted percent change in each category of workload, and was derived by multiplying the weighting factor in each line in column 4 by the percent change from the base years in column 3. At the bottom right of table 1, the sum of the values in column 5 is calculated, reflecting a total change in workload of negative 17 percent for FY 2013. This is the workload adjuster for FY 2013.

TABLE 1—WORKLOAD ADJUSTER CALCULATION

Application type	Column 1 5-year average (base years)	Column 2 latest 5-year average	Column 3 percent change	Column 4 weighting factor	Column 5 weighted percent change
Abbreviated New Animal Drug Applications (ANADAs)	44.2	24.6	−44	0.4608	−20
Manufacturing Supplements ANADAs	114.6	123.6	8	0.2490	2
Generic Investigational Study Submissions	17.4	21.8	25	0.1921	5
Generic Investigational Protocol Submissions	21.6	13.2	−39	0.0980	−4
FY 2013 AGDUFA Workload Adjuster					−17

AGDUFA specifies that the workload adjuster may not result in fees for a fiscal year that are less than the statutory revenue amount (21 U.S.C. 379j–21(c)(1)(B)) for that fiscal year. Because applying the workload adjuster for FY 2013 would result in fees less than the statutory amount, the workload adjustment will not be applied in FY 2013. As a result, the statutory revenue amount for each category of fees for FY 2013 ($1,809,000 for application fees and $2,111,000 for both product and sponsor fees) becomes the revenue target for the fees in FY 2013, for a total fee revenue target in FY 2013 of $6,031,000 for fees from all three categories.

D. Offset for Excess Collections Through FY 2012

Under the provisions of the FD&C Act, if the cumulative amount of the fees collected for fiscal years 2009 through 2011, and the amount of fees estimated to be collected under this section for FY 2012, exceeds the cumulative amount appropriated for fees for fiscal years 2009 through 2012, the excess will be subtracted from the amount of fees that FDA would otherwise be authorized to collect for FY 2013 pursuant to the FD&C Act (21 U.S.C. 379j–21(g)(4)).

Table 2 shows the amounts appropriated for each year from FY 2009 through FY 2012, and the amounts FDA has collected for FY 2009, FY 2010, and FY 2011 as of March 31, 2012, and the amount that FDA estimated it would collect in FY 2012 when it published the notice of FY 2012 fees in the **Federal Register** on August 1, 2011 (76 FR45814). The bottom line of Table 2 shows the estimated cumulative amount by which fees collected fell below amounts appropriated for FY 2009 through FY 2012.

TABLE 2—OFFSETS TO BE TAKEN IN FY 2013—FOR FY 2009–2011, FEES COLLECTED THROUGH 3/31/2012; FOR FY 2012, ESTIMATE AS OF 8/1/2011

Fiscal year	Fees appropriated	Fees collected	Difference
2009	$4,831,000	$5,099,084	$268,084
2010	5,106,000	4,392,209	(713,791)
2011	5,397,000	4,942,876	(454,124)

TABLE 2—OFFSETS TO BE TAKEN IN FY 2013—FOR FY 2009–2011, FEES COLLECTED THROUGH 3/31/2012; FOR FY 2012, ESTIMATE AS OF 8/1/2011—Continued

Fiscal year	Fees appropriated	Fees collected	Difference
2012 estimate	5,706,000	5,706,000	0
Cumulative Difference Less than Appropriations			(899,831)
Balance to be Offset in a Subsequent Fiscal Year			0

As can be seen from the above table, no offset is required for the period FY 2009 through FY 2012 since collections have fallen below the amounts appropriated in aggregate.

E. Final Year Adjustment

Under the provisions of the FD&C Act, as amended, the Secretary may, in addition to the workload adjustment and offset, further increase the fees and fee revenues if such an adjustment is necessary to provide for up to 3 months of operating reserves of carryover user fees for the process for the review of abbreviated applications for generic new animal drugs for the first 3 months of FY 2014. The rationale for the amount of this increase shall be contained in the annual notice establishing fee revenues and fees for FY 2013 (See the FD&C Act, section 741(c)(2)[21U.S.C. 379j–21(c)(2)]). Table 3 below estimates the amount of carryover reserve FDA currently estimates to have available at the end of FY 2013. It begins with the balance available at the end of FY 2011, rounded to the nearest thousand dollars, and adds the net prior year collections for the 6 months ending March 31, 2012. In addition, FDA is keeping aside a reserve of $200,000 for potential refunds, and a net of $955,000 for the last 2 years of AGDUFA. The amount of carryover balance FDA expects to be available for obligation at the end of FY 2013 is $3,694,000, as shown in the last line of Table 3.

TABLE 3—ESTIMATED CARRYOVER BALANCE AT THE END OF FY 2013, AFTER ADJUSTMENTS

Total Carryover Balance End of FY 2011	$2,727,000
Net Prior Year Fees Collected After 9/30/2011 (3/31/2012)	212,000
Reserve for Refunds for FY 2012 and FY 2013	(200,000)
Estimated Change to Carryover Balance at the End of FY 2012	1,327,000
Estimated Change to Carryover Balance at the End of FY 2013	(372,000)
Estimated 2013 End of FY Carryover Balance	3,694,000

In FY 2013, FDA expects to spend a total of $6,031,000, the amount authorized for collection from AGDUFA fees in that year, as shown in table 4 below. To maintain FY 2013 operations in FY 2014, FDA is applying an anticipated inflation rate of 2.01 percent to the amount of fee revenues FDA expects to obligate in FY 2013. This 2.01 percent is the statutory inflation adjustment to be applied to PDUFA and several other user fee programs in FY 2013, and the only statutory inflation adjustment for FDA available at this time; its derivation is published elsewhere in this issue of the **Federal Register** where the FY 2013 fees for the PDUFA user fee program is published. FDA expects to obligate a total of $6,152,000 in FY 2014—or a total of about $1,538,000 during the first 3 months of FY 2014, rounded to the nearest thousand dollars. The available carryover balance at the beginning of FY 2013 is estimated at $3,694,000, rounded to the nearest thousand dollars. Since the estimated carryover balance is greater than the amount FDA will need to operate for the first 3 months of FY 2014, no final year adjustment is needed.

TABLE 4—ESTIMATED FEE REVENUE NEEDED TO SUSTAIN FY 2013 OPERATIONS FOR THE FIRST 3 MONTHS OF FY 2014

Estimated Total Spending from Fees in FY 2013	$6,031,000
Estimated FY 2014 Inflation Costs at 2.01%	121,000
Estimated FY 2014 Funds to Sustain FY 2013 Operations	6,152,000
Estimated Fees Needed for 3 Months in FY 2014	1,538,000
Estimated End-of-FY 2013 Carryover Balance	3,694,000
Final Year Adjustment Needed	0

Since there is no offset nor final year adjustment to be applied in FY 2013, the AGDUFA revenue targets for FY 2013 remain as set in the statute: $1,809,000 for application fees and $2,111,000 each for both product and sponsor fees. The final revenue target for the fees in FY 2013 is $6,031,000 for fees from all three categories.

III. Abbreviated Application Fee Calculations for FY 2013

The term ''abbreviated application for a generic new animal drug'' is defined in 21 U.S.C. 379j–21(k)(1).

A. Application Fee Revenues and Numbers of Fee-Paying Applications

The application fee must be paid for abbreviated applications for a generic new animal drug that is subject to fees under AGDUFA and that is submitted on or after July 1, 2008. The application fees are to be set so that they will generate $1,809,000 in fee revenue for FY 2013. This is the amount set out in the statute.

To set fees for abbreviated applications for generic new animal drugs to realize $1,809,000, FDA must first make some assumptions about the number of fee-paying abbreviated applications it will receive during FY 2013.

The Agency knows the number of applications that have been submitted in previous years. That number fluctuates significantly from year to year. FDA is making estimates and applying different assumptions for two types of submissions: Original submissions of abbreviated applications for generic new animal drugs and ''reactivated'' submissions of abbreviated applications for generic new animal drugs. Any original submissions of abbreviated applications for generic new animal drugs that were received by the FDA before July 1, 2008, were not

assessed fees (21 U.S.C. 379j–21(a)(1)(A)). Some of these non-fee-paying submissions were later resubmitted after July 1 because the initial submission was not approved by the FDA (i.e. the FDA marked the submission as incomplete and requested additional non-administrative information) or because the original submission was withdrawn by the sponsor. Abbreviated applications for generic new animal drugs resubmitted after July 1, 2008, are subject to user fees. In this notice, FDA refers to these resubmitted applications as ''reactivated'' applications.

Regarding original submissions of abbreviated applications for generic new animal drugs, FDA is assuming that the number of applications that will pay fees in FY 2013 will equal 15 percent less than the average number of submissions over the 5 most recent completed years (2007–2011). This 15 percent reduction is made because of the anticipated impact of fees on the number on submissions. The average number of original submissions of abbreviated applications for generic new animal drugs over the 5 most recently completed years is 13.2. Applying a 15 percent reduction to the 13.2 average, the estimate for original submissions of abbreviated applications for generic new animal drugs for FY 2013 is 11.2.

Regarding reactivated submissions of abbreviated applications for generic new animal drugs, FDA is applying a 90 percent reduction. This is based on the fact that there were a limited number of original submissions of abbreviated applications for generic new animal drugs received by FDA before July 1, 2008, which were not assessed fees. For these original submissions that were not approved before July 1, 2008, resubmission to the FDA would trigger an application fee (21 U.S.C. 379j–21(a)(1)(A)). Once these initial original submissions of abbreviated applications for generic new animal drugs received by the FDA before July 1, 2008, have either been withdrawn or resubmitted, ''reactivation submissions'' will cease completely. This reduction is consistent with estimates made when this user fee program was in the development process. The average number of receipts for reactivated submission of abbreviated applications for generic new animal drugs over the 5 most recently completed fiscal years is 10.2. Applying a 90 percent reduction to the 10.2 average, the estimate for reactivated submissions of abbreviated applications for generic new animal drugs for FY 2013 is 1. These reductions may not fully account for possible year to year fluctuations in numbers of fee-paying applications, but FDA believes that this is a reasonable approach after years of experience with other user fee programs.

Based on the previous assumptions, FDA is estimating that it will receive a total of 12.2 fee paying generic new animal drug applications in FY 2013 (11.2 original applications and 1 reactivation).

B. Fee Rates for FY 2013

FDA must set the fee rates for FY 2013 so that the estimated 12.2 abbreviated applications that pay the fee will generate a total of $1,809,000. To generate this amount, the fee for a generic new animal drug application, rounded to the nearest hundred dollars, will have to be $148,300.

IV. Generic New Animal Drug Product Fee Calculations for FY 2013

A. Product Fee Revenues and Numbers of Fee-Paying Products

The generic new animal drug product fee (also referred to as the product fee) must be paid annually by the person named as the applicant in an abbreviated new animal drug application or supplemental abbreviated application for generic new animal drugs for an animal drug product submitted for listing under section 510 of the FD&C Act (21 U.S.C. 360), and who had an abbreviated application for a generic new animal drug or supplemental abbreviated application for a generic new animal drug pending at FDA after September 1, 2008 (see 21 U.S.C. 379j–21(a)(2)). The term ''generic new animal drug product'' means each specific strength or potency of a particular active ingredient or ingredients in final dosage form marketed by a particular manufacturer or distributor, which is uniquely identified by the labeler code and product code portions of the national drug code, and for which an abbreviated application for a generic new animal drug or supplemental abbreviated application for a generic new animal drug has been approved (21 U.S.C. 379j–21(k)(6)). The product fees are to be set so that they will generate $2,111,000 in fee revenue for FY 2013. This is the amount set out in the statute and no further adjustments are required for FY 2013.

To set generic new animal drug product fees to realize $2,111,000, FDA must make some assumptions about the number of products for which these fees will be paid in FY 2013. FDA gathered data on all generic new animal drug products that have been submitted for listing under section 510 of the FD&C Act, and matched this to the list of all persons who FDA estimated would have an abbreviated new animal drug application or supplemental abbreviated application pending after September 1, 2008. FDA estimates a total of 360 products submitted for listing by persons who had an abbreviated application for a generic new animal drug or supplemental abbreviated application for a generic new animal drug pending after September 1, 2008. Based on this, FDA believes that a total of 360 products will be subject to this fee in FY 2013.

In estimating the fee revenue to be generated by generic new animal drug product fees in FY 2013, FDA is assuming that 10 percent of the products invoiced, or 36, will not pay fees in FY 2013 due to fee waivers and reductions. Based on experience with other user fee programs and the first 4 years of AGDUFA, FDA believes that this is a reasonable basis for estimating the number of fee-paying products in FY 2013.

Accordingly, the Agency estimates that a total of 324 (360 minus 36) products will be subject to product fees in FY 2013.

B. Product Fee Rates for FY 2013

FDA must set the fee rates for FY 2013 so that the estimated 324 products that pay fees will generate a total of $2,111,000. To generate this amount will require the fee for a generic new animal drug product, rounded to the nearest 5 dollars, to be $6,515.

V. Generic New Animal Drug Sponsor Fee Calculations for FY 2013

A. Sponsor Fee Revenues and Numbers of Fee-Paying Sponsors

The generic new animal drug sponsor fee (also referred to as the sponsor fee) must be paid annually by each person who: (1) Is named as the applicant in an abbreviated application for a new generic animal drug, except for an approved application for which all subject products have been removed from listing under section 510 of the FD&C Act, or has submitted an investigational submission for a generic new animal drug that has not been terminated or otherwise rendered inactive and (2) had an abbreviated application for a generic new animal drug, supplemental abbreviated application for a generic new animal drug, or investigational submission for a generic new animal drug pending at FDA after September 1, 2008 (see 21 U.S.C. 379j–21(k)(7) and 379j–21(a)(3)). A generic new animal drug sponsor is subject to only one such fee each fiscal

year (see 21 U.S.C. 379j–21(a)(3)(B)). Applicants with more than 6 approved abbreviated applications will pay 100 percent of the sponsor fee; applicants with 2 to 6 approved abbreviated applications will pay 75 percent of the sponsor fee; and applicants with 1 or fewer approved abbreviated applications will pay 50 percent of the sponsor fee (see 21 U.S.C. 379j–21(a)(3)(B)). The sponsor fees are to be set so that they will generate $2,111,000 in fee revenue for FY 2013. This is the amount set out in the statute and no adjustments are required for FY 2013.

To set generic new animal drug sponsor fees to realize $2,111,000, FDA must make some assumptions about the number of sponsors who will pay these fees in FY 2013. FDA now has 3 complete years of experience with collecting these sponsor fees. Based on the number of firms that meet this definition, and the average number of firms paying fees at each level over the 3 completed years of AGDUFA (FY 2009–FY 2011) FDA estimates that in FY 2013, 11 sponsors will pay 100 percent fees, 13 sponsors will pay 75 percent fees, and 33 sponsors will pay 50 percent fees. That totals the equivalent of 37.25 full sponsor fees (11 times 100 percent or 11, plus 13 times 75 percent or 9.75, plus 33 times 50 percent or 16.5).

FDA estimates that about 10 percent of all of these sponsors, or 3.73, may qualify for a minor use/minor species waiver.

Accordingly, the Agency estimates that the equivalent of 33.52 full sponsor fees (37.25 minus 3.73) are likely to be paid in FY 2013.

B. Sponsor Fee Rates for FY 2013

FDA must set the fee rates for FY 2013 so that the estimated equivalent of 33.52 full sponsor fees will generate a total of $2,111,000. To generate this amount will require the 100 percent fee for a generic new animal drug sponsor, rounded to the nearest $50, to be $63,000. Accordingly, the fee for those paying 75 percent of the full sponsor fee will be $47,250, and the fee for those paying 50 percent of the full sponsor fee will be $31,500.

VI. Fee Schedule for FY 2013

The fee rates for FY 2013 are summarized in table 5 of this document.

TABLE 5—FY 2013 FEE RATES

Generic new animal drug user fee category	Fee rate for FY 2013
Abbreviated Application Fee for Generic New Animal Drug Application	$148,300
Generic New Animal Drug Product Fee	6,515
[1] 100 Percent Generic New Animal Drug Sponsor Fee	63,000
[1] 75 Percent Generic New Animal Drug Sponsor Fee	47,250
[1] 50 Percent Generic New Animal Drug Sponsor Fee	31,500

(1) An animal drug sponsor is subject to only one fee each fiscal year.

VII. Procedures for Paying FY 2013 Generic New Animal Drug User Fees

A. Abbreviated Application Fees and Payment Instructions

The FY 2013 fee established in the new fee schedule must be paid for an abbreviated new animal drug application subject to fees under AGDUFA that is submitted on or after October 1, 2012. Payment must be made in U.S. currency by check, bank draft, or U.S. postal money order payable to the order of the Food and Drug Administration, by wire transfer, or by automatic clearing house (ACH) using *www.Pay.gov*. (The *www.Pay.gov* payment option is available to you after you submit a cover sheet. Click the ''Pay Now'' button). On your check, bank draft, U.S. or postal money order, please write your application's unique Payment Identification Number, beginning with the letters ''AG'', from the upper right-hand corner of your completed Animal Generic Drug User Fee Cover Sheet. Also write the FDA post office box number (P.O. Box 953877) on the enclosed check, bank draft, or money order. Your payment and a copy of the completed Animal Generic Drug User Fee Cover Sheet can be mailed to: Food and Drug Administration, P.O. Box 953877, St. Louis, MO 63195–3877.

If payment is made via wire transfer, send payment to U. S. Department of the Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, Account Name: Food and Drug Administration, Account Number: 75060099, Routing Number: 021030004, Swift Number: FRNYUS33. You are responsible for any administrative costs associated with the processing of a wire transfer. Contact your bank or financial institution regarding the amount of the fees that need to be paid in addition to the wire transfer amount.

If you prefer to send a check by a courier such as Federal Express or United Parcel Service, the courier may deliver the check and printed copy of the cover sheet to: U.S. Bank, Attn: Government Lockbox 953877, 1005 Convention Plaza, St. Louis, MO 63101. (Note: This address is for courier delivery only. If you have any questions concerning courier delivery contact the U.S. Bank at 314–418–4013. This phone number is only for questions about courier delivery.)

The tax identification number of the Food and Drug Administration is 530196965. (**Note:** In no case should the payment for the fee be submitted to FDA with the application.)

It is helpful if the fee arrives at the bank at least a day or two before the abbreviated application arrives at FDA's Center for Veterinary Medicine. FDA records the official abbreviated application receipt date as the later of the following: The date the application was received by FDA's Center for Veterinary Medicine, or the date U.S. Bank notifies FDA that your payment in the full amount has been received, or when the U.S. Department of the Treasury notifies FDA of payment. U.S. Bank and the United States Treasury are required to notify FDA within one working day, using the Payment Identification Number described previously.

B. Application Cover Sheet Procedures

Step One—Create a user account and password. Log onto the AGDUFA Web site at *http://www.fda.gov/ForIndustry/UserFees/AnimalGenericDrugUserFeeActAGDUFA/ucm137049.htm* and scroll down the page until you find the link ''Create AGDUFA User Fee Cover Sheet.'' Click on that link and follow the directions. For security reasons, each firm submitting an application will be assigned an organization identification number, and each user will also be required to set up a user account and password the first time you use this site. Online instructions will walk you through this process.

Step Two—Create an Animal Generic Drug User Fee Cover Sheet, transmit it to FDA, and print a copy. After logging into your account with your user name and password, complete the steps required to create an Animal Generic Drug User Fee Cover Sheet. One cover sheet is needed for each abbreviated animal drug application. Once you are satisfied that the data on the cover sheet is accurate and you have finalized the Cover Sheet, you will be able to transmit it electronically to FDA and you will be able to print a copy of your cover sheet showing your unique Payment Identification Number.

Step Three—Send the Payment for your application as described in Section VII.A of this document.

Step Four—Please submit your application and a copy of the completed Animal Generic Drug User Fee Cover Sheet to the following address: Food and Drug Administration, Center for Veterinary Medicine, Document Control Unit (HFV–199), 7500 Standish Pl., Rockville, MD 20855.

C. Product and Sponsor Fees

By December 31, 2012, FDA will issue invoices and payment instructions for product and sponsor fees for FY 2013 using this fee schedule. Fees will be due and payable 30 days after the issuance of the invoices. FDA will issue invoices in November 2013 for any products and sponsors subject to fees for FY 2013 that qualify for fees after the December 2012 billing.

Dated: July 26, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18710 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0007]

Biosimilar User Fee Rates for Fiscal Year 2013

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the rates for biosimilar user fees for fiscal year (FY) 2013. The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Biosimilar User Fee Act of 2012 (BsUFA) (Title IV of the Food and Drug Administration Safety and Innovation Act, Public Law 112–144, which was signed by the President on July 9, 2012), authorizes FDA to assess and collect user fees for certain activities in connection with biosimilar biological product development, for certain applications and supplements for approval of biosimilar biological products, on establishments where approved biosimilar biological product products are made, and on biosimilar biological products after approval. BsUFA directs FDA to establish, before the beginning of each fiscal year, the initial and annual biosimilar biological product development (BPD) fees, the reactivation fee, and the biosimilar biological product application, establishment, and product fees.

Under BsUFA, the initial and annual BPD fee rates for a fiscal year are equal to 10 percent of the fee rate established under the Prescription Drug User Fee Act (PDUFA) for an application requiring clinical data for that fiscal year (FY). The reactivation fee is equal to 20 percent of the fee rate established under PDUFA for an application requiring clinical data for that fiscal year. Finally, the application, establishment, and product fee rates under BsUFA are equal to the application, establishment, and product fee rates under PDUFA, respectively. This document, which establishes FY 2013 rates for BsUFA fees, uses the PDUFA application, establishment, and product fee amounts for FY 2013 published elsewhere in this issue of the **Federal Register.**

The FY 2013 rates for BsUFA fees are as follows: Initial and annual biosimilar BPD fees ($195,880), reactivation fee ($391,760), fee for a biosimilar biological product application requiring clinical data ($1,958,800), fee for a biosimilar biological product application not requiring clinical data ($979,400), fee for a biosimilar biological product supplement requiring clinical data ($979,400), biosimilar biological product establishment fee ($526,500), and biosimilar biological product fee ($98,380). These fees are effective on October 1, 2012, and will remain in effect through September 30, 2013.

FOR FURTHER INFORMATION CONTACT: David Miller, Office of Financial Management (HFA–100), Food and Drug Administration, 1350 Piccard Dr., PI50, rm. 210J, Rockville, MD 20850, 301–796–7103.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 744G, 744H, and 744I of the FD&C Act, as added by BsUFA, establish fees for biosimilar biological products. Under section 744H(a)(1)(A), the initial BPD fee for a product is due when the sponsor submits an investigational new drug (IND) application that FDA determines is intended to support a biosimilar biological product application for the product, or within 5 calendar days after FDA grants the first BPD meeting for the product, whichever occurs first. For a sponsor that submitted an IND for a biosimilar biological product prior to the date of enactment of BsUFA, FDA expects the initial BPD fee to be paid by December 1, 2012, or within 5 calendar days after FDA grants the first BPD meeting for the product, whichever occurs first. A sponsor that has paid the initial BPD fee for a product is considered to be participating in FDA's BPD Program for that product.

Under section 744H(a)(1)(B) of the FD&C Act, once a sponsor has paid the initial BPD fee for a product, the annual BPD fee for the product is assessed beginning in the next fiscal year. The annual BPD fee is assessed for the product until the sponsor submits a marketing application for the product that is accepted for filing, or discontinues participation in FDA's BPD Program for the product.

Under section 744H(a)(1)(D) of the FD&C Act, if a sponsor has discontinued participation in FDA's BPD Program for a product, and wants to again engage with FDA on development of the product as a biosimilar biological product, the sponsor must pay a reactivation fee to resume participation in the BPD Program for that product. The reactivation fee is assessed when the sponsor submits an IND for an investigation that FDA determines is intended to support a biosimilar biological product application, or within 5 calendar days after FDA grants the sponsor's request for a BPD meeting for a product, whichever occurs first. Annual BPD fees will resume beginning in the fiscal year after the year in which the reactivation fee was paid.

BsUFA also establishes fees for certain types of applications and supplements for approval of biosimilar biological products, establishments where approved biosimilar biological products are made, and on biosimilar biological products after approval (section 744H(a)(2), 744H(a)(3), and 744H(a)(4) respectively of the FD&C Act). When certain conditions are met, FDA may grant small businesses a waiver from the biosimilar biological product application fee (section 744H(c)(1) of the FD&C Act).

II. Fee Amounts for FY 2013

BsUFA directs FDA to use the yearly fee amounts for PDUFA to calculate the biosimilar fee rates in each fiscal year. For more information about BsUFA, please refer to the FDA Web site at *http://www.fda.gov/ForIndustry/UserFees/BiosimilarUserFeeActBsUFA/default.htm.* PDUFA fee calculations for FY 2013 are published elsewhere in this issue of the **Federal Register.** The BsUFA fee calculations for FY 2013 are described in this document.

A. Initial and Annual BPD Fees; Reactivation Fees

Under BsUFA, the initial and annual BPD fees equal 10 percent of the PDUFA fee for an application requiring clinical data, and the reactivation fee equals 20 percent of the PDUFA fee for an

application requiring clinical data. The FY 2013 fee for an application requiring clinical data under PDUFA is $1,958,800. Multiplying the PDUFA application fee, $1,958,800, by 0.1 results in FY 2013 initial and annual BPD fees of $195,880. Multiplying the PDUFA application fee, $1,958,800, by 0.2 results in an FY 2013 reactivation fee of $391,760.

B. Application and Supplement Fees

The FY 2013 fee for a biosimilar biological product application requiring clinical data equals the PDUFA fee for an application requiring clinical data, $1,958,800, and the FY 2013 fee for a biosimilar biological product application not requiring clinical data equals half this amount, $979,400. However, under section 744H(a)(2)(A) of the FD&C Act, if a sponsor that submits a biosimilar biological product application has previously paid initial BPD fees, annual BPD fees, and/or reactivation fees for the product that is the subject of the application, the fee for the application is reduced by the cumulative amount of these previously paid fees. The FY 2013 fee for a biosimilar biological product supplement with clinical data is $979,400, which is half the fee for a biosimilar biological product application requiring clinical data.

C. Establishment Fee

The FY 2013 biosimilar biological product establishment fee is set equal to the FY 2013 PDUFA establishment fee of $526,500.

D. Product Fee

The FY 2013 biosimilar biological product fee is set equal to the FY 2013 PDUFA product fee of $98,380.

III. Fee Schedule for FY 2013

The fee rates for FY 2013 are set out in table 1 of this document.

TABLE 1—FEE SCHEDULE FOR FY 2013

Fee category	Fee rates for FY 2013
Initial BPD	$195,880
Annual BPD	195,880
Reactivation	391,760
Applications [1]:	
Requiring Clinical Data	* 1,958,800
Not Requiring Clinical Data	* 979,400
Supplement Requiring Clinical Data	979,400
Establishment	526,500
Product	98,380

[1] Under section 744H(a)(2)(A) of the FD&C Act, if a sponsor that submits a biosimilar biological product application has previously paid initial BPD fees, annual BPD fees, and/or reactivation fees for the product that is the subject of the application, the fee for the application is reduced by the cumulative amount of these previously paid fees.

IV. Fee Payment Options and Procedures

A. Initial BPD, Reactivation, Application, and Supplement Fees

The fees established in the new fee schedule are effective October 1, 2012. For a sponsor that submitted an IND for a biosimilar biological product prior to the date of enactment of BsUFA, FDA expects to receive the initial BPD fee by December 1, 2012 (unless the IND is withdrawn before the fee due date), or within 5 calendar days after FDA grants the first BPD meeting for the product, whichever occurs first. Otherwise, the initial BPD fee for a product is due when the sponsor submits an IND that FDA determines is intended to support a biosimilar biological product application for the product, or within 5 calendar days after FDA grants the first BPD meeting for the product, whichever occurs first. For sponsors that have discontinued participation in the BPD Program, a reactivation fee will be due when the sponsor submits an IND for an investigation that FDA determines is intended to support a biosimilar biological product application, or within 5 calendar days after FDA grants the sponsor's request for a BPD meeting for a product, whichever occurs first.

The application or supplement fee for a biosimilar biological product is due upon submission of the application or supplement.

To make a payment of the initial BPD, reactivation, supplement, or application fee, you must complete the Biosimilar User Fee Cover Sheet, available on the FDA Web site starting October 1, 2012, and generate a user fee identification (ID) number. Payment must be made in U.S. currency by electronic check, check, bank draft, U.S. postal money order, or wire transfer.

FDA has partnered with the U.S. Department of the Treasury to utilize Pay.gov, a Web-based payment application, for online electronic payment. The *www.Pay.gov* feature is available on the FDA Web site after completing the Biosimilar User Fee Cover Sheet and generating the user fee ID number.

Please include the user fee ID number on your check, bank draft, or postal money order, and make payable to the order of the Food and Drug Administration. Your payment can be mailed to: Food and Drug Administration, P.O. Box 979108, St. Louis, MO 63197–9000. If checks are to be sent by a courier that requests a street address, the courier can deliver the checks to: U.S. Bank, Attention: Government Lockbox 979108, 1005 Convention Plaza, St. Louis, MO 63101. (**Note:** This U.S. Bank address is for courier delivery only.) Please make sure that FDA post office box number (P.O. Box 979108) is written on the check, bank draft, or postal money order.

If paying by wire transfer, please reference your unique user fee ID number when completing your transfer. The originating financial institution may charge a wire transfer fee between $15.00 and $35.00. Please ask your financial institution about the fee and include it with your payment to ensure that your fee is fully paid. The account information is as follows: New York Federal Reserve Bank, U.S. Department of Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, Account Number: 75060099, Routing Number: 021030004, Swift Number: FRNYUS33, Beneficiary: FDA, 1350 Piccard Dr., Rockville, MD 20850.

The tax identification number of the Food and Drug Administration is 53–0196965.

B. Annual BPD, Establishment, and Product Fees

FDA will issue invoices for annual BPD, biosimilar biological product establishment, and biosimilar biological product fees. Payment instructions will be included in the invoices. No annual BPD invoices will be issued for FY 2013. FDA will issue invoices in November 2013 for any products and establishments subject to fees for FY 2013.

Dated: July 24, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18712 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0799]

Food Safety Modernization Act Domestic and Foreign Facility Reinspection, Recall, and Importer Reinspection Fee Rates for Fiscal Year 2013

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the fiscal year (FY) 2013 fee rates for certain domestic and foreign facility reinspections, failures to comply with a recall order, and importer reinspections that are authorized by the Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the FDA Food Safety Modernization Act (FSMA). These fees are effective on October 1, 2012, and will remain in effect through September 30, 2013.

DATES: Submit either electronic or written comments by October 31, 2012.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Erin Caines, Office of Resource Management, Office of Regulatory Affairs, 12420 Parklawn Dr., rm. 2010, Rockville, MD 20857, 301–796–2900, email: *Erin.Caines@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

Section 107 of FSMA (Pub. L. 111–353) added section 743 to the FD&C Act (21 U.S.C. 379j–31) to provide FDA with the authority to assess and collect fees from, in part: (1) The responsible party for each domestic facility and the U.S. agent for each foreign facility subject to a reinspection, to cover reinspection-related costs; (2) the responsible party for a domestic facility and an importer who does not comply with a recall order, to cover food recall activities associated with such order; and (3) each importer subject to a reinspection to cover reinspection-related costs (sections 743(a)(1)(A), (B), and (D) of the FD&C Act). Section 743 of the FD&C Act directs FDA to establish fees for each of these activities based on an estimate of 100 percent of the costs of each activity for each year (sections 743(b)(2)(A), (B), and (D)), and these fees must be made available solely to pay for the costs of each activity for which the fee was incurred (section 743(b)(3)).

These fees are effective on October 1, 2012, and will remain in effect through September 30, 2013. FDA is accepting comments to this document and intends to consider such comments in its continued implementation of these fees. Submit either electronic or written comments by October 31, 2012.

Section 743(b)(2)(B)(iii) of the FD&C Act directs FDA to develop a proposed set of guidelines in consideration of the burden of fee amounts on small businesses. As a first step in developing these guidelines, FDA invited public comment on the potential impact of the fees authorized by section 743 of the FD&C Act on small businesses (76 FR 45818, Aug. 1, 2011). The comment period for this request ended November 30, 2011. As stated in FDA's September 2011 ''Guidance for Industry: Implementation of the Fee Provisions of Section 107 of the FDA Food Safety Modernization Act,''(*http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/FoodSafety/ucm274176.htm*), because FDA recognizes that for small businesses the full cost recovery of FDA reinspection or recall oversight could impose severe economic hardship, FDA intends to consider reducing certain fees for those firms. FDA is currently developing a guidance document to outline the process through which firms may request such a reduction of fees. FDA does not intend to issue invoices for reinspection or recall order fees until this guidance document has been published.

In addition, as stated in the September 2011 Guidance, FDA is in the process of considering various issues associated with the assessment and collection of importer reinspection fees. Recognizing the particular complexities involved in these issues, FDA is not in a position to assess importer reinspection fees until the Agency has resolved these issues and will not assess importer reinspection fees until the Agency notifies the public. However, the fee rates set forth in this notice will be used to determine any importer reinspection fees assessed in FY 2013.

II. Estimating the Average Cost of a Supported Direct FDA Work Hour for FY 2013

FDA is required to estimate 100 percent of its costs for each activity in order to establish fee rates for FY 2013. In each year, the costs of salary (or personnel compensation) and benefits for FDA employees account for between 50 and 60 percent of the funds available to, and used by, FDA. Almost all of the remaining funds (or the operating funds) available to FDA are used to support FDA employees for paying rent, travel, utility, information technology, and other operating costs.

A. Estimating the Full Cost per Direct Work Hour in FY 2011

In general, the starting point for estimating the full cost per direct work hour is to estimate the cost of a full-time-equivalent (FTE) or paid staff year for the relevant activity. This is most reasonably done by dividing the total funds allocated to the elements of FDA primarily responsible for carrying out the activities for which fees are being collected by the total FTEs allocated to those activities, using information from the most recent FY for which data are available. For the purposes of the reinspection and recall order fees authorized by section 743 of the FD&C Act (the fees that are the subject of this notice), primary responsibility for the activities for which fees will be collected rests with FDA's Office of Regulatory Affairs (ORA), which carries out inspections and other field-based activities on behalf of FDA's product centers, including the Center for Food Safety and Applied Nutrition (CFSAN) and the Center for Veterinary Medicine (CVM). Thus, as the starting point for estimating the full cost per direct work hour, FDA will use the total funds allocated to ORA for CFSAN and CVM related field activities. The most recent FY with available data is FY 2011. In that year, FDA obligated a total of $669,939,746 for ORA in carrying out the CFSAN and CVM related field activities work, excluding the cost of inspection travel. In that same year, the number of ORA staff primarily conducting the CFSAN and CVM related field activities was 3,022 FTEs or paid staff years. Dividing $669,939,746 by 3,022 FTEs, results in an average cost of $221,688 per paid staff year, excluding travel costs.

Not all of the FTEs required to support the activities for which fees will be collected are conducting direct work such as inspecting or reinspecting facilities, examining imports, or monitoring recalls. Data collected over a number of years and used consistently in other FDA user fee programs (e.g., under the Prescription Drug User Fee Act (PDUFA) and the Medical Device User Fee and Modernization Act show that every seven FTEs who perform direct FDA work require three indirect and supporting FTEs. These indirect

and supporting FTEs function in budget, facility, human resource, information technology, planning, security, administrative support, legislative liaison, legal counsel, program management, and other essential program areas. On average, two of these indirect and supporting FTEs are located in ORA or the FDA center where the direct work is being conducted, and one of them is located in the Office of the Commissioner. To get the fully supported cost of an FTE, FDA needs to multiply the average cost of an FTE by 1.43, to take into account the indirect and supporting functions. The 1.43 factor is derived by dividing the 10 fully supported FTEs by 7 direct FTEs. In FY 2011, the average cost of an FTE was $221,688. Multiplying this amount by 1.43 results in an average fully supported cost of $317,013 per FTE, excluding the cost of inspection travel.

To calculate an hourly rate, FDA must divide the average fully supported cost of $317,013 per FTE by the average number of supported direct FDA work hours. See Table 1.

TABLE 1—SUPPORTED DIRECT FDA WORK HOURS IN A PAID STAFF YEAR

Total number of hours in a paid staff year	2,080
Less:	
10 paid holidays	80
20 days of annual leave	160
10 days of sick leave	80
10 days of training	80
2 hours of meetings per week	80
Net Supported Direct FDA Work Hours Available for Assignments	1,600

Dividing the average fully supported cost of an FTE in FY 2011 ($317,013) by the total number of supported direct work hours available for assignment (1,600) results in an average fully supported cost of $198 (rounded to the nearest dollar), excluding inspection travel costs, per supported direct work hour in FY 2011—the last FY for which data are available.

B. Adjusting FY 2011 Costs for Inflation To Estimate FY 2013 Costs

To adjust the hourly rate for FY 2013, FDA must estimate the cost of inflation in each year for FY 2012 and FY 2013. FDA uses the method prescribed for estimating inflationary costs under the PDUFA provisions of the FD&C Act (section 736(c)(1) (21 U.S.C. 379h(c)(1)), the only statutory method for inflation adjustment in the FD&C Act. FDA previously determined the FY 2012 inflation rate to be 3.72 percent; this rate was published in the FY 2012 PDUFA user fee rates notice in the **Federal Register** of August 1, 2011 (see 76 FR 45831). Utilizing the method set forth in section 736(c)(1) of the FD&C Act, FDA has calculated an inflation rate of 2.01 percent for FY 2013 and FDA intends to use this inflation rate to make inflation adjustments for FY 2013 for several of its user fee programs; the derivation of this rate is published elsewhere in this issue of the **Federal Register** in the FY 2013 notice for the PDUFA user fee rates. The compounded inflation rate for FYs 2012 and 2013, therefore, is 5.80 percent (one plus 3.72 percent times one plus 2.01 percent).

Increasing the FY 2011 average fully supported cost per supported direct FDA work hour of $198 (excluding inspection travel costs) by 5.80 percent yields an inflationary adjusted estimated cost of $209 per a supported direct work hour in FY 2013, excluding inspection travel costs. This is the base unit fee that FDA will use in determining the hourly fee rate for reinspection and recall order fees for FY 2013, prior to including domestic or foreign travel costs as applicable for the activity.

In FY 2011, ORA spent a total of $4,504,788 for domestic regulatory inspection travel costs and General Services Administration (GSA) Vehicle costs related to FDA's CFSAN and CVM field activities programs. The total ORA domestic travel costs spent is then divided by the total of 12,729 CFSAN and CVM domestic inspections, which averages a total of $354 per inspection. These inspections average 32.77 hours per inspection. Dividing $354 per inspection by 32.77 hours per inspection results in a total and an additional cost of $11 per hour spent for domestic inspection travel costs in FY 2011. To adjust $11 for inflationary increases in FY 2012 and FY 2013, FDA must multiply it by the same inflation factor mentioned previously in this document (1.0580) which results in an estimated cost of $12 dollars per paid hour in addition to $209 for a total of $221 per paid hour ($209 plus $12) for each direct hour of work requiring domestic inspection travel. These are the rates that FDA will use in charging fees in FY 2013 when domestic travel is required.

In FY 2011, ORA spent a total of $2,095,738 on a total of 229 foreign inspection trips related to FDA's CFSAN and CVM field activities programs, which averaged a total of $9,152 per foreign inspection trip. These trips averaged 3 weeks (or 120 paid hours) per trip. Dividing $9,152 per trip by 120 hours per trip results in a total and an additional cost of $76 per paid hour spent for foreign inspection travel costs in FY 2011. To adjust $76 for inflationary increases in FY 2012 and FY 2013, FDA must multiply it by the same inflation factor mentioned previously in this document (1.0580) which results in an estimated cost of $80 dollars per paid hour in addition to $209 for a total of $289 per paid hour ($209 plus $80) for each direct hour of work requiring foreign inspection travel. These are the rates that FDA will use in charging fees in FY 2013 when foreign travel is required.

TABLE 2—FSMA FEE SCHEDULE FOR FY 2013

Fee category	Fee rates for FY 2013
Hourly rate if domestic travel is required	$221
Hourly rate if foreign travel is required	289

III. Fees for Reinspections of Domestic or Foreign Facilities Under Section 743(a)(1)(A)

A. What will cause this fee to be assessed?

The fee will be assessed for a reinspection conducted under section 704 of the FD&C Act to determine whether corrective actions have been implemented and are effective and compliance has been achieved to the Secretary of Health and Human Services' (the Secretary) (and, by delegation, FDA's) satisfaction at a facility that manufactures, processes, packs or holds food [1] for consumption necessitated as a result of a previous inspection (also conducted under section 704) of this facility which had a final classification of Official Action Indicated (OAI) conducted by or on behalf of FDA, when FDA determined the non-compliance was materially related to food safety requirements of the FD&C Act. FDA considers such non-compliance to include non-compliance with a statutory or regulatory requirement under section 402 of the FD&C Act (21 U.S.C. 342) and section 403(w) of the FD&C Act (21 U.S.C. 343(w)). However, FDA does not consider non-compliance that is materially related to a food safety requirement to include circumstances where the non-compliance is of a technical nature and not food safety related (e.g., failure to comply with a food standard or incorrect font size on a food label). Determining when non-

[1] The term ''food'' for purposes of this document has the same meaning as such term in section 201(f) of the FD&C Act (21 U.S.C. 321(f)).

compliance, other than under section 402 and 403(w) of the FD&C Act, is materially related to a food safety requirement may depend on the facts of a particular situation. FDA intends to issue guidance to provide additional information about the circumstances under which FDA would consider non-compliance to be materially related to a food safety requirement of the FD&C Act.

Under section 743(a)(1)(A) of the FD&C Act, FDA is directed to assess and collect fees from ''the responsible party for each domestic facility (as defined in section 415(b) (21 U.S.C. 350d)) and the United States agent for each foreign facility subject to a reinspection'' to cover reinspection-related costs.

Section 743(a)(2)(A)(i) of the FD&C Act defines the term ''reinspection'' with respect to domestic facilities as ''1 or more inspections conducted under section 704 subsequent to an inspection conducted under such provision which identified non-compliance materially related to a food safety requirement of th[e] Act, specifically to determine whether compliance has been achieved to the Secretary's satisfaction.''

The FD&C Act does not contain a definition of ''reinspection'' specific to foreign facilities. In order to give meaning to the language in section 743(a)(1)(A) of the FD&C Act to collect fees from the United States agent of a foreign facility subject to a reinspection, the Agency is using the following definition of ''reinspection'' for purposes of assessing and collecting fees under section 743(a)(1)(A), with respect to a foreign facility: ''1 or more inspections conducted by officers or employees duly designated by the Secretary subsequent to such an inspection which identified non-compliance materially related to a food safety requirement of the FD&C Act, specifically to determine whether compliance has been achieved to the Secretary's (and, by delegation, FDA's) satisfaction.''

This definition allows FDA to fulfill the mandate to assess and collect fees from the United States agent of a foreign facility in the event that an inspection reveals non-compliance materially related to a food safety requirement causing one or more subsequent inspections to determine whether compliance has been achieved to the Secretary's (and, by delegation, FDA's) satisfaction. By requiring the initial inspection to be conducted by officers or employees duly designated by the Secretary, the definition ensures that a foreign facility would be subject to fees only in the event that FDA, or an entity designated to act on its behalf, has made the requisite identification at an initial inspection of non-compliance materially related to a food safety requirement of the FD&C Act. The definition of ''reinspection-related costs'' in section 743(a)(2)(B) of the FD&C Act relates to both a domestic facility reinspection and a foreign facility reinspection, as described in section 743(a)(1)(A).

B. Who will be responsible for paying this fee?

The FD&C Act states that this fee is to be paid by the responsible party for each domestic facility (as defined in section 415(b) of the FD&C Act) and by the United States agent for each foreign facility (section 743(a)(1)(A) of the FD&C Act). This is the party to whom FDA will send the invoice for any fees that are assessed under this section.

C. How much will this fee be?

The fee is based on the number of direct hours spent on such reinspections, including time spent conducting the physical surveillance and/or compliance reinspection at the facility, or whatever components of such an inspection are deemed necessary, making preparations and arrangements for the reinspection, traveling to and from the facility, preparing any reports, analyzing any samples or examining any labels if required, and performing other activities as part of the OAI reinspection until the facility is again determined to be in compliance. The direct hours spent on each such reinspection will be billed at the appropriate hourly rate shown in table 2 of this document.

IV. Fees for Non-Compliance With a Recall Order Under Section 743(a)(1)(B)

A. What will cause this fee to be assessed?

The fee will be assessed for not complying with a recall order under section 423(d) or 412(f) of the FD&C Act to cover food recall activities associated with such order performed by the Secretary (and by delegation, FDA) (section 743(a)(1)(B) of the FD&C Act). Non-compliance may include the following: (1) Not initiating a recall as ordered by FDA; (2) not conducting the recall in the manner specified by FDA in the recall order; or (3) not providing FDA with requested information regarding the recall, as ordered by FDA.

B. Who will be responsible for paying this fee?

Section 743(a)(1)(B) of the FD&C Act states that the fee is to be paid by the responsible party for a domestic facility (as defined in section 415(b) of the FD&C Act) and an importer who does not comply with a recall order under section 423 or under section 412(f) of the FD&C Act. In other words, the party paying the fee would be the party that received the recall order.

C. How much will this fee be?

The fee is based on the number of direct hours spent on taking action in response to the firm's failure to comply with a recall order. Types of activities could include conducting recall audit checks, reviewing periodic status reports, analyzing the status reports and the results of the audit checks, conducting inspections, traveling to and from locations, and monitoring product disposition. The direct hours spent on each such recall will be billed at the appropriate hourly rate shown in table 2 of this document.

V. How must the fees be paid?

An invoice will be sent to the responsible party for paying the fee after FDA completes the work on which the invoice is based. Payment must be made within 90 days of the invoice date in U.S. currency by check, bank draft, or U.S. postal money order payable to the order of the Food and Drug Administration. Detailed payment information will be included with the invoice when it is issued.

VI. What are the consequences of not paying these fees?

Under section 743(e)(2) of the FD&C Act, any fee that is not paid within 30 days after it is due shall be treated as a claim of the United States Government subject to provisions of subchapter II of chapter 37 of title 31, United States Code.

Dated: July 26, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18678 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Blood Products Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Blood Products Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on September 20, 2012, from 8 a.m. to 5 p.m. and September 21, 2012, from 8 a.m. to 4 p.m.

Location: 5630 Fishers Lane, rm. 1066, Rockville, MD 20857. For those unable to attend in person, the meeting will also be Web cast. The Web cast will be available at the following links: On September 20, 2012, Blood Products Advisory Committee Day 1, *http://fda.yorkcast.com/webcast/Viewer/?peid=27146555dd9347f09571f29589297e0c1d* and on September 21, 2012, Blood Products Advisory Committee Day 2, *http://fda.yorkcast.com/webcast/Viewer/?peid=8effe88a1e834779b4932f882b67e3391d.*

Contact Person: Bryan Emery or Pearline Muckelvene, Center for Biologics Evaluation and Research (HFM–71), Food and Drug Administration, 1401 Rockville Pike, Rockville, MD 20852, 301–827–1281, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area), to find out further information regarding FDA advisory committee information. A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: On September 20, 2012, the committee will discuss hepatitis E virus and blood transfusion safety. In the afternoon, the committee will discuss Octapharma's biologics license application for Pooled Plasma (Human, Solvent/Detergent Treated). On September 21, 2012, the committee will discuss considerations for strategies to further reduce the risk of bacterial contamination in Platelets. In the late afternoon the committee will hear the following update: Summary of September 6–7, 2012, public workshop on the risks and benefits of hydroxyethyl starch solutions.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before September 13, 2012. Oral presentations from the public will be scheduled between approximately 10:30 a.m. to 11:15 a.m. and 3:30 p.m. to 4 p.m. on September 20, 2012, and also between approximately 1 p.m. and 2 p.m. on September 21, 2012. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before September 5, 2012. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by September 6, 2012.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets. The public is encouraged to watch the free Web cast if you are unable to attend this meeting. The link for the Web cast will be available at 8 a.m. each day September 20–21, 2012, located under the *Location* section of this notice.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Bryan Emery, 301–827–1277, or Pearline Muckelvine, 301–827–1281, at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: July 26, 2012.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2012–18724 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0007]

Prescription Drug User Fee Rates for Fiscal Year 2013

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the rates for prescription drug user fees for fiscal year (FY) 2013. The Federal Food, Drug, and Cosmetic Act (the FD&C Act), as amended by the Prescription Drug User Fee Amendments of 2012 (Title 1 of the Food and Drug Administration Safety and Innovation Act (FDASIA), Public Law 112–144, which was signed by the President on July 9, 2012) (PDUFA V)), authorizes FDA to collect user fees for certain applications for approval of drug and biological products, on establishments where the products are made, and on such products. Base revenue amounts to be generated from PDUFA fees were established by PDUFA V, with provisions for certain adjustments. Fee revenue amounts for applications, establishments, and products are to be established each year by FDA so that one-third of the PDUFA fee revenues FDA collects each year will be generated from each of these categories. This document establishes fee rates for FY 2013 for application fees for an application requiring clinical data ($1,958,800), for an application not requiring clinical data or a supplement requiring clinical data ($979,400), for establishment fees ($526,500), and for product fees ($98,380). These fees are effective on October 1, 2012, and will remain in effect through September 30, 2013. For applications and supplements that are submitted on or after October 1, 2012, the new fee schedule must be used. Invoices for establishment and product fees for FY 2013 will be issued

in August 2012 using the new fee schedule.

FOR FURTHER INFORMATION CONTACT: David Miller, Office of Financial Management (HFA–100), Food and Drug Administration, 1350 Piccard Dr., PI50, rm. 210J, Rockville, MD 20850, 301–796–7103.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 735 and 736 of the FD&C Act (21 U.S.C. 379g and 379h, respectively), establish three different kinds of user fees. Fees are assessed on the following: (1) Certain types of applications and supplements for approval of drug and biological products, (2) certain establishments where such products are made, and (3) certain products (section 736(a) of the FD&C Act). When certain conditions are met, FDA may waive or reduce fees (section 736(d) of the FD&C Act).

For FY 2013 through FY 2017, the base revenue amounts for the total revenues from all PDUFA fees are established by PDUFA V. The base revenue amount for FY 2013 is to be adjusted for inflation and workload, and that adjusted FY 2013 amount becomes the base amount for the remaining 4 FYs of PDUFA V. That FY 2013 base revenue amount is further adjusted each year after FY 2013 for inflation and workload. Fees for applications, establishments, and products are to be established each year by FDA so that revenues from each category will provide one-third of the total revenue to be collected each year.

II. Fee Revenue Amount for FY 2013

The statutory fee revenue amount for FY 2013 is $693,099,000, prior to adjustment for inflation and workload (see section 736(b)(1) of the FD&C Act). Of this amount, $652,709,000 will be further adjusted for inflation and workload, and $40,390,000, for new initiatives, will not be adjusted in FY 2013.

A. FY 2013 Statutory Fee Revenue Adjustments for Inflation

PDUFA V specifies that $652,709,000 of the amount for FY 2013 is to be further adjusted for inflation increases for FY 2013 using 2 separate adjustments—one for payroll costs and one for non-pay costs (see section 736(b)(3)(A) of the FD&C Act).

The component of the inflation adjustment for payroll costs shall be one plus the average annual percent change in the cost of all personnel compensation and benefits (PC&B) paid per full-time equivalent position (FTE) at FDA for the first 3 of the 4 preceding fiscal years multiplied by the proportion of PC&B costs to total FDA costs of the review of human drug applications for the first 3 of the preceding 4 FYs (see section 736(c)(1)(B) of the FD&C Act). The data on total PC&B paid and numbers of FTE paid, from which the average cost per FTE can be derived, are published in FDA's Justification of Estimates for Appropriations Committees.

Table 1 of this document summarizes that actual cost and FTE data for the specified fiscal years, and provides the percent change from the previous fiscal year and the average percent change over the first 3 of the 4 FYs preceding FY 2013. The 3 year average is 2.17 percent.

TABLE 1—FDA PERSONNEL COMPENSATION AND BENEFITS (PC&B) EACH YEAR AND PERCENT CHANGE

Fiscal year	2009	2010	2011	3-Year average
Total PC&B	$1,464,445,000	$1,634,108,000	$1,761,655,000	
Total FTE	11,413	12,526	13,331	
PC&B per FTE	$128,314	$130,457	$132,143	
Percent Change from Previous Year	3.56%	1.67%	1.29%	2.17%

The statute says that this 2.17 percent should be multiplied by the proportion of PC&B for the review of human drug applications. Table 2 of this document shows the amount of PC&B and the total amount obligated for the process for the review of human drug applications for the same 3 FYs.

TABLE 2—PC&B AS A PERCENT OF FEE REVENUES SPENT ON THE PROCESS FOR THE REVIEW OF HUMAN DRUG APPLICATIONS

Fiscal year	2009	2010	2011	3-Year average
Total PC&B	$514,874,163	$573,603,582	$596,627,595	
Total Costs	855,426,294	931,845,581	1,025,621,707	
PC&B percent	60%	62%	58%	60%

The payroll adjustment is 2.17 percent multiplied by 60 percent (or 1.30 percent).

The statute specifies that the portion of the inflation adjustment for non-payroll costs for FY 2013 is the average annual percent change that occurred in the Consumer Price Index (CPI) for urban consumers (Washington-Baltimore, DC–MD–VA–WV; not seasonally adjusted; all items; annual index) for the first 3 of the preceding 4 years of available data multiplied by the proportion of all costs of the process for the review of human drug applications other than PC&B (see section 736(c)(1)(C) of the FD&C Act). Table 3 of this document provides the summary data for the percent change in the specified CPI for the Baltimore-Washington area. The data is published by the Bureau of Labor Statistics and can be found on their Web site at *http://data.bls.gov/cgi-bin/surveymost?cu* by checking the box marked ''Washington-Baltimore All Items, November 1996 = 100 − CUURA311SAO'' and then clicking on the retrieve data button.

TABLE 3—ANNUAL AND 3-YEAR AVERAGE PERCENT CHANGE IN BALTIMORE-WASHINGTON AREA CPI

Year	2009	2010	2011	3-Year average
Annual CPI	140.718	142.915	146.975	
Annual Percent Change	0.23%	1.72%	3.34%	1.76%

To complete the inflation adjustment for non-pay costs, we multiply the 1.76 percent by the proportion of costs of the process for the review of human drug applications obligated for costs other than PC&B. Since 60 percent was obligated for PC&B as shown in table 2 of this document, 40 percent is the portion of costs other than PC&B (100 percent minus 60 percent equals 40 percent). The non-payroll adjustment is 2.5 percent times 40 percent, or 0.71 percent.

To complete the inflation adjustment, we add the payroll component (1.30 percent) to the non-pay component (0.71 percent), for a total inflation adjustment of 2.01 percent (rounded), and then add one, making 1.0201. We then multiply the amount specified in the statute ($652,709,000) by 1.0201 percent, yielding an inflation adjusted amount of $665,828,451.

B. FY 2013 Statutory Fee Revenue Adjustments for Workload

PDUFA V specifies that after the $652,709,000 has been adjusted for inflation, the inflation adjusted amount ($665,828,451) shall be further adjusted for workload (see section 736(b)(3)(B) of the FD&C Act). For FY 2013 the workload adjustment will be the percentage by which the workload adjustment for FY 2013 exceeds the workload adjuster for FY 2012, if both such adjustments were calculated using the 5 year base period consisting of FYs 2003 through 2007. As published in the **Federal Register** of August 1, 2011 (76 FR 45831), the FY 2012 workload calculated as directed was 8.12 percent.

To calculate the FY 2013 adjustment factor, FDA calculated the average number of each of the four types of applications specified in the workload adjustment provision: (1) Human drug applications, (2) active commercial investigational new drug applications (INDs) (applications that have at least one submission during the previous 12 months), (3) efficacy supplements, and (4) manufacturing supplements received over the 5-year period that ended on June 30, 2007 (base years), and the average number of each of these types of applications over the most recent 5-year period that ended June 30, 2012.

The calculations are summarized in table 4 of this document. The 5-year averages for each application category are provided in column 1 (''5-Year Average Base Years 2003–2007'') and column 2a (''5-Year Average 2008–2012'').

PDUFA specifies that FDA make additional adjustments for changes in review activities to human drug applications and active commercial INDs. These adjustments, started under PDUFA IV, are summarized in columns 2b and 2c in table 4 of this document. The number in the new drug applications/biologics license applications (NDAs/BLAs) line of column 2b of table 4 of this document is the percent by which the average workload for meetings, annual reports, and labeling supplements for NDAs and BLAs has changed from the 5-year period 2003 through 2007, to the 5-year period 2008 through 2012. Likewise, the number in the ''Active commercial INDs'' line of column 2b of table 4 of this document is the percent by which the workload for meetings and special protocol assessments for active commercial INDs has changed from the 5-year period 2003 through 2007, to the 5-year period 2008 through 2012. There is no entry in the last two lines of column 2b because the adjustment for changes in review workload does not apply to the workload for efficacy supplements and manufacturing supplements.

Column 3 of table 4 of this document reflects the percent change in workload from column 1 to column 2c. Column 4 of table 4 of this document shows the weighting factor for each type of application, estimating how much of the total FDA drug review workload was accounted for by each type of application in the table during the most recent 5 years. Column 5 of table 4 of this document is the weighted percent change in each category of workload. This was derived by multiplying the weighting factor in each line in column 4 by the percent change from the base years in column 3. At the bottom right of table 4 of this document is the sum of the values in column 5 that are added, reflecting an increase in workload of 9.99 percent for FY 2013 when compared to the base years.

TABLE 4—WORKLOAD ADJUSTER CALCULATIONS FOR FY 2013

Application type	Column 1	Column 2a	Column 2b	Column 2c	Column 3	Column 4	Column 5
	5-Year Average base years 2003–2007	5-Year Average 2008–2012	Adjustment for changes in review activity	Column 2a increased by column 2b	Percent change (column 1 to column 2c)	Weighting factor	Weighted percent change
NDAs/BLAs	123.8	134.4	0.08%	134.5	8.6%	39.6%	3.42%
Active commercial INDs	5,528.2	6724.2	−3.13%	6513.7	17.8%	40.3%	7.18%
Efficacy supplements	163.4	153.8	NA	153.8	−5.9%	9.5%	−0.56%
Manufacturing Supplements	2589.2	2575.4	NA	2575.4	−0.5%	10.6%	−0.06%
FY 2013 Workload Adjuster							9.99%

Since the calculated workload adjustment for 2013 (9.99 percent) is greater than the 8.12 percent that was calculated last year for FY 2012 the difference between the two, 1.87 percent (9.99 percent minus 8.12 percent), and that is the amount of the workload adjustment for FY 2013 (see section 736(b)(3)(B) of the FD&C Act).

Table 5 of this document shows the calculation of the revenue amount for FY 2013. The $652,709,000 subject to adjustment on the first line is multiplied by the combined inflation adjustment

factor of 1.0201, resulting in the inflation adjusted amount on the third line. That amount is then multiplied by one plus the workload adjustment of 1.87 percent, resulting in the inflation and workload adjusted amount of $678,279,443 on the fifth line. Finally the portion of the FY 2013 fees not subject to adjustment ($40,390,000) is added, resulting in the total FY 2013 fee revenue amount of $718,669,000 on the last line of table 5 of this document.

TABLE 5—PDUFA REVENUE AMOUNT FOR FY 2013 AND BASE FOR SUBSEQUENT YEARS

Portion of FY 2013 Revenues Subject to Adjustments	$652,709,000
Amount of Inflation Adjustment Factor for FY 2013	1.0201
Inflation Adjusted Amount (1 plus 2.01 percent)	$665,828,451
Workload Adjustment Factor for FY 2013 (1 plus 1.87 percent)	1.0187
Inflation and Workload Adjusted Amount	$678,279,443
Portion of 2013 Revenues Not Subject to Adjustment	$40,390,000
FY 2013 Revenue Amount and Base for Subsequent Years (Rounded to nearest thousand dollars)	$718,669,000

PDUFA specifies that one-third of the total fee revenue is to be derived from application fees, one-third from establishment fees, and one-third from product fees (see section 736(b)(2) of the FD&C Act). Accordingly, one third of the total revenue amount ($718,669,000), or a total of $239,556,333, is the amount of fee revenue that will be derived from each of these fee categories: Application Fees, Establishment Fees, and Product Fees.

While the fee revenue amount anticipated in FY 2013 is $718,669,000, as the previous paragraph shows, FDA assumes that the fee appropriation for FY 2013 will be 5 percent higher, or $754,602,000, rounded to the nearest thousand dollars. The latest PDUFA 5-Year Financial Plan (which can be found at *http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm153456.htm*) states in Assumption 14 (Fee Revenue and Annual Appropriation Amount) that the PDUFA workload adjuster is a lagging adjustment dampened by averages over 5 years, and will not help FDA keep up with workload if there are sudden increases in the number of applications to be reviewed in the current fiscal year. Appropriated amounts for PDUFA fee revenue each year are estimated at 5 percent higher than estimated fee revenues for each year, to provide FDA with the ability to cope with surges in application review workload should that occur. If FDA collects less than the fee estimate at the beginning of the year and less than the fee appropriation, then collections rather than appropriations set the upper limit on how much FDA may actually keep and spend. If, however, FDA collects more than fee estimates at the beginning of the year, due to a workload surge, a slightly higher fee appropriation will permit FDA to keep and spend the higher collections in order to respond to a real surge in review workload that caused the increased collections—an unexpected increase in the number of applications that FDA must review in accordance with PDUFA goals. For this reason, in most fiscal years since 1993, actual appropriations have slightly exceeded PDUFA fee revenue estimates made each year.

III. Application Fee Calculations

A. Application Fee Revenues and Application Fees

Application fees will be set to generate one-third of the total fee revenue amount, or $239,556,333 in FY 2013, as calculated previously in this document.

B. Estimate of the Number of Fee-Paying Applications and the Establishment of Application Fees

For FY 2013 through FY 2017, FDA will estimate the total number of fee-paying full application equivalents (FAEs) it expects to receive the next fiscal year by averaging the number of fee-paying FAEs received in the 3 most recently completed fiscal years. This will avoid having FDA try to estimate the number it expects to receive in the current fiscal year.

In estimating the number of fee-paying FAEs, full application requiring clinical data counts as one FAE. An application not requiring clinical data counts as one-half an FAE, as does a supplement requiring clinical data. An application that is withdrawn, or refused for filing, counts as one-fourth of an FAE if the applicant initially paid a full application fee, or one-eighth of an FAE if the applicant initially paid one-half of the full application fee amount.

As Table 6 of this document shows, the average number of fee-paying FAEs received annually in the most recent 3-year period is 122.3 FAEs. FDA will set fees for FY 2013 based on this estimate as the number of full application equivalents that will pay fees.

TABLE 6—FEE-PAYING FAE 3-YEAR AVERAGE

Fiscal year	2009	2010	2011	3-Year average
Fee-Paying FAEs	140.3	118.4	108.25	122.3

The FY 2013 application fee is estimated by dividing the average number of full applications that paid fees over the latest 3 years, 122.3, into the fee revenue amount to be derived from application fees in FY 2013, $239,556,333. The result, rounded to the nearest $100, is a fee of $1,958,800 per full application requiring clinical data, and $979,400 per application not requiring clinical data or per supplement requiring clinical data.

IV. Fee Calculations for Establishment and Product Fees

A. Establishment Fees

At the beginning of FY 2012, the establishment fee was based on an estimate that 450 establishments would be subject to, and would pay, fees. By the end of FY 2012, FDA estimates that 480 establishments will have been billed for establishment fees, before all decisions on requests for waivers or reductions are made. FDA estimates that a total of 10 establishment fee waivers or reductions will be made for FY 2012. In addition, FDA estimates that another 15 full establishment fees will be exempted this year based on the orphan drug exemption in the Food and Drug Administration Amendments Act (FDAAA) (see section 736(k) of the FD&C Act). Subtracting 25 establishments (10 waivers, plus the estimated 15 establishments under the orphan exemption) from 480 leaves a net of 455 fee-paying establishments. FDA will use 455 for its FY 2013 estimate of establishments paying fees,

after taking waivers and reductions into account. The fee per establishment is determined by dividing the adjusted total fee revenue to be derived from establishments ($239,556,333) by the estimated 455 establishments, for an establishment fee rate for FY 2013 of $526,500 (rounded to the nearest $100).

B. Product Fees

At the beginning of FY 2012, the product fee was based on an estimate that 2,365 products would be subject to and would pay product fees. By the end of FY 2012, FDA estimates that 2,525 products will have been billed for product fees, before all decisions on requests for waivers, reductions, or exemptions are made. FDA assumes that there will be 50 waivers and reductions granted. In addition, FDA estimates that another 40 product fees will be exempted this year based on the orphan drug exemption in FDAAA (see section 736(k) of the FD&C Act). FDA estimates that 2,435 products will qualify for product fees in FY 2012, after allowing for waivers and reductions, including the orphan drug products eligible under the FDAAA exemption, and will use this number for its FY 2013 estimate. The FY 2013 product fee rate is determined by dividing the adjusted total fee revenue to be derived from product fees ($239,556,333) by the estimated 2,435 products for a FY 2013 product fee of $98,380 (rounded to the nearest $10).

V. Fee Schedule for FY 2013

The fee rates for FY 2013 are set out in Table 7 of this document:

TABLE 7—FEE SCHEDULE FOR FY 2013

Fee category	Fee rates for FY 2013
Applications:	
Requiring clinical data	$1,958,800
Not requiring clinical data	979,400
Supplements requiring clinical data	979,400
Establishments	526,500
Products	98,380

VI. Fee Payment Options and Procedures

A. Application Fees

The appropriate application fee established in the new fee schedule must be paid for any application or supplement subject to fees under PDUFA that is received after September 30, 2012. Payment must be made in U.S. currency by check, bank draft, or U.S. postal money order payable to the order of the Food and Drug Administration. Please include the user fee identification (ID) number on your check, bank draft, or postal money order. Your payment can be mailed to: Food and Drug Administration, P.O. Box 979107, St. Louis, MO 63197–9000.

If checks are to be sent by a courier that requests a street address, the courier can deliver the checks to: U.S. Bank, Attention: Government Lockbox 979107, 1005 Convention Plaza, St. Louis, MO 63101. (Note: This U.S. Bank address is for courier delivery only. Contact the U.S. Bank at 314–418–4013 if you have any questions concerning courier delivery.)

Please make sure that the FDA post office box number (P.O. Box 979107) is written on the check, bank draft, or postal money order.

Wire transfer payment may also be used. Please reference your unique user fee ID number when completing your transfer. The originating financial institution may charge a wire transfer fee between $15.00 and $35.00. Please ask your financial institution about the fee and include it with your payment to ensure that your fee is fully paid. The account information is as follows: New York Federal Reserve Bank, U.S. Department of the Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, Acct. No.: 75060099, Routing No.: 021030004, SWIFT: FRNYUS33, Beneficiary: FDA, 1350 Piccard Dr., Rockville, MD.

Application fees can also be paid online with an electronic check (ACH). FDA has partnered with the U.S. Department of the Treasury to utilize Pay.gov, a Web-based payment application, for online electronic payment. The Pay.gov feature is available on the FDA Web site after the user fee ID number is generated.

The tax identification number of the Food and Drug Administration is 53–0196965.

B. Establishment and Product Fees

FDA will issue invoices for establishment and product fees for FY 2013 under the new fee schedule in August 2012. Payment will be due on October 1, 2012. FDA will issue invoices in November 2013 for any products and establishments subject to fees for FY 2013 that qualify for fee assessments after the August 2012 billing.

Dated: July 24, 2012.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2012–18711 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and AIDS Related Research.

Date: August 16–17, 2012.

Time: 10:00 a.m. to 8:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Robert Freund, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, 301–435–1050, *freundr@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Vascular Hematology I.

Date: August 29, 2012.

Time: 1 p.m. to 3 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: Anshumali Chaudhari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4124, MSC 7802, Bethesda, MD 20892, (301) 435–1210, *chaudhaa@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: July 26, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–18689 Filed 7–31–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Heart, Lung, and Blood Advisory Council.

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 Heart, Lung, and Blood Advisory Council

Date: September 11, 2012.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 10, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Stephen C. Mockrin, Ph.D., Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6701 Rockledge Drive, Room 7100, Bethesda, MD 20892, (301) 435–0260, *mockrins@nhlbi.nih.gov*.

Information is also available on the Institute's/Center's home page: *www.nhlbi.nih.gov/meetings/nhlbac/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: July 26, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–18781 Filed 7–31–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; 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 materials, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel; NeuroNEXT SEP.

Date: August 13, 2012.

Time: 10 a.m. to 1 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Shanta Rajaram, Ph.D., Scientific Review Officer, Scientific Review Branch, Division of Extramural Research, NINDS/NIH/DHHS, NSC, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892–9529, 301–435–6033, *rajarams@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 25, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–18792 Filed 7–31–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; NIAID Clinical Trial Implementation (U01) Cooperative Agreement.

Date: August 29, 2012.

Time: 1 p.m. to 3 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Sujata Vijh, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892–7616, 301–594–0985, *vijhs@niaid.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: July 26, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–18791 Filed 7–31–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Biomedical Imaging and Bioengineering; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Advisory Council for Biomedical Imaging and Bioengineering.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Advisory Council for Biomedical Imaging and Bioengineering NACBIB, September, 2012.

Date: September 14, 2012.

Open: 9 a.m. to 1 p.m.

Agenda: Report from the Institute Director, other Institute Staff and scientific presentation.

Place: The William F. Bolger Center, Franklin Building, 9600 Newbridge Drive, Conference Room 1, Potomac, MD 20854.

Closed: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: The William F. Bolger Center, Franklin Building, 9600 Newbridge Drive, Conference Room 1, Potomac, MD 20854.

Contact Person: Anthony Demsey, Ph.D., Director, National Institute of Biomedical Imaging and Bioengineering, 6707 Democracy Boulevard, Room 241, Bethesda, MD 20892.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *http://www.nibib1.nih.gov/about/NACBIB/NACBIB.htm*, where an agenda and any additional information for the meeting will be posted when available.

Dated: July 26, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–18788 Filed 7–31–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; 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 a meeting of the National Advisory Council for Nursing Research.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable 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 Advisory Council for Nursing Research.

Date: September 18–19, 2012.

Open: September 18, 2012, 1:00 p.m. to 5:00 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Closed: September 19, 2012, 9:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Building 31, 31 Center Drive, Conference Room 6, Bethesda, MD 20892.

Contact Person: Ann R. Knebel, DNSC, RN, FAAN, Deputy Director, National Institute of Nursing Research, National Institutes of Health, 31 Center Drive, Building 31, Room 5B05, Bethesda, MD 20892, 301–496–8230, *knebelar@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *www.nih.gov/ninr/a_advisory.html*, where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: July 26, 2012.

Jennifer S. Spaeth,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–18783 Filed 7–31–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the Laboratories and Instrumented Initial Testing Facilities (IITF) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); and on April 30, 2010 (75 FR 22809).

A notice listing all currently certified Laboratories and Instrumented Initial Testing Facilities (IITF) is published in the **Federal Register** during the first week of each month. If any Laboratory/IITF's certification is suspended or revoked, the Laboratory/IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any Laboratory/IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://www.workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1042, One Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. The ''Mandatory Guidelines for Federal Workplace Drug Testing Programs,'' as amended in the revisions listed above, requires strict standards that Laboratories and Instrumented Initial Testing Facilities (IITF) must meet in order to conduct drug and specimen validity tests on urine specimens for federal agencies.

To become certified, an applicant Laboratory/IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a Laboratory/IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and Instrumented Initial Testing Facilities (IITF) in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A laboratory/IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with the Mandatory Guidelines dated November 25, 2008 (73 FR 71858), the following Laboratories and Instrumented Initial Testing Facilities (IITF) meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Instrumented Initial Testing Facilities (IITF)

None.

Laboratories

ACL Laboratories, 8901 W. Lincoln Avenue, West Allis, WI 53227, 414–328–7840/800–877–7016 (Formerly: Bayshore Clinical Laboratory).

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264.

Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770/888–290–1150.

Aegis Analytical Laboratories, 345 Hill Avenue, Nashville, TN 37210, 615–255–2400 (Formerly: Aegis Sciences Corporation, Aegis Analytical Laboratories, Inc.).

Alere Toxicology Services, 1111 Newton Street, Gretna, LA 70053, 504–361–8989/800–433–3823 (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.).

Alere Toxicology Services, 450 Southlake Boulevard, Richmond, VA 23236, 804–378–9130 (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.).

Baptist Medical Center-Toxicology Laboratory, 11401 I–30, Little Rock, AR 72209–7056, 501–202–2783 (Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Reference Lab, 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917.

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602, 229–671–2281.

DrugScan, Inc., P.O. Box 2969, 1119 Mearns Road, Warminster, PA 18974, 215–674–9310.

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609.

Gamma-Dynacare Medical Laboratories *, A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630.

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Avenue, Raritan, NJ 08869, 908–526–2400/800–437–4986 (Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984 (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339 (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center).

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Boulevard, Lenexa, KS 66219, 913–888–3927/800–873–8845 (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.,).

Maxxam Analytics *, 6740 Campobello Road, Mississauga, ON, Canada L5N 2L8, 905–817–5700 (Formerly: Maxxam Analytics Inc., NOVAMANN (Ontario), Inc.).

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244.

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Avenue, Portland, OR 97232, 503–413–5295/800–950–5295.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088.

National Toxicology Laboratories, Inc., 1100 California Avenue, Bakersfield, CA 93304, 661–322–4250/800–350–3515.

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774 (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).

Pacific Toxicology Laboratories, 9348 DeSoto Avenue, Chatsworth, CA 91311, 800–328–6942 (Formerly: Centinela Hospital Airport Toxicology Laboratory).

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991/800–541–7891x7.

Phamatech, Inc., 10151 Barnes Canyon Road, San Diego, CA 92121, 858–643–5555.

Quest Diagnostics Incorporated, 1777 Montreal Circle, Tucker, GA 30084, 800–729–6432 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216 (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 8401 Fallbrook Avenue, West Hills, CA 91304, 818–737–6370 (Formerly: SmithKline Beecham Clinical Laboratories).

South Bend Medical Foundation, Inc., 530 N. Lafayette Boulevard, South Bend, IN 46601, 574–234–4176 x1276.

Southwest Laboratories, 4625 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040, 602–438–8507/800–279–0027.

STERLING Reference Laboratories, 2617 East L Street, Tacoma, Washington 98421, 800–442–0438.

Toxicology & Drug Monitoring Laboratory, University of Missouri

Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273.

U.S. Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson Street, Fort George G. Meade, MD 20755–5235, 301–677–7085.

The following laboratory has voluntarily withdrawn from the National Laboratory Certification Program, effective July 20, 2012:

Quest Diagnostics Incorporated, 5601 Office Boulevard, Albuquerque, NM 87109, 505–727–6300/800–999–5227 (Formerly: S.E.D. Medical Laboratories).

* The Standards Council of Canada (SCC) voted to end its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS NLCP contractor continuing to have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 30, 2010 (75 FR 22809). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Janine Denis Cook,

Chemist, Division of Workplace Programs, Center for Substance Abuse Prevention, SAMHSA.

[FR Doc. 2012–18707 Filed 7–31–12; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Center for Substance Abuse Prevention; Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given that the Substance Abuse and Mental Health Services Administration's (SAMHSA) Center for Substance Abuse Prevention (CSAP) Drug Testing Advisory Board (DTAB) will meet on August 27 and 28, 2012 from 10:00 a.m. to 2:00 p.m. E.D.T. via teleconference.

The Board will discuss proposed revisions to the Mandatory Guidelines for Federal Workplace Drug Testing Programs. Therefore, this meeting is closed to the public as determined by the Administrator, SAMHSA, in accordance with 5 U.S.C. 552b(c)(9)(B) and 5 U.S.C. App. 2, Section 10(d).

Substantive program information, a summary of the meeting, and a roster of DTAB members may be obtained as soon as possible after the meeting by accessing the SAMHSA Advisory Committees' Web site, *http://www.nac.samhsa.gov/DTAB/meetings.aspx,* or by contacting Dr. Cook.

Committee Name: Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Prevention, Drug Testing Advisory Board.

Dates/Time/Type: August 27—28, 2012 from 10:00 a.m. to 2:00 p.m. E.D.T.: Closed.

Place: SAMHSA Office Building, 1 Choke Cherry Road, Rockville, Maryland 20857.

Contact: Janine Denis Cook, Ph.D., Designated Federal Official, CSAP Drug Testing Advisory Board, 1 Choke Cherry Road, Room 2–1045, Rockville, Maryland 20857, Telephone: 240–276–2600, Fax: 240–276–2610, Email: *janine.cook@samhsa.hhs.gov.*

Janine Denis Cook,

Designated Federal Official, DTAB, Division of Workplace Programs, Center for Substance Abuse Prevention, Substance Abuse and Mental Health Services Administration.

[FR Doc. 2012–18708 Filed 7–31–12; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Cancellation of Customs Broker Licenses

AGENCY: U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: General Notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930, as amended, (19 USC 1641) and the U.S. Customs and Border Protection regulations (19 CFR 111.51), the following Customs broker licenses and all associated permits are cancelled without prejudice.

Name	License No.	Issuing port
Ferrara International Logistics	11930	New York.
J.B. Fong & Co., Inc	06461	San Francisco.
Air 7 Seas Transport Logistics, Inc	23081	San Francisco.
Liberty Port Broker, Inc	20911	New York.
Sky Sea Forwarding Corp	13261	New York.
Contact Customs Clearance, Inc	13467	New York.
Legacy Worldwide Logistics, Inc	22827	New York.
Hellmuth Dieterle	05289	New York.

Dated: July 25, 2012.

Richard F. DiNucci,

Acting Assistant Commissioner, Office of International Trade.

[FR Doc. 2012–18739 Filed 7–31–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Cancellation of Customs Broker Licenses Due to Death of the License Holder

AGENCY: U.S. Customs and Border Protection, U.S. Department of Homeland Security.

ACTION: General Notice.

SUMMARY: Notice is hereby given that, pursuant to Title 19 of the Code of Federal Regulations at section 111.51(a), the following individual Customs broker licenses and any and all permits have been cancelled due to the death of the broker:

Name	License No.	Port name
David D. Combs	09873	Chicago
Ubaldo Diaz	05914	New York
Achille D'Anca	03631	New York
Brian J. Rodgers	05462	New York
Leonard M. Shayne	02500	New York
John S. Ross	02482	New York
Mary Beth LaPenna	20824	New York
Frederick Matalevich	04360	New York
Samuel Felicano	21146	Miami

Dated: July 25, 2012.

Richard F. DiNucci,

Acting Assistant Commissioner, Office of International Trade.

[FR Doc. 2012–18740 Filed 7–31–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5607–N–24]

Notice of Proposed Information Collection: Comment Request; Manufactured Home Construction and Safety Standards Program

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

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 1, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reporting Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Frank R. Vetrano, Acting Deputy Assistant Secretary for Risk Management and Regulatory Affairs, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–6401 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Manufactured Home Construction and Safety Standards Program.

OMB Control Number, If Applicable: 2502–0233.

Description of the Need for the Information and Proposed Use: Collection of this information will result in a better determination of reporting how Primary Inspection Agencies and manufacturers request certification labels, track payment, track production, refund monies, and report missing or damaged labels to the Department or its monitoring contractor.

Agency Form Numbers, If Applicable:

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The number of burden hours is 2,230. The number of respondents is 140, the number of responses is 4,440, the frequency of response is on occasion, and the burden hour per response is 6.5.

Status of the Proposed Information Collection: This is an extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., Chapter 35, as amended.

Dated: July 26, 2012.

William A. Glavin,

Acting General Deputy Assistant Secretary for Housing—Acting Deputy Federal Housing Commissioner.

[FR Doc. 2012–18811 Filed 7–31–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5607–N–23]

Notice of Proposed Information Collection: Comment Request Direct Endorsement Underwriter/HUD Reviewer—Analysis of Appraisal Report

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 1, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and/or OMB Control Number and should be sent to: Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, Room 9120 or the number for the Federal Information Relay Service (1–800–877–8339).

FOR FURTHER INFORMATION CONTACT: Karin Hill, Office of Single Family Program Development, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410, telephone (202) 708–2121 (this is not a toll free number) for copies of the proposed forms and other available information.

SUPPLEMENTARY INFORMATION: The Department is submitting the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended).

This Notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond; including the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

This Notice also lists the following information:

Title of Proposal: Direct Endorsement Underwriter/HUD Reviewer—Analysis of Appraisal Report.

OMB Control Number, if applicable: 2502–0477.

Description of the need for the information and proposed use: The Department requires Direct Endorsement Underwriters to maintain responsibility for the appraisal and the appraised value. When the DE Underwriter disagrees with the value conclusion and cannot reach the appraiser or the appraiser refuses to change the appraisal, the Department allows the DE Underwriter to make changes and requires the underwriter to do so on the HUD 54114. The information collected is used by FHA to monitor the quality of the lender's analysis of the appraisal report, identify areas of weakness for future training, and removing lenders that consistently exhibits careless underwriting and subsequently affect the risk to the Department.

Agency form numbers, if applicable: HUD–54114.

Estimation of the total numbers of hours needed to prepare the information collection including number of respondents, frequency of response, and hours of response: The estimated total number of burden hours needed to prepare the information collection is 27,916; the number of respondents is 127,000 generating approximately 127,000 annual responses; the frequency of response is on occasion; and the estimated time needed to prepare the response is .05 hour per response.

Status of the proposed information collection: Extension of a currently approved collection.

Authority: The Paperwork Reduction Act of 1995, 44 U.S.C., chapter 35, as amended.

Dated: July 24, 2012.

William A. Glavin,

Acting General Deputy Assistant Secretary for Housing-Acting General Deputy Federal Housing Commissioner.

[FR Doc. 2012–18815 Filed 7–31–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5609–N–07]

Notice of Proposed Information Collection for Public Comment on the Assessment of Native American, Alaska Native and Native Hawaiian Housing Needs

AGENCY: Office of Policy Development and Research, HUD.

ACTION: Notice.

SUMMARY: The proposed information collection requirement described below will be submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act. The Department is soliciting public comments on the subject proposal.

DATES: *Comments Due Date:* October 1, 2012.

ADDRESSES: Interested persons are invited to submit comments regarding this proposal. Comments should refer to the proposal by name and should be sent to: Reports Liaison Officer, Office of Policy Development and Research, Department of Housing and Urban Development, 451 Seventh Street SW., Room 8230, Washington, DC 20410.

FOR FURTHER INFORMATION CONTACT: Jennifer Stoloff, Department of Housing and Urban Development, Office of Policy Development and Research, 451 7th Street SW., Room 8120, Washington DC 20401; telephone (202) 402–5723, (this is not a toll free number). Copies of the proposed data collection instruments and other available documents may be obtained from Dr. Stoloff.

SUPPLEMENTARY INFORMATION: The Department will submit the proposed information collection to OMB for review, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35, as amended). This notice is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to: (1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including if the information will have practical utility; (2) Evaluate the accuracy of the agency's estimate of the burden of proposed collection of information; (3) Enhance the quality, utility, and clarity of the information to be collected; and (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information

technology, e.g., permitting electronic submission of responses.

This notice also lists the following information:

Title of Proposal: Assessment of Native American, Alaska Native and Native Hawaiian Housing Needs.

Description of the Need for Information and Proposed Use: The Department is conducting this study under contract with The Urban Institute and its subcontractors, NORC, Econometrica and SSI. The project is a housing needs assessment that will produce national level estimates of housing needs in tribal areas in the United States. HUD provides funding though several programs to Native American and Alaskan Native populations, most notably through the Indian Housing Block Grant. The level of housing need is of particular interest to HUD and the Congress has mandated this study. HUD has not published a study on housing needs, in general, for this population since 1996. The surveys covered by this data collection include a household survey of native Hawaiians, living in Hawaii, served by the Department of Hawaiian Home Lands.

Members of the Affected Public: Native Hawaiian households on the DHHL waiting list: 500 surveys total, 10% by telephone, the remainder in-person.

Native Hawaiian households residing in the home lands (potentially): 500 surveys total, 10% by telephone, the remainder in-person.

Estimation of the Total Number of Hours Needed To Prepare the Information Collection

Including Number of Respondents, Frequency of Response, and Hours of Response:

Respondents	Number of respondents	Number responses per respondent	Average burden/response (in hours)	Total burden (in hours)
Household Survey (waiting list)	500	1	45 minutes (.75 hour).	375
Household Survey (home lands residents)	500	1	45 minutes (.75 hour).	375
Total				750

Status of the Proposed Information Collection: Pending OMB approval.

Authority: Title 13 U.S.C. Section 9(a), and Title 12, U.S.C., Section 1701z–1 *et seq.*

Dated: July 24, 2012.

Erika C. Poethig,

Acting Assistant Secretary for Policy Development and Research.

[FR Doc. 2012–18816 Filed 7–31–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Interior Fire Program Assessment 2012

AGENCY: Office of Wildland Fire, Interior.

ACTION: Notice of Tribal consultations and informational meetings.

SUMMARY: The Office of Wildland Fire is announcing tribal consultations to discuss the following topics: (1) The Interior Fire Program Assessment 2012; and (2) potential options being considered as a result of the Interior Fire Program Assessment 2012.

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: Jim Douglas, Senior Advisor, Public Safety, Resource Protection, and Emergency Services, (202) 208–7754.

SUPPLEMENTARY INFORMATION: Federally recognized tribes are invited to attend one or more of the consultation and informational sessions regarding the Interior Fire Program Assessment 2012.

• In their report on the Department of the Interior, Environment, and Related Agencies Appropriation Bill for fiscal year 2012, the House of Representatives Committee on Appropriations stated, in part, ''The Committee is aware of the duplication that exists in the Department of the Interior's wildland fire programs, with multiple parallel organizations in four bureaus, each having nearly identical administrative organizations at the national, state, and regional levels, and at the local level.'' The Committee went on in the report to direct the Department of the Interior to ''complete an assessment of the Department's wildland fire management programs in order to determine the most cost effective, efficient means of providing comprehensive fire management services in support of the Departmental and bureau missions and to better direct scarce resources from duplicative administrative management organizations to focus resources on the protection of lives, property and natural and cultural resources.'' The Committee asked for a set of options for restructuring and conducting the wildland fire management programs.

• In response to the Committee's report, the Department of the Interior contracted the services of PricewaterhouseCoopers (the Assessment Team) to conduct an assessment considering the specific areas of wildland fire management referenced in the report to include, ''the Department and bureau roles and responsibilities for administration and management of preparedness, suppression operation, hazardous fuels reduction, burned area rehabilitation, fire facilities, fire science, community assistance, and budget and finance functions.'' The Assessment Team was also asked to, evaluate existing alternative models for service delivery, including the Alaska Fire Service, state, and other countries and identify resources that can be redirected to on-the-ground services through reorganization of its wildland fire management programs.''

• This review is ongoing and has included the Office of Wildland Fire, Bureau of Indian Affairs, Bureau of Land Management, National Park Service, Fish and Wildlife Service, the U.S. Geological Survey, and the Bureau of Reclamation. Although the USDA Forest Service is not included in the review, they have been consulted and interviews have been conducted as they are a major partner in the Federal wildland fire management program.

• On June 19, 2012, Task 1, the identification of potential opportunities, was completed; and Task 2, development of recommendations, began. As part of Task 2, and in support of the Consultation and Coordination with Indian Tribal Governments

requirements outlined in Executive Order 13175 and the Secretary of the Interior's Order No. 3317, the Department of the Interior is conducting three Tribal Consultation sessions during the week of August 26, 2012.

• At these sessions the Department will present background information on the Interior Fire Program Assessment 2012 project, the options that have been prepared by the Assessment Team, and the criteria for evaluating those options.

• The Assessment Team's summary document will be available at: *http://www.doi.gov/pmb/owf/Tribal_Consultation_Advance_Materials.cfm* no later than July 27, 2012.

• After the consultations are completed, there will be an opportunity to provide additional feedback to the Assessment Team by emailing your comments to *IFPA12@ios.doi.gov,* by 5 p.m., on September 12, 2012.

Meeting Dates and Locations

The consultation sessions will be held on the following dates, at the following locations:

Meeting date	Location	Time
August 27, 2012	National Indian Programs Training Center, 1011 Indian School Road N.W., Suite 254, Albuquerque, NM 87104.	0830–1200
August 28, 2012	Northern Quest Resort and Casino, 2012 Northern Quest Casino, 100 North Hayford Road, Airway Heights, WA 99001.	0830–1200
August 31, 2012	Mid-West Regional Office, Bureau of Indian Affairs, Department of the Interior, Norman Pointell Building, 5600 West America Blvd., Suite 500, Bloomington, MN 55347.	0830–1200

MEETING AGENDA

[All times are local]

Time	Topic
0830–0900	Welcome and Introductions.
0900–1000	Presentation.
1000–1200	Questions and Concerns.
1200	Adjourn.

Dated: July 24, 2012.

Amy Holley,

Chief of Staff, Policy, Management and Budget.

[FR Doc. 2012–18723 Filed 7–31–12; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management [LLCO956000 L14200000.BJ0000]

Notice of Filing of Plats

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats; Colorado.

SUMMARY: The Bureau of Land Management (BLM) Colorado State Office is publishing this notice to inform the public of the intent to officially file the survey plats listed below and afford all affected parties a proper period of time to protest this action prior to the plat filing. During this time, the plats will be available for viewing at *http://www.glorecords.blm.gov.*

DATES: Unless there are protests of this action, the filing of the plats described in this notice will happen on August 31, 2012.

ADDRESSES: BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The plat, in 6 sheets, and field notes of the dependent resurvey in Township 2 South, Range 73 West, Sixth Principal Meridian, Colorado, were accepted on June 13, 2012.

The plat, in 2 sheets, and field notes of the dependent resurvey in Township 2 South, Range 73 West, Sixth Principal Meridian, Colorado, were accepted on June 25, 2012.

The plat, in 4 sheets, and field notes of the dependent resurvey in Township 3 South, Range 73 West, Sixth Principal Meridian, Colorado, were accepted on June 29, 2012.

The plat and field notes of the dependent resurvey and survey in Township 48 North, Range 4 West, New Mexico Principal Meridian, Colorado, were accepted on July 10, 2012.

Randy Bloom,

Chief Cadastral Surveyor for Colorado.

[FR Doc. 2012–18721 Filed 7–31–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLCO956000 L14200000.BJ0000]

Notice of Filing of Plats

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Filing of Plats; Colorado.

SUMMARY: The Bureau of Land Management (BLM) Colorado State Office is publishing this notice to inform the public of the official filing of the survey plats listed below.

DATES: The plats described in this notice were filed on July 11, 2012.

ADDRESSES: BLM Colorado State Office, Cadastral Survey, 2850 Youngfield Street, Lakewood, Colorado 80215–7093.

FOR FURTHER INFORMATION CONTACT: Randy Bloom, Chief Cadastral Surveyor for Colorado, (303) 239–3856.

Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The supplemental plat of the SE1/4SE1/4 of Section 29, in Township 1 North, Range 71 West, Sixth Principal Meridian, Colorado, was accepted and filed on July 11, 2012.

The supplemental plat of the NE1/4SW1/4 of Section 25, in Township 1 North, Range 72 West, Sixth Principal Meridian, Colorado, was accepted and filed on July 11, 2012.

Randy Bloom,

Chief Cadastral Surveyor for Colorado.

[FR Doc. 2012–18720 Filed 7–31–12; 8:45 am]

BILLING CODE 4310–JB–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Final Program Environmental Impact Statement/Environmental Impact Report for the San Joaquin River Restoration Program, California

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of availability.

SUMMARY: Pursuant to the National Environmental Policy Act and the California Environmental Quality Act, the Bureau of Reclamation and the California Department of Water Resources have prepared a joint Final Program Environmental Impact Statement/Environmental Impact Report (Final PEIS/R), for the implementation of the Stipulation of Settlement in *NRDC, et al.,* v. *Rodgers, et al.* The Final PEIS/R recommends a proposed action from the alternatives considered in the Draft PEIS/R to achieve the Stipulation of Settlement's restoration and water management goals.

DATES: The Bureau of Reclamation will not make a decision on the proposed action until at least 30 days after release of the Final PEIS/R. After the 30 day waiting period, the Bureau of Reclamation will complete a Record of Decision. The Record of Decision will state the actions that will be implemented and will discuss factors leading to the decisions.

ADDRESSES: A compact disk or a copy of the Final PEIS/R may be requested in writing from Ms. Margaret Gidding, Bureau of Reclamation, 2800 Cottage Way, MP–170, Sacramento, California 95825, by email to *mgidding@usbr.gov,* or by calling 916–978–5461. The Final PEIS/R is also accessible from the following Web site: *www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=2940.*

Copies of the Final PEIS/R are available to the public, including the following locations:

- Bureau of Reclamation, 2800 Cottage Way, MP–170, Sacramento, California 95825
- Bureau of Reclamation, South-Central California Area Office, 1243 N Street, Fresno, California 93721–1813
- California Department of Water Resources, South Central Region Office, 3374 East Shields Avenue, Fresno, California 93726
- Visalia Branch Library, 200 West Oak Avenue, Visalia, California 93291–4931
- Central Branch, 2420 Mariposa Street, Fresno, California 93721
- Sacramento Public Library, 828 I Street, Sacramento, California 95814
- Merced County, Los Banos Public Library, 1312 S. 7th Street, Los Banos, California 93635–4757

FOR FURTHER INFORMATION CONTACT: Ms. Michelle Banonis at 916–978–5457, via fax at 916–978–5469, or email at *mbanonis@usbr.gov.* Additional information is available online at *www.restoresjr.net.*

SUPPLEMENTARY INFORMATION: In 1988, a coalition of environmental groups, led by the Natural Resources Defense Council (NRDC), filed a lawsuit challenging the renewal of long-term water service contracts between the United States and the Central Valley Project (CVP) Friant Division contractors. After more than 18 years of litigation, this lawsuit, known as *NRDC, et al.,* v. *Rodgers, et al.,* was settled. On September 13, 2006, the Settling Parties, including NRDC, Friant Water Users Authority, and the Departments of the Interior and Commerce, agreed on the terms and conditions of the Settlement, which was subsequently approved by the U.S. District Court, Eastern District of California (Court) on October 23, 2006. The Settlement establishes two primary goals:

- Restoration Goal—To restore and maintain fish populations in ''good condition'' in the mainstem San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish.
- Water Management Goal—To reduce or avoid adverse water supply impacts on all of the Friant Division long-term contractors that may result from the interim and restoration flows provided for in the Settlement.

The planning and environmental review necessary to implement the Settlement is authorized under the San Joaquin River Restoration Settlement Act (Act), included in Public Law 111–11. The Secretary of the Interior is authorized and directed to implement the terms and conditions of the Settlement through the Act. The San Joaquin River Restoration Program (SJRRP), consisting of the Bureau of Reclamation (Reclamation), the California Department of Water Resources (DWR), the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), and the California Department of Fish and Game (DFG), will work to implement the Settlement.

Reclamation, on behalf of the Secretary of the Interior, proposes to implement the terms and conditions of the Settlement, consistent with the Act. Additionally, the Settling Parties agreed that implementation of the Settlement will also require participation of the state of California (State). Therefore, concurrent with the execution of the Settlement, the Settling Parties entered into a Memorandum of Understanding with the State (by and through the California Resources Agency, DWR, DFG, and the California Environmental Protection Agency) regarding the State's role in the implementation of the Settlement. The ''implementing agencies,'' Reclamation, FWS, NMFS, DWR, and DFG, are responsible for the management of the program to implement the Settlement.

The Final PEIS/R evaluates and documents numerous physical and operational actions that, when implemented, could potentially directly, indirectly, or cumulatively affect environmental conditions in the Central Valley. The Final PEIS/R study area includes areas potentially affected by Settlement actions and involves the San Joaquin River, from Millerton Reservoir to the Sacramento-San Joaquin Delta, and the water service areas of the CVP and State Water Project, including the Friant Division.

The Final PEIS/R selects proposed actions that would be implemented at a program level and will require future project-specific environmental compliance. The Final PEIS/R also analyzes the reoperation of Friant Dam to implement the Settlement at a project level. The project level review for the reoperation of Friant Dam comprises the entire NEPA analysis for this component of the Settlement. The Final PEIS/R provides broad direction for a wide range of possible future actions while allowing the opportunity for flexibility to respond to changing needs.

Public Disclosure

Before including your address, phone number, email address, or other personal identifying information in your communication, you should be aware that your entire communication—including your personal identifying information—may be made publicly available at any time. While you can ask us in your communication to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: June 27, 2012.

Pablo R. Arroyave,

Deputy Regional Director, Mid-Pacific Region, Bureau of Reclamation.

[FR Doc. 2012–18722 Filed 7–31–12; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Yakima River Basin Conservation Advisory Group; Yakima River Basin Water Enhancement Project, Yakima, WA

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of public meeting.

SUMMARY: As required by the Federal Advisory Committee Act, the Yakima River Basin Conservation Advisory Group, Yakima River Basin Water Enhancement Project, established by the Secretary of the Interior, will hold a public meeting. The Yakima River Basin Conservation Advisory Group is a Federal advisory committee that provides technical advice and counsel to the Secretary of the Interior and Washington State on the structure, implementation, and oversight of the Yakima River Basin Water Conservation Program.

DATES: The meeting will be held on Tuesday, August 21, 2012, from 1 p.m. to 4 p.m.

ADDRESSES: The meeting will be held at the Bureau of Reclamation, Yakima Field Office, 1917 Marsh Road, Yakima, Washington.

FOR FURTHER INFORMATION CONTACT: Timothy McCoy, Manager, Yakima River Basin Water Enhancement Project, 1917 Marsh Road, Yakima, Washington, 98901; (509) 575–5848, extension 209; facsimile (509) 454–5612; email at *tmccoy@usbr.gov.*

SUPPLEMENTARY INFORMATION: The Yakima River Basin Conservation Advisory Group (CAG) provides recommendations to the Secretary and the State on the structure and implementation of the basin conservation program; with that the group provides recommendations on rules, regulations, and administration to facilitate the voluntary sale and lease of water. The CAG provides oversight to the Yakima River Basin Conservation Plan, and provides an annual review of the implementation of the Water Conservation Program, including the applicable water conservation guidelines of the Secretary used by participating entities in preparing their individual water conservation plan.

Agenda: The primary purpose of the meeting is to update CAG members of the status of ongoing and future projects being funded with Yakima River Basin Water Enhancement Project funds. The CAG will also review the options of using the acquired habitat lands to mitigate the impacts that occur from the planned conservation measures and will develop recommendations at the completion of their review. This meeting is open to the public.

Public Disclosure of Comments: 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.

Dated: July 17, 2012.

Timothy McCoy,

Program Manager, Pacific Northwest Region.

[FR Doc. 2012–18743 Filed 7–31–12; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–678, 679, 681, and 682 (Third Review)]

Stainless Steel Bar From Brazil, India, Japan, and Spain; Determination

Determination

On the basis of the record [1] developed in the subject five-year reviews, the United States International Trade Commission (Commission) determines, pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)), that revocation of the antidumping duty orders on stainless steel bar from Brazil, India, Japan, and Spain would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[2]

Background

The Commission instituted these reviews on December 1, 2011 (76 FR 74807) and determined on March 5, 2012 that it would conduct expedited reviews (77 FR 18861, March 28, 2012).

The Commission transmitted its determinations in these reviews to the Secretary of Commerce on July 26, 2012. The views of the Commission are contained in USITC Publication 4341 (July 2012), entitled *Stainless Steel Bar from Brazil, India, Japan, and Spain: Investigation Nos. 731–TA–678–679 and 681–682 (Third Review).*

Issued: July 26, 2012.

By order of the Commission.

William R. Bishop,

Hearings and Meetings Coordinator.

[FR Doc. 2012–18697 Filed 7–31–12; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] Commissioners Deanna Tanner Okun and Daniel R. Pearson voted in the affirmative with respect to India and Japan and in the negative with respect to Brazil and Spain.

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–1105–1106 (Review)]

Lemon Juice From Argentina and Mexico

Institution of five-year reviews concerning the suspended investigations on lemon juice from Argentina and Mexico.

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice that it has instituted reviews pursuant to section 751(c) of the Tariff Act of 1930 (19 U.S.C. 1675(c)) (the Act) to determine whether termination of the suspended investigations on lemon juice from Argentina and Mexico would be likely to lead to continuation or recurrence of material injury. Pursuant to section 751(c)(2) of the Act, interested parties are requested to respond to this notice by submitting the information specified below to the Commission; [1] to be assured of consideration, the deadline for responses is August 31, 2012. Comments on the adequacy of responses may be filed with the Commission by October 15, 2012. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207), as most recently amended at 74 FR 2847 (January 16, 2009).

DATES: *Effective Date:* August 1, 2012.

FOR FURTHER INFORMATION CONTACT: Mary Messer (202–205–3193), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-

[1] No response to this request for information is required if a currently valid Office of Management and Budget (OMB) number is not displayed; the OMB number is 3117–0016/USITC No. 12–5–273, expiration date June 30, 2014. Public reporting burden for the request is estimated to average 15 hours per response. Please send comments regarding the accuracy of this burden estimate to the Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436.

impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—Effective September 10, 2007, the Department of Commerce suspended antidumping duty investigations on imports of lemon juice from Argentina and Mexico (72 FR 53991 and 53995, September 21, 2007). The Commission is conducting reviews to determine whether termination of the suspended investigations would be likely to lead to continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. It will assess the adequacy of interested party responses to this notice of institution to determine whether to conduct full or expedited reviews. The Commission's determination in any expedited reviews will be based on the facts available, which may include information provided in response to this notice.

Definitions.—The following definitions apply to these reviews:

(1) *Subject Merchandise* is the class or kind of merchandise that is within the scope of the five-year reviews, as defined by the Department of Commerce.

(2) The *Subject Countries* in these reviews are Argentina and Mexico.

(3) The *Domestic Like Product* is the domestically produced product or products which are like, or in the absence of like, most similar in characteristics and uses with, the *Subject Merchandise.* In its original preliminary determinations, the Commission defined a single *Domestic Like Product* consisting of all lemon juice for further manufacturing, coextensive with the scope of investigation.

(4) The *Domestic Industry* is the U.S. producers as a whole of the *Domestic Like Product,* or those producers whose collective output of the *Domestic Like Product* constitutes a major proportion of the total domestic production of the product. In its original preliminary determinations, the Commission defined a single *Domestic Industry* consisting of all domestic producers of lemon juice for further manufacture, corresponding to the subject merchandise. The Commission found that the lemon growers did not meet the criteria for inclusion in the *Domestic Industry* pursuant to the statutory grower/processor provision.

(5) The *Order Date* is the date that the investigations were suspended. In these reviews, the *Order Date* is September 10, 2007.

(6) An *Importer* is any person or firm engaged, either directly or through a parent company or subsidiary, in importing the *Subject Merchandise* into the United States from a foreign manufacturer or through its selling agent.

Participation in the reviews and public service list.—Persons, including industrial users of the *Subject Merchandise* and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11(b)(4) of the Commission's rules, no later than 21 days after publication of this notice in the **Federal Register**. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Former Commission employees who are seeking to appear in Commission five-year reviews are advised that they may appear in a review even if they participated personally and substantially in the corresponding underlying original investigation. The Commission's designated agency ethics official has advised that a five-year review is not considered the ''same particular matter'' as the corresponding underlying original investigation for purposes of 18 U.S.C. 207, the post employment statute for Federal employees, and Commission rule 201.15(b) (19 CFR 201.15(b)), 73 FR 24609 (May 5, 2008). This advice was developed in consultation with the Office of Government Ethics. Consequently, former employees are not required to seek Commission approval to appear in a review under Commission rule 19 CFR 201.15, even if the corresponding underlying original investigation was pending when they were Commission employees. For further ethics advice on this matter, contact Carol McCue Verratti, Deputy Agency Ethics Official, at 202–205–3088.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and APO service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI submitted in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made no later than 21 days after publication of this notice in the **Federal Register**. Authorized applicants must represent interested parties, as defined in 19 U.S.C. 1677(9), who are parties to the reviews. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Certification.—Pursuant to section 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these reviews must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will be deemed to consent, unless otherwise specified, for the Commission, its employees, and contract personnel to use the information provided in any other reviews or investigations of the same or comparable products which the Commission conducts under Title VII of the Act, or in internal audits and investigations relating to the programs and operations of the Commission pursuant to 5 U.S.C. Appendix 3.

Written submissions.—Pursuant to section 207.61 of the Commission's rules, each interested party response to this notice must provide the information specified below. The deadline for filing such responses is August 31, 2012. Pursuant to section 207.62(b) of the Commission's rules, eligible parties (as specified in Commission rule 207.62(b)(1)) may also file comments concerning the adequacy of responses to the notice of institution and whether the Commission should conduct expedited or full reviews. The deadline for filing such comments is October 15, 2012. All written submissions must conform with the provisions of sections 201.8 and 207.3 of the Commission's rules and any submissions that contain BPI must also conform with the requirements of sections 201.6 and 207.7 of the Commission's rules. Please be aware that the Commission's rules with respect to electronic filing have been amended. The amendments took effect on November 7, 2011. See 76 FR 61937 (Oct. 6, 2011) and the newly revised Commission's Handbook on E–Filing, available on the Commission's Web site at *http://edis.usitc.gov.* Also, in accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to

the reviews (as identified by either the public or APO service list as appropriate), and a certificate of service must accompany the document (if you are not a party to the reviews you do not need to serve your response).

Inability to provide requested information.—Pursuant to section 207.61(c) of the Commission's rules, any interested party that cannot furnish the information requested by this notice in the requested form and manner shall notify the Commission at the earliest possible time, provide a full explanation of why it cannot provide the requested information, and indicate alternative forms in which it can provide equivalent information. If an interested party does not provide this notification (or the Commission finds the explanation provided in the notification inadequate) and fails to provide a complete response to this notice, the Commission may take an adverse inference against the party pursuant to section 776(b) of the Act in making its determinations in the reviews.

Information to be Provided In Response to this Notice of Institution: If you are a domestic producer, union/worker group, or trade/business association; import/export *Subject Merchandise* from more than one *Subject Country;* or produce *Subject Merchandise* in more than one *Subject Country,* you may file a single response. If you do so, please ensure that your response to each question includes the information requested for each pertinent *Subject Country.* As used below, the term ''firm'' includes any related firms.

(1) The name and address of your firm or entity (including World Wide Web address) and name, telephone number, fax number, and Email address of the certifying official.

(2) A statement indicating whether your firm/entity is a U.S. producer of the *Domestic Like Product,* a U.S. union or worker group, a U.S. importer of the *Subject Merchandise,* a foreign producer or exporter of the *Subject Merchandise,* a U.S. or foreign trade or business association, or another interested party (including an explanation). If you are a union/worker group or trade/business association, identify the firms in which your workers are employed or which are members of your association.

(3) A statement indicating whether your firm/entity is willing to participate in these reviews by providing information requested by the Commission.

(4) A statement of the likely effects of the termination of the suspended investigations on the *Domestic Industry* in general and/or your firm/entity specifically. In your response, please discuss the various factors specified in section 752(a) of the Act (19 U.S.C. 1675a(a)) including the likely volume of subject imports, likely price effects of subject imports, and likely impact of imports of *Subject Merchandise* on the *Domestic Industry.*

(5) A list of all known and currently operating U.S. producers of the *Domestic Like Product.* Identify any known related parties and the nature of the relationship as defined in section 771(4)(B) of the Act (19 U.S.C. 1677(4)(B)).

(6) A list of all known and currently operating U.S. importers of the *Subject Merchandise* and producers of the *Subject Merchandise* in each *Subject Country* that currently export or have exported *Subject Merchandise* to the United States or other countries since the *Order Date.*

(7) A list of 3–5 leading purchasers in the U.S. market for the *Domestic Like Product* and the *Subject Merchandise* (including street address, World Wide Web address, and the name, telephone number, fax number, and Email address of a responsible official at each firm).

(8) A list of known sources of information on national or regional prices for the *Domestic Like Product* or the *Subject Merchandise* in the U.S. or other markets.

(9) If you are a U.S. producer of the *Domestic Like Product,* provide the following information on your firm's operations on that product during calendar year 2011, except as noted (report quantity data in 1,000 gallons @ 400 GPL and value data in U.S. dollars, f.o.b. plant). If you are a union/worker group or trade/business association, provide the information, on an aggregate basis, for the firms in which your workers are employed/which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total U.S. production of the *Domestic Like Product* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm to produce the *Domestic Like Product* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix);

(c) The quantity and value of U.S. commercial shipments of the *Domestic Like Product* produced in your U.S. plant(s);

(d) The quantity and value of U.S. internal consumption/company transfers of the *Domestic Like Product* produced in your U.S. plant(s); and

(e) The value of (i) net sales, (ii) cost of goods sold (COGS), (iii) gross profit, (iv) selling, general and administrative (SG&A) expenses, and (v) operating income of the *Domestic Like Product* produced in your U.S. plant(s) (include both U.S. and export commercial sales, internal consumption, and company transfers) for your most recently completed fiscal year (identify the date on which your fiscal year ends).

(10) If you are a U.S. importer or a trade/business association of U.S. importers of the *Subject Merchandise* from the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2011 (report quantity data in 1,000 gallons @ 400 GPL and value data in U.S. dollars). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) The quantity and value (landed, duty-paid) of U.S. imports and, if known, an estimate of the percentage of total U.S. imports of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') imports;

(b) The quantity and value (f.o.b. U.S. port) of U.S. commercial shipments of *Subject Merchandise* imported from each *Subject Country;* and

(c) The quantity and value (f.o.b. U.S. port) of U.S. internal consumption/company transfers of *Subject Merchandise* imported from each *Subject Country.*

(11) If you are a producer, an exporter, or a trade/business association of producers or exporters of the *Subject Merchandise* in the *Subject Country(ies),* provide the following information on your firm's(s') operations on that product during calendar year 2011 (report quantity data in 1,000 gallons @ 400 GPL and value data in U.S. dollars, landed and duty-paid at the U.S. port). If you are a trade/business association, provide the information, on an aggregate basis, for the firms which are members of your association.

(a) Production (quantity) and, if known, an estimate of the percentage of total production of *Subject Merchandise* in each *Subject Country* accounted for by your firm's(s') production;

(b) Capacity (quantity) of your firm(s) to produce the *Subject Merchandise* in each *Subject Country* (i.e., the level of production that your establishment(s) could reasonably have expected to attain during the year, assuming normal

operating conditions (using equipment and machinery in place and ready to operate), normal operating levels (hours per week/weeks per year), time for downtime, maintenance, repair, and cleanup, and a typical or representative product mix); and

(c) The quantity and value of your firm's(s') exports to the United States of *Subject Merchandise* and, if known, an estimate of the percentage of total exports to the United States of *Subject Merchandise* from each *Subject Country* accounted for by your firm's(s') exports.

(12) Identify significant changes, if any, in the supply and demand conditions or business cycle for the *Domestic Like Product* that have occurred in the United States or in the market for the *Subject Merchandise* in the *Subject Country(ies)* since the *Order Date,* and significant changes, if any, that are likely to occur within a reasonably foreseeable time. Supply conditions to consider include technology; production methods; development efforts; ability to increase production (including the shift of production facilities used for other products and the use, cost, or availability of major inputs into production); and factors related to the ability to shift supply among different national markets (including barriers to importation in foreign markets or changes in market demand abroad). Demand conditions to consider include end uses and applications; the existence and availability of substitute products; and the level of competition among the *Domestic Like Product* produced in the United States, *Subject Merchandise* produced in the *Subject Country(ies),* and such merchandise from other countries.

(13) (Optional) A statement of whether you agree with the above definitions of the *Domestic Like Product* and *Domestic Industry;* if you disagree with either or both of these definitions, please explain why and provide alternative definitions.

Authority: These reviews are being conducted under authority of Title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.61 of the Commission's rules.

By order of the Commission.

Issued: July 24, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–18441 Filed 7–31–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Pistoia Alliance, Inc.

Notice is hereby given that, on June 29, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Pistoia Alliance, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Certara L.P. Portugal, Funchal, Madeira, PORTUGAL; Deloitte Consulting LLP, New York, NY; Mary Chitty (individual member), Needham, MA; and Hewlett-Packard Company, Palo Alto, CA, have been added as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Pistoia Alliance, Inc. intends to file additional written notifications disclosing all changes in membership.

On May 28, 2009, Pistoia Alliance, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 15, 2009 (74 FR 34364).

The last notification was filed with the Department on April 17, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on May 14, 2012 (77 FR 28404).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–18769 Filed 7–31–12; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–45]

Decision and Order; Perry T. Dobyns, M.D.

On November 2, 2011, Administrative Law Judge (ALJ) Gail A. Randall issued the attached recommended decision. Therein, the ALJ found that while the Government had established grounds for denying Respondent's application, ALJ at 22, Respondent has been sober since December 2008, that he has been in compliance with his Indiana Physicians' Assistance Program Continuing Care Contract since November 2009, *id.* at 20, and that he ''has consistently taken responsibility for his misconduct.'' [1] Id. at 21. The ALJ thus recommended that Respondent be granted a restricted registration subject to multiple conditions. The Government did not file exceptions to the ALJ's decision.[2]

Having reviewed the record, I have decided to adopt the ALJ's findings of fact, conclusions of law, and recommended Order. Accordingly, I will order that Respondent be granted a registration subject to the following conditions:

(1) Respondent shall be limited to prescribing controlled substances and may not administer or dispense directly any controlled substances. In addition, Respondent may not order any controlled substances or accept any samples of controlled substances. If Respondent is employed at a practice in which controlled substances are stored on the premises, Respondent shall not have access to the cabinet in which the controlled substances are stored. Respondent shall inform any medical practice at which he becomes employed of this restriction on his registration.

(2) Respondent is prohibited from prescribing controlled substances to himself or any family member.

(3) Respondent shall maintain a log of all controlled substance prescriptions he authorizes and shall file a report listing in chronological order all such prescriptions by date, and including the following information: the name and address of the patient, name and dosage of the drug, quantity of the drug, and number of refills authorized. Each report shall be filed with the local DEA field office no later than ten (10) calendar days after the end of the previous quarter, *e.g.,* April 10 (for the quarter ending on March 31), July 10

[1] No evidence was put forward showing that Respondent diverted controlled substances to others.

[2] In its post-hearing brief, the Government cites a prior decision of this Agency, which after having already ordered that the practitioner's application be granted, then noted ''evidence of the community's need for a physician of his specialty with prescribing capabilities.'' Gov. Br. 11 (quoting *David M. Headley,* 61 FR 39469, 39471 (1996)). However, the Agency has since held in multiple cases that community impact evidence is not relevant in the public interest determination and provided an extensive explanation as to why. *See Linda Sue Cheek,* 76 FR 66972, 66973 (2011); *Mark De La Lama,* 76 FR 20011, 20020 n.20 (2011); *Bienvenido Tan,* 76 FR 17673, 17694 n.58 (2011); *Gregory D. Owens,* 74 FR 36571, 36757 & n.22 (2009).

(for the quarter ending on June 30), October 10 (for the quarter ending on September 30), and January 10 (for the quarter ending on December 31). If Respondent issues no controlled substance prescriptions during a quarter, a report indicating that no prescriptions were issued shall also be filed no later than ten (10) calendar days following the end of the quarter.

(4) If Respondent opens his own practice, he shall consent to unannounced inspections by DEA personnel of any medical office he maintains and shall waive his right to require DEA personnel to obtain an Administrative Inspection Warrant prior to conducting an inspection.

(5) Respondent shall enter into an agreement with the Indiana Physicians' Assistance Program pursuant to which he agrees *that it shall* disclose any violation of the conditions of his contract (including any failed drug screens) to the local DEA field office. In the event Respondent tests positive for a drug for which he does not hold a valid prescription, or fails to report for drug screening upon being ordered to do so, such acts shall constitute grounds for the *immediate suspension* of his registration.

(6) Respondent shall report to the local DEA field office any relapse within forty-eight hours of such occurrence.

(7) These conditions shall remain in effect for a period of three years, except that in the event Respondent successfully completes his contract with the Indiana Physicians' Assistance Program, condition number five shall terminate upon completion of said contract. However, if said contract is renewed, condition number five shall continue in effect until three years from the date of issuance of this registration.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the application of Perry T. Dobyns, M.D., for a DEA Certificate of Registration as a practitioner, be, and it hereby is, granted, subject to the conditions set forth above. This Order is effective immediately.

Dated: July 24, 2012.

Michele M. Leonhart,

Administrator.

D. Linden Barber, Esq., and

Jonathan P. Novak, Esq., for the Government

Robert E. Saint, Esq., for the Respondent

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. PROCEDURAL BACKGROUND

Gail A. Randall, Administrative Law Judge. The Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause (''Order'') dated March 7, 2011, proposing to deny the DEA Certificate of Registration application of Perry T. Dobyns, M.D., (''Respondent''), as a practitioner, pursuant to 21 U.S.C. § 823(f) (2006), because to grant the Respondent's registration would be inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f). [Administrative Law Judge Exhibit (''ALJ Exh.'') 1 at 1].

The Order alleged that on June 25, 2010, the Respondent submitted an application for a DEA registration as a practitioner with authority to handle controlled substances in Schedules II–V. [*Id.*].

The Order further alleged that the Respondent had entered into an agreement with the North Carolina Medical Board in 2007, because of his misuse of drugs, including controlled substances. The Respondent also agreed not to use mood-altering drugs that had not been prescribed to him by a physician. However, a urine screen submitted on October 31, 2008, tested positive for tetrahydrocannabinol, indicating that he had unlawfully possessed and used a Schedule I controlled substance. Further, the Respondent's urine screen submitted on November 22, 2008, tested positive for oxycodone and oxymorphone, indicating that he had unlawfully possessed and consumed two Schedule II controlled substances. [*Id.*].

Next, the Order asserted that, on December 2, 2008, the Respondent forged a prescription for oxycodone in order to illegally obtain this Schedule II controlled substance. He filled this prescription. [ALJ Exh. 1 at 2].

The Order noted that, on August 3, 2010, the Respondent was interviewed by DEA personnel, and he admitted that: (a) in 2002 the Respondent was admitted to a hospital due to abuse of alcohol and narcotics, and he subsequently entered into an agreement with the Indiana State Medical Association's Physicians Assistance Program; (b) in 2008, the Respondent had used narcotics that had been prescribed to one of his family members; (c) in September of 2008, he smoked marijuana; and (d) in late 2008, he issued a forged prescription for oxycodone to himself. [*Id.*].

Lastly, the Order asserts that the Respondent returned to Indiana in June of 2010, and began practicing medicine. Although he did not possess a DEA registration, on November 15, 2010, the Respondent or his medical office staff issued two prescriptions for controlled substances using an electronic prescribing program. [*Id.*].

The Deputy Assistant Administrator then gave the Respondent the opportunity to show cause as to why his application should not be denied on the basis of those allegations. [*Id.* at 2].

On April 25, 2011, the Respondent [1] filed a request for a hearing in the above-captioned matter. [ALJ Exh. 2].

On May 31, 2011, the Government filed Government's Motion to Terminate Proceeding Due to Untimely Request for Hearing, [Motion]. [ALJ Exh. 3]. On June 17, 2011, I denied the Government's Motion. [ALJ Exh. 5].

On July 20, 2011, Jonathan P. Novak entered his appearance on behalf of the Government in the above captioned matter. [ALJ Exh. 6].

The hearing was conducted on August 23, 2011, in Lafayette, Indiana. [ALJ Exh. 7]. At the hearing, counsel for the DEA called one witness to testify and introduced documentary evidence. The Respondent testified and introduced documentary evidence. [Transcript (''Tr.'') Volume I].

After the hearing, the Government submitted Proposed Findings of Fact, Conclusions of Law and Argument (''Govt. Brief''). The Respondent also submitted Proposed Findings of Fact, Conclusions of Law and Argument (''Resp. Brief'').

II. ISSUE

The issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration (''DEA'' or ''Government'') should deny the application for a DEA Certificate of Registration, of Perry T. Dobyns, M.D., (''Respondent''), as a practitioner, pursuant to 21 U.S.C. § 823(f) (2006), because to grant his application would be inconsistent with the public interest, as that term is defined in 21 U.S.C. § 823(f). [ALJ Exh. 4; Transcript (''Tr.'') at 8].

[1] On May 26, 2011, the Respondent filed his Pre-Hearing Statement. Mr. Saint entered his appearance by filing this document.

III. FINDINGS OF FACT

A. Stipulated Facts

The parties have stipulated to the following facts:

1. Respondent applied for a DEA registration on June 25, 2010. [Government Exhibit (''Govt. Exh.'') 1].

2. Respondent previously held a DEA registration but allowed it to expire without renewal in 2009.

3. Respondent was hospitalized for alcohol and drug abuse in 2002, and entered into the Physicians Assistance Program in Indiana because of his abuse of alcohol and narcotic controlled substances.

4. In 2007, Respondent entered an agreement with the North Carolina Physicians Health Program that required him to submit to drug testing.

5. In the fall of 2008, Respondent unlawfully possessed marijuana, oxymorphone and oxycodone, and used these drugs.

6. On October 31, 2008, Respondent tested positive for marijuana in a drug test performed under his agreement with the North Carolina Physicians Health Program.

7. On November 22, 2008, Respondent tested positive for oxymorphone and oxycodone in a drug test performed under his agreement with the North Carolina Physicians Health Program.

8. On December 2, 2008, Respondent filled a prescription for oxycodone which he had forged using the name and DEA number of another physician. [ALJ Exh. 4].

B. Respondent's Addiction History

In late 2001, the Respondent's medical practice in Oklahoma was failing. The Respondent's alcohol intake increased at home, and he began taking a controlled substance, hydrocodone, ''to help (him) during the day.'' [Tr. 44]. The Respondent used hydrocodone samples given to the clinic by drug representatives. [Tr. 45]. He failed to maintain distribution records for these controlled substances. [Tr. 88].

In 2002, the Respondent moved to Indiana. He continued to drink during the night and use narcotic prescription medications during the day. [Tr. 44–45]. The narcotics were taken from the practice's sample cabinet. [Tr. 46]. In November of 2002, the Respondent's ''depression, exacerbated by the alcohol and drug dependence, came to an extreme, and (he) attempted suicide.'' [Tr. 46]. His employers at the Harrison Family Practice referred him to the Indiana Physician Assistance Program, (PAP), who recommended that he seek inpatient treatment. [Tr. 46–47].

In late 2002, the Respondent was admitted to the Rush Memorial Behavioral Health program in Chicago, Illinois, which was a specific program for impaired physicians. [Tr. 47]. The Respondent attended this in-patient program for 10 weeks. [Tr. 20, 47, 87]. He was initially diagnosed as chemically dependent on opiates and alcohol along with a diagnosis of depression. [Respondent's Exhibit (''Resp. Exh.'') D].

The Respondent enrolled in the Indiana PAP and signed a Continuing Care Contract (''Contract''). [Tr. 48; Resp. Exh. D]. He was required to have regular contact with the PAP through in-person meetings in Indianapolis. [Tr. 48]. He was also required to attend regular meetings of Alcoholics Anonymous or Narcotics Anonymous three times per week. [*Id.*]. He was also to attend weekly meetings of the Caduceus Group, a treatment group for doctors with substance abuse issues, in Indianapolis. [*Id.*]. The Contract also required the Respondent to participate in random urine drug screens. [Tr. 48–50]. While in Indiana, the Respondent remained in compliance with the Contract. [Tr. 49].

In 2007, the Respondent moved to North Carolina, enrolled in the North Carolina PAP, and signed a new five-year contract. [Tr. 51; Resp. Exh. D]. Similar to the Indiana PAP, this program is intended to ''help[] physicians overcome an addiction issue.'' [Tr. 19]. As a requirement of this program, the Respondent was to refrain from consuming any controlled substances that were not legitimately prescribed to him or given to him for medical purposes. [Tr. 20]. He was also to submit to urine drug screens as dictated to by the program. [*Id.*].

While in North Carolina, the Respondent worked in Chapel Hill during the week and spent his weekends in Fayetteville with his family. [Tr. 52–53]. He was also caring for his dying brother. [Tr. 53]. The stress of caring for his brother contributed to his relapse. [Tr. 21–22]. This was his first relapse since beginning the recovery process in 2002. [Tr. 22, 93]. The Respondent's brother used medical marijuana, and the Respondent used it in October of 2008. [Tr. 53–54]. The Respondent also consumed oxycodone from his brother's prescription, and subsequently he issued a prescription to himself using another doctor's DEA number. [Tr. 22]. This doctor did not know of the Respondent's conduct until the DEA informed him. [Tr. 22]. The Respondent also wrote a prescription for his sister using his DEA registration and consumed the controlled substances himself. [Tr. 94].

The Respondent then had a positive drug screen for marijuana in October of 2008, and another positive drug screen for oxycodone and oxymorphone in November of 2008. [Tr. 55–56, 88–89]. The North Carolina PAP reported these positive test results to the North Carolina Medical Board. [Tr. 56]. Ultimately, the Respondent's North Carolina medical license was indefinitely suspended. [Tr. 22].

The DEA did not know about the Respondent's sobriety between November of 2008 until November of 2009, when he reentered the Indiana Physician Assistance Program. [Tr. 31, 58]. He then applied to renew his Indiana medical license. On the application for such renewal, the Respondent disclosed the action that had been taken against his North Carolina medical license. [Tr. 58–59]. The Indiana Medical Board renewed the Respondent's medical license with probationary conditions. [Tr. 23]. In August and December of 2009, those terms and conditions were altered slightly. [Resp. Exh. A]. The Respondent is to remain compliant with the Indiana's Physician Assistance Program (PAP), and he is to notify the Indiana Medical Board within twenty-four hours of any relapse. [Tr. 23]. The Respondent is only allowed to work a forty hour work week, and, prior to the Board's removal of this condition, there had to be another physician on-site when the Respondent was working. The Respondent has remained compliant with the terms of his probation. [Tr. 23, 28].

On November 23, 2009, the Respondent signed a second Continuing Care Contract with the Indiana PAP. [Resp. Exh. D]. This is a five-year agreement. [*Id.*]. The Respondent agreed, among other provisions, to participate in supervised urine/hair/blood drug screens, and agreed to abstain from mood-changing chemicals except those prescribed by a treating physician. [*Id.*]. In the event of a relapse, the Respondent is to notify the PAP. [*Id.*]. The Respondent also agreed to attend Caduceus meetings and to attend ''mutual self-help meetings''such as AA or NA at a frequency of three times per week. [Tr. 68; Resp. Exh. D]. The Respondent also agreed to attend individual therapy bi-weekly for a period of time and to see a psychiatrist for medication management. [Resp. Exh. D; Tr. 69–70].

In August of 2010, Diversion Investigator (DI) Gary L. Whisenand [2] interviewed the Respondent. [Tr. 19]. I find DI Whisenand's testimony consistent with the documentary exhibits and credible. DI Whisenand credibly testified that Indiana's Physician Assistance Program was a reliable program that cooperated with the DEA. [Tr. 30]. During the interview with DI Whisenand, the Respondent admitted to smoking marijuana and consuming oxycodone. [Tr. 21, 84]. The Respondent had explained that he had moved to North Carolina to care for an ailing brother, who had Stage IV lung cancer, and the stress of tending to his brother had caused the Respondent to relapse. [Tr. 21–22]. This was his first relapse since beginning the recovery process in 2002. [Tr. 22, 93].

Dr. Fred W. Frick submitted an affidavit in this proceeding. [Resp. Exh. D]. Dr. Frick is board certified in internal medicine with an extensive record as an addictionologist. [*Id.*]. Since 2004, he has been the contract Medical Consultant and Director of the Indiana State Medical Association's Physicians Assistance Program. [*Id.*]. He explained that the PAP ''is currently recognized as an acceptable monitoring and advocacy program by the Indiana Medical Licensing Board.'' [*Id.*]. Dr. Frick oversees the program, ''which directs the monitoring and advocacy for chemically dependent physicians in the State of Indiana.'' [*Id.*]. Dr. Frick was familiar with the Respondent's history of drug use and addiction. [*Id.*].

Dr. Frick wrote that each of the Respondent's drug screens have been negative since November 23, 2009, except for the presence of Ultram, ''which was prescribed for Dr. Dobyns by a treating physician.'' [*Id.*]. Lastly, Dr. Frick wrote that to the best of his knowledge, the Respondent ''has been compliant with all other aspects of his Continuing Care Contract since November 23, 2009.'' [*Id.*].

C. Respondent's DEA Application

In his DEA application, the Respondent disclosed that his North Carolina medical license had been placed on indefinite suspension. [Tr. 18; Govt. Exh. 1]. No charges are pending before the North Carolina medical board. [Govt. Exh. 1]. The Respondent also disclosed that he had had a positive drug test in 2008. [*Id.*].

The Respondent also disclosed that he had applied to renew his medical license in Indiana, and that the Indiana Medical Board agreed to do so on a probationary basis. [*Id.*]. The Respondent agreed to participate in the Indiana State Medical Association's Physician Assistance Program (PAP). [*Id.*]. The Respondent also wrote that his participation in Indiana has continued to the date of his application without incident. [*Id.*].

D. Electronic Prescriptions

In June of 2010, the Respondent accepted a position at the Madison County Health Center (''Center'') as a staff physician. [Tr. 75]. He made a full disclosure to that employer about his drug use history. [Tr. 62]. There, if a patient needed controlled substances, the Respondent would take a medical history, perform a physical examination, and determine whether the prescription was appropriate for the patient. [Tr. 64]. At that point, the Respondent would refer the patient to the Center's medical director for issuance of the controlled substance prescription. [*Id.*].

The DEA received two electronic prescriptions for controlled substances written under the Respondent's name and dated in November of 2010. [Tr. 26–28; Govt. Exh. 2]. These prescriptions contained the Respondent's electronic signature. [Tr. 31]. These two prescriptions were for a patient who had seen the Respondent's supervisory physician previously, and she was issued these two prescriptions for ongoing treatment of chronic pain and anxiety. [Tr. 78].

At the time of these prescriptions, the Respondent was working at the Center. [Tr. 75]. The Center had an electronic medical records system. [Tr. 31, 65]. The default for the Respondent was for the system to send prescriptions to the printer for the Respondent to then take to the medical director to issue. [Tr. 65].

The two electronic prescriptions for controlled substances were inadvertently sent by the system to the facsimile machine rather than to the printer. As soon as the Respondent became aware of the computer error, he took corrective action. He credibly testified that ''the measure that we took was to disconnect the fax function from the computer entirely so that the computer could no longer physically access the fax line.'' [Tr. 67]. It was DI Whisenand's assumption that the Respondent's electronic signature was affixed by that system. [Tr. 32]. The prescriptions were then faxed to a pharmacy by the electronic medical records system without the Respondent's knowledge. [Tr. 33]. DI Whisenand credibly testified that he did not have any evidence that the Respondent knowingly transmitted controlled substance prescriptions via facsimile to a pharmacy. [Tr. 35]. After this time, DI Whisenand never received any complaints from a pharmacy or a pharmacy worker regarding the Respondent. [Tr. 34].

E. Respondent's Current Situation

The Respondent received his medical degree with honors in 1995 from the University of Tennessee at Memphis, Tennessee. [Tr. 42]. The Respondent completed a residency in family medicine in 1997, and he became board certified by the American Board of Family Practice the same year. [Tr. 43]. In 2005, the Respondent recertified for a ten-year period. [*Id.*]. However, due to the North Carolina action against his medical license, his certification was invalidated. [*Id.*].

The Respondent has been clean and sober since December 20, 2008. [Tr. 98]. The Respondent is unemployed, and he does not have a DEA registration number. [Tr. 24–25]. The Respondent is currently active in AA and has a sponsor. [Tr. 70–71]. He attends at least two meetings a week with his sponsor and engages in one or two phone calls during the week. [Tr. 71].

The Respondent currently has an active, in all substances, controlled substances registration with Indiana. [Tr. 40, 61–62]. He also has an active Indiana medical license which is on probation. [Tr. 40–41; Resp. Exh. A]. In July of 2011, the Indiana Medical Board modified the Respondent's probationary conditions of December 2009. [Resp. Exh. C]. Currently the Respondent's probationary conditions include: (a) the Respondent must maintain and remain in compliance with a contract from the Indiana PAP; (b) the Respondent shall report any relapse regarding chemical dependency to the Board within twenty-four hours; (c) the Respondent shall not work more than forty hours a week and for the next year shall submit quarterly written reports to the Board from his employer concerning his employment, and from the Respondent concerning his DEA status; and (d) the Respondent shall comply with the statutes and rules governing the practice of medicine. [Resp. Exh. B; Resp. Exh. C].

In April of 2011, the Respondent was discharged from the Center. The primary reason for that action was the difficulties experienced by the Center in handling the Respondent's lack of a DEA registration. [Tr. 67].

The Respondent credibly testified that he has never had a medical malpractice judgment entered against him, he has never settled a medical malpractice claim, and that the disclosed adverse actions taken against his medical license

[2] DI Whisenand has been a DEA diversion investigator for just over six years. [Tr. 15].

were the only such actions taken. [Tr. 67–68].

Today, the Respondent's North Carolina medical license is indefinitely suspended. [Tr. 56]. The Respondent does not plan to return to North Carolina. [Tr. 56]. The Respondent intends to become gainfully employed as a physician in Indiana. [Tr. 71]. Without a DEA registration, the Respondent is not able to have a meaningful medical practice. [Tr. 72]. The Respondent is not seeking any employment where he would have access to mood altering substances on the worksite. [Tr. 96].

IV. STATEMENT OF LAW AND DISCUSSION

A. Position of the Parties

1. Government's Position

The Government asserts that the appropriate remedy in this matter is denial of the Respondent's application. [Govt. Brief at 12]. Looking to the factors defining the public interest, the Government first proposes that factor one is applicable, for the North Carolina licensing board has indefinitely suspended the Respondent's medical license. [Govt. Brief at 6]. Further, the State of Indiana only granted the Respondent a medical license with restrictions and monitoring requirements. [*Id.*]. The Government argues that such conditions reflect ''a systematic concern for Respondent's professional and personal well-being. As such, this factor weighs in favor of denying Respondent's application for a DEA Certificate of Registration.'' [*Id.*].

As to factor two, the Government asserts that the Respondent admitted to a lengthy history of using illicit drugs for recreational purposes, and to obtaining controlled substances for personal use through illicit means. [Govt. Brief at 7]. Under this factor, the Government concludes that the ''Respondent has shown a callous and cavalier attitude towards both using and prescribing controlled substances.'' [Govt. Brief at 8].

Under factor four, the Government asserts that the Respondent violated federal law when he fraudulently used a prescription pad belonging to another doctor to write a prescription for a controlled substance for himself. [*Id.*]. Also, the Respondent admitted to possessing and using marijuana that he obtained illicitly. [*Id.*]. Because of this conduct, the Government argues that factor four weighs heavily in favor of denying the Respondent's application. [Govt. Brief at 8–9].

Lastly, under factor five, the Government argues that the Respondent has only been in monitored recovery for two years. [Govt. Brief at 10]. The Government notes that prior DEA precedent takes into account the length of time the Respondent has been in recovery. [Govt. Brief at 9]. Here, the Respondent had been clean and sober for six years before his relapse. In the context of this behavior, the Government argues that the Respondent's ''risk of relapse should be considered high until such time (as) Respondent has shown a longer period of compliance with the restrictions of his substance abuse treatment by remaining sober, as well as a better understanding of the seriousness of his addiction and the danger it presents to himself and to others.'' [Govt. Brief at 10].

The Government also finds it significant that the Respondent failed to show any remorse or ''even [an] understanding for the danger he presented to his patients by practicing under the influence of Schedule II narcotics.'' [*Id.*]. Therefore, the Government concludes, the Respondent's application should be denied. [Govt. Brief at 11–12].

In the alternative, the Government asserts, if the Respondent should be granted a restricted registration, the Government requests that (a) the Respondent's registration be limited to Schedule IV and V controlled substances only; (b) the Respondent be limited to prescribing controlled substances only, and not be authorized to prescribe to himself or any family members; (c) the Respondent shall only be authorized to obtain controlled substances from a treating practitioner who prescribes controlled substances to the Respondent for a legitimate medical purpose; (d) the Respondent maintain a prescription log which he would submit quarterly to the DEA; (e) Respondent shall consent to unannounced inspections without the need of an Administrative Inspection Warrant; and (f) the Respondent continue in his agreement with the Indiana PAP. [Govt. Brief at 12–13].

2. Respondent's Position

The Respondent asserts that granting his application would be in the public interest. [Resp. Brief at 11]. The Respondent argues that he has been in substantial compliance with his treatment for eight years except for a relapse during two months in 2008. [Resp. Brief at 10]. He notes that he has maintained an active probationary medical license in Indiana, and he has complied with the terms of that probation. [*Id.*]. The Respondent also has an active Indiana Controlled Substance Registration. [*Id.*].

The Respondent next asserts that no evidence exists that the Respondent's medical care endangered patients or that his care deviated from any standard of care. [Resp. Brief at 11]. Instead, Respondent argues that his violations stemmed from his chemical dependency, which was exacerbated by unusual family circumstances, namely the terminal illness of his brother. [*Id.*]. Therefore, the Respondent proffers that the ''issuance of a restricted registration'' would resolve ''[a]ny concern for the public health and safety'' posed by the Respondent's violations. Lastly, the Respondent concludes that he should be granted a registration restricted as follows: (1) the Respondent must remain in compliance with the Indiana Continuing Care Contract; (2) and also with his probationary medical license; (3) and that the Respondent be required to immediately disclose any non-compliance with either of these two monitoring agreements. [*Id.*].

B. Statement of Law and Analysis

Pursuant to 21 U.S.C. § 823(f) (2006),[3] the Deputy Administrator may deny an application for a DEA Certificate of Registration if she determines that such registration would be inconsistent with the public interest. In determining the public interest, the following factors are considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

These factors are to be considered in the disjunctive; the Deputy Administrator may rely on any one or a combination of factors and may give each factor the weight she deems appropriate in determining whether a registration should be revoked or an application for registration be denied. *See Robert A. Leslie, M.D.,* 68 Fed. Reg. 15,227, 15,230 (DEA 2003); *Henry J. Schwarz, Jr., M.D.,* 54 Fed. Reg. 16,422 (DEA 1989). Moreover, the Deputy

[3] The Deputy Administrator has the authority to make such a determination pursuant to 28 C.F.R. §§ 0.100(b) and 0.104 (2011).

Administrator is ''not required to make findings as to all of the factors.'' *Hoxie v. DEA,* 419 F.3d 477, 482 (6th Cir. 2005); *see also Morall v. DEA,* 412 F.3d 165, 173–74 (DC Cir. 2005).

The Government bears the burden of proving that the requirements for registration are not satisfied. 21 C.F.R. § 1301.44(d) (2011). The burden of proof shifts to the Respondent once the Government has made its prima facie case. *See Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 380 (DEA 2008); *see also Thomas E. Johnston,* 45 Fed. Reg. 72,311 (DEA 1980).

DEA precedent has also held that ''past performance is the best predictor of future performance.'' *Alra Labs., Inc. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995). Further, DEA has repeatedly held that ''where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. at 387; *see also Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23,848, 23,853 (DEA 2007). In short, after the Government makes its *prima facie* case, the Respondent must prove by a preponderance of the evidence that he can be entrusted with the authority that a registration provides by demonstrating that he accepts responsibility for his misconduct and that the misconduct will not re-occur.

1. Recommendation of Appropriate State Licensing Board.

The DEA has long held that a practitioner's reinstatement by a State board ''is not dispositive,'' because ''DEA maintains a separate oversight responsibility with respect to the handling of controlled substances and has a statutory obligation to make its independent determination as to whether the granting of [a registration] would be in the public interest.'' *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 8,209, 8,210 (DEA 1990); *see also Jayam Krishna-Iyer,* M.D., 74 Fed. Reg. 459, 461 (DEA 2009). The ultimate responsibility to determine whether a registration is consistent with the public interest has been delegated exclusively to the DEA, not to entities within state government. *Edmund Chein, M.D.,* 72 Fed. Reg. 6,580, 6,590 (DEA 2007), *aff'd, Chein v. DEA,* 533 F.3d 828 (DC Cir. 2008). Although not dispositive, state board decisions are relevant on the issue of granting or denying a DEA application. *See Gregory D. Owens, D.D.S.,* 74 Fed. Reg. 36,751, 36,755 (DEA 2009); *Martha Hernandez, M.D.,* 62 Fed. Reg. 61,145, 61,147 (DEA 1997).

Here, the Indiana State Medical Board has not made a recommendation concerning the Respondent's DEA application. The Respondent currently has an active, in all substances, controlled substances registration with Indiana. He also has an active Indiana medical license which is on probation. Nevertheless, the DEA has consistently held that a practitioner's possession of State authority, while a prerequisite to registration, is not dispositive of the public interest determination. *Mark De La Lama, P.A.,* 76 Fed. Reg. 20,011, 20,018 (DEA 2011).

2. Applicant's Conviction Record Relating to Controlled Substances, Experience With Controlled Substances And Compliance With Applicable State, Federal, Or Local Laws Relating To Controlled Substances.

The critical consideration in this proceeding is whether the circumstances that existed in 2008, have changed sufficiently to support a conclusion that Respondent's registration would be in the public interest. *See Ellis Turk, M.D.,* 62 Fed. Reg. 19,603, 19,604 (DEA 1997). As this Agency has repeatedly held, a proceeding under the Controlled Substances Act '''is a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused * * * their DEA Certificate of Registration, and who have not presented sufficient mitigating evidence to assure the Administrator that they can be entrusted with the responsibility carried by such a registration.''' *Jon Karl Dively, D.D.S.,* 72 Fed. Reg. 74,332, 74,334 (DEA 2007) (*quoting Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23,848, 23,853 (DEA 2007)).

As for Factor 3, the parties do not dispute that the Respondent has not been convicted of any offense relating to controlled substances. The Respondent also previously held a DEA registration but allowed it to expire without renewal in 2009.

In late 2001, the Respondent illegally used hydrocodone samples given to the clinic by drug representatives. He failed to maintain distribution records for these controlled substances. The Respondent continued this behavior of unlawful consumption of controlled substances through 2002.

In late 2002, the Respondent was hospitalized for alcohol and drug abuse. He was diagnosed as chemically dependent on opiates and alcohol. In March of 2003, when he completed the inpatient treatment, he entered the Physicians Assistance Program in Indiana. He remained in compliance with his Contract during this time.

Under the Controlled Substances Act, it is ''unlawful for any person knowingly or intentionally * * * to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.'' 21 U.S.C. § 843(a)(3) (2006). In 2008, the Respondent began smoking marijuana and consuming other controlled substances unlawfully. The Respondent wrote a prescription for his sister, filled it, and consumed the controlled substances himself. He also wrote a prescription for controlled substances on another physician's prescription pad, filled that prescription, and consumed those controlled substances. Subsequently the Respondent tested positive for marijuana use in October of 2008, and for oxycodone and oxymorphone in November of 2008. Such unlawful consumption of controlled substances weighs against the Respondent's being granted a DEA registration.

Further, the Respondent's use of another's DEA registration to prescribe himself controlled substances is, itself, a violation of the Controlled Substances Act. *See* 21 U.S.C. § 843(a)(2) (2006) (''It shall be unlawful for any person knowingly or intentionally to use in the course of the * * * dispensing of a controlled substance * * * a registration number which is * * * issued to another person.''); *see also Patrick W. Stodola, M.D.,* 74 Fed. Reg. 20,727, 20,735–36 (DEA 2009); *Harrell E. Robinson, M.D.,* 74 Fed. Reg. 61,370, 61,376 (DEA 2009). This violation also weighs against the granting of the Respondent's application for a DEA registration.

In June of 2010, a pharmacy received two electronic prescriptions for controlled substances electronically signed by the Respondent. The Respondent did not have a DEA registration. Such conduct also violates the Controlled Substances Act and its implementing regulations. *See* 21 U.S.C. § 841(a)(1) (2006) (''Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally to * * * dispense * * * a controlled substance.''); *see also* 21 C.F.R. § 1301.11 (2011) (requiring any person who dispenses a controlled substance to be registered unless exempted by law). However, I also note the nature of the offense, for the computer-generated prescriptions were sent to the facsimile machine in error. I also note that the Respondent took remedial actions to ensure such an error does not happen again. Further, although not an excuse

for this incident, I also note that the recipient of this prescription was being treated by the Respondent, who credibly testified that the prescriptions were issued for a legitimate medical purpose.

3. Other Factors Affecting the Public Interest

Another factor in this case is the fact that the Respondent unlawfully consumed controlled substances while caring for patients. Although this record contains no evidence of any harm coming to his patients, the fact that he was willing to risk such harm is inconsistent with the requirements of a DEA registrant.

Further, the DEA has long held that a practitioner's self-abuse of controlled substances constitutes ''conduct which may threaten public health and safety.'' 21 U.S.C. § 823(f)(5) (2006); *see also Tony T. Bui, M.D.,* 75 Fed. Reg. 49,979, 49,990 (DEA 2010); *Kenneth Wayne Green, Jr., M.D.,* 59 Fed. Reg. 51,453 (DEA 1994); *David E. Trawick, D.D.S.,* 53 Fed. Reg. 5,326 (DEA 1988). Here, the Respondent self-abused hydrocodone products in 2001 and oxycodone products in 2008. Such unlawful ingestion of controlled substances, especially when a physician is caring for patients while under the influence of these drugs, places the public health and safety in jeopardy.

Yet, I found the Respondent credible when he testified that he has been drug free since December of 2008. He has remained active in his recovery, and his drug screens have been negative. As the Deputy Administrator has previously determined, ''[t]he paramount issue is not how much time has elapsed since [the Respondent's] unlawful conduct, but rather, whether during that time [the] Respondent has learned from past mistakes and has demonstrated that he would handle controlled substances properly if entrusted with a DEA registration.'' *Leonardo V. Lopez, M.D.,* 54 Fed. Reg. 36,915 (DEA 1989). Even though it has been previously found that time, alone, is not dispositive in such situations, it is certainly an appropriate factor to be considered. *See Robert G. Hallermeier, M.D.,* 62 Fed. Reg. 26,818 (DEA 1997) (four years); *John Porter Richards, D.O.,* 61 Fed. Reg. 13,878 (DEA 1996) (ten years); *Norman Alpert, M.D.,* 58 Fed. Reg. 67,420, 67,421 (DEA 1993) (seven years).

Here, the Respondent's Indiana medical license requires him to remain compliant with the Indiana's Physician Assistance Programs' Continuing Care Contract. The Respondent signed that five-year contract in November of 2009. The contract provides for supervised drug screens, and in the event of a relapse, the Respondent is to notify the Indiana PAP. The Respondent agreed to attend Caduceus meetings, AA or NA meetings, to receive counseling, to abstain from consuming nonprescribed mood-changing chemicals, and to see a psychiatrist for medication management. The Medical Director, Dr. Frick, affirmed that the Respondent has been compliant with these requirements, and that his drug screens have been negative since November 23, 2009. The Respondent credibly testified that he has been clean and sober since December 20, 2008. This past conduct demonstrates the Respondent's ability to comply with his PAP contract and to continue to perform his daily functions drug-free.

After the Government ''has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.' '' *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 387 (DEA 2008) (*quoting Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23,848, 23,853 (DEA 2007). ''Moreover, because 'past performance is the best predictor of future performance,' *Alra Labs., Inc. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe—Jonesborough,* 73 Fed. Reg. at 387; *see also Samuel S. Jackson, D.D.S.,* 72 Fed. Reg. 23, 848, 23,853 (DEA 2007); *John H. Kennedy, M.D.,* 71 Fed. Reg. 35,705, 35,709 (DEA 2006); *Prince George Daniels, D.D.S.,* 60 Fed. Reg. 62,884, 62,887 (DEA 1995). *See also Hoxie v. DEA,* 419 F.3d 477, 483 (6th Cir. 2005) (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

Here, the Respondent has consistently taken responsibility for his misconduct. He disclosed his misconduct to the Indiana medical board and to the DEA in his applications and in his testimony at this proceeding. Further, requirements are in place to ensure the public interest is protected from the possibility of relapse by the Respondent. First, early detection will take place because of the urine screens and the requirement for the Respondent to disclose any violations of his Continuing Care Contract. Second, the DEA can restrict his registration to the prescribing of controlled substances only, and to prohibit his prescribing to himself or to any other family member. Lastly, the situation that led to his relapse in 2008 no longer exists. The Respondent is no longer caring for his brother. These factors are also appropriate to consider when determining the appropriate use of the Deputy Administrator's discretion in this matter. *See Martha Hernandez, M.D.,* 62 Fed. Reg. 61,145 (DEA 1997) (holding that, in exercising his discretion in determining the appropriate remedy, the Deputy Administrator should consider all of the facts and circumstances of a particular case).

V. CONCLUSION AND RECOMMENDATION

Therefore, I conclude that the DEA has met its burden of proof and has established that grounds exist for denying the Respondent's DEA application for registration.

I do not condone nor minimize the seriousness of the Respondent's prior misconduct in 2001–2002, and again in 2008. However, based on this record, I recommend that the Respondent be afforded an opportunity to demonstrate that he can responsibly handle controlled substance prescriptions by the granting of a restricted registration. *See Cecil E. Oakes, Jr., M.D.,* 63 Fed. Reg. 11,907, 11,910 (DEA 1998) (''Such a resolution will provide Respondent with the opportunity to demonstrate that he can responsibly handle controlled substances, while at the same time protect the public health and safety, by providing a mechanism for rapid detection of any improper activity.'').

Based on this record and the Respondent's actions since December of 2008, I recommend to the Deputy Administrator[4] that the Respondent be granted a conditional DEA registration. I suggest that the conditions include: that the registration restricts his handling of controlled substances to merely prescribing and not storing or dispensing such drugs and that he be prohibited from prescribing controlled substances to himself or any family member. Further, I recommend the Respondent be subject to quarterly reporting of his prescribing of controlled substances to his local DEA office. I also recommend that the Respondent be ordered to consent to unannounced inspections by DEA personnel without requiring an administrative inspection warrant. Lastly, I recommend that the Respondent be ordered to continue with

[4] The Deputy Administrator has the authority to make such a determination pursuant to 28 C.F.R. §§ 0.100(b) and 0.104 (2011).

his agreement with the Indiana PAP and to notify the DEA should a relapse occur. I recommend these restrictions apply for three years from the date of the final order so directing this result. In this way, the Respondent may return to the full practice of medicine, and the DEA can assure itself of the Respondent's compliance with DEA regulations and of the protection of the public interest.

Date: November 2, 2011

/s/Gail A. Randall

Administrative Law Judge

[FR Doc. 2012–18750 Filed 7–31–12; 8:45 am]

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 12–27]

James William Eisenberg, M.D.; Decision and Order

On April 5, 2012, Administrative Law Judge Timothy D. Wing issued the attached recommended decision.[1] Neither party filed exceptions to the ALJ's decision.

Having reviewed the entire record, I have decided to adopt the ALJ's findings of fact and conclusions of law except as noted below.[2] Based on a recent action of the Arizona Medical Board, which is discussed more fully below, I reject the ALJ's conclusion that the Arizona Medical Board's ''action reflects a determination that Respondent, notwithstanding findings of unprofessional conduct in the recent past, can be entrusted with a medical license'' and that ''this action * * * weigh[s] against a finding that Respondent's continued registration would be inconsistent with the public interest under Factor One.'' ALJ at 21.

However, I do adopt the ALJ's findings and legal conclusions that Respondent lacked a legitimate medical purpose and acted outside of the usual course of professional practice when, on August 12, 2011, he prescribed both oxycodone and Xanax to an undercover officer, as well as on September 1, 2011, when he prescribed oxycodone to a second undercover officer. ALJ at 30–31. As the ALJ found, substantial evidence supports the conclusion that these were negotiated drug deals in which for an additional fee, Respondent, upon the requests of the undercover officers for the drugs, agreed to prescribe controlled substances and negotiated with the undercover officers over the quantity of the oxycodone and/or the strength of the drug.[3] *See id.* 23–27. Indeed, with respect to the second undercover officer, Respondent agreed to write a prescription for oxycodone before he had even performed a physical examination. *See id.* at 25–26. The findings with respect to the two undercover officers alone establish a *prima facie* case that Respondent has committed acts which render his registration inconsistent with the public interest. *See* 21 U.S.C. 824(a)(4); *see also MacKay* v. *DEA,* 664 F.3d 808, 821 (10th Cir. 2011); *Jayam Krishna-Iyer,* 74 FR 459, 463 (2009) (citing *Alan H. Olefsky,* 57 FR 928, 928–29 (1992)).

While I do not rely on the hearsay evidence cited by the ALJ as support for his conclusion that Respondent was engaged in drug deals, there is other evidence to support the conclusion that Respondent is a drug dealer. I take official notice[4] that on April 4, 2012, the Arizona Medical Board issued to Respondent an Order For Decree Of Censure And Practice Restriction And Consent To The Same. *See In re James W. Eisenberg, M.D.* No. MD–11–1351A (Az. Med. Bd. Apr. 4, 2012). Therein, the Board found, with respect to four patients (including the owner of the clinic where he worked), that Respondent:

> Failed to document any attempt to verify the diagnoses or to obtain medical records, imaging, diagnostic work up or specialty consultation. Respondent failed to consider any non-opioid management other than cannabis, and failed to review the Controlled Substance Prescription Monitoring Program (CSPMP); perform urine drug testing; counsel the patients regarding precaution, risks and safe opioid use; or obtain a standard opioid treating agreement.

Id. at 2. The Board further found with respect to these patients, that Respondent:

> Deviated from the standard of care by performing an extremely limited pain history and physical exam, by failing to perform a medical record review or risk assessment for opioid use, by failing to perform a diagnostic evaluation or consider a multidisciplinary approach outside of cannabis and daily opioid, by failing to verify a medical diagnosis appropriately treated with daily high dose opioid, and by failing to monitor for compliance by urine drug testing or review of the CSPMP.

Id. at 3. The Board thus concluded that Respondent had committed ''unprofessional conduct,'' by engaging in conduct ''that is or might be harmful or dangerous to the health of the patient or the public'' and by ''failing or refusing to maintain adequate records

[1] All citations to the ALJ's decision are to the slip opinion as originally issued.

[2] I do not adopt the ALJ's footnote 25. *See Kwan Bo Jin,* 77 FR 35021, 35021 n.2 (2012).

Moreover, regarding the ALJ's discussion of whether the Arizona Board's 2011 order, *see* GX 11, which provided that Respondent's admissions were ''not intended or made for any other use, such as in the context of another State or Federal government regulatory proceeding,'' is binding on this Agency, *see* ALJ at 20 n. 29, I further note that DEA has previously held that ''[s]tate officials * * * lack authority to resolve a matter pending before the [Agency] and [a] stipulated settlement [between state officials and a Registrant] cannot bind this Agency.'' *Edmund Chein,* 72 FR 6580, 6590 (2007), *pet. for rev. denied,* 533 F.3d 828 (DC Cir. 2008)). *See also Fourth Street Pharmacy v. DEA,* 836 F.2d 1137, 1139 (8th Cir. 1988) (absent proof of an agency relationship between a state Attorney General and the Agency regarding an agreement between the State and a registrant, a state Attorney General ''could not and did not have authority to bind the DEA to a promise to refrain from instituting lawful regulatory action to revoke'' a registration).

[3] While I adopt the ALJ's findings and legal conclusions that Respondent unlawfully distributed controlled substances to the undercover officers, I rely solely on the evidence regarding the circumstances of their visits with Respondent. To make clear, I reject the ALJ's legal conclusion that the hearsay statement of a former employee of AZ Go Green to the effect ''that Respondent was illegally prescribing oxycodone'' constitutes substantial evidence that Respondent was engaged in drug deals. ALJ at 27 n.35. Contrary to the ALJ's assertion, this information was initially provided by the informant to the Phoenix Police Department, which relayed it to the Arizona Attorney General's Office, which then passed it on to the DEA Special Agent, and was thus hearsay within hearsay within hearsay. Tr. 23.

While the Special Agent testified that he knew the informant had been a former employee, he offered no further evidence to support that the declarant was reliable. *See id.* Most significantly, the Government offered the testimony for the limited purpose of showing what prompted the investigation, *id.* at 69, and when on cross-examination, Respondent's counsel attempted to explore the issue of the informant's potential bias, the Government objected that the inquiry was not relevant to the issue of whether Respondent issued prescriptions for a legitimate medical purpose in the usual course of professional practice. *Id.* at 70–71. Indeed, the Government itself later objected to a further question on cross-examination contending that the informant's statements were hearsay, explaining that it had offered the statements ''just to show why the agents were at AZ Go Green.'' *Id.* at 74.

I agree with the Government and conclude that the statement does not constitute substantial evidence that Respondent was engaged in drug deals. *See Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938) (Substantial evidence * * * means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.''). Instead, I rely on the evidence pertaining to the specific undercover visits.

[4] Under the Administrative Procedure Act (APA), an agency ''may take official notice of facts at any stage in a proceeding—even in the final decision.'' U.S. Dept. of Justice, *Attorney General's Manual on the Administrative Procedure Act* 80 (1947) (Wm. W. Gaunt & Sons, Inc., Reprint 1979). In accordance with the APA and DEA's regulations, Respondent is ''entitled on timely request to an opportunity to show to the contrary.'' 5 U.S.C. 556(e); *see also* 21 CFR 1316.59(e). To allow Respondent the opportunity to refute the facts of which I take official notice, Respondent may file a motion for reconsideration within fifteen days of service of this order which shall commence with the mailing of the order.

on a patient.'' *Id.* at 4 (citing Ariz. Rev. Stat. § 32–1401(27)(q) &(e)). Accordingly, the Arizona Board found that ''a practice restriction is needed in order to protect the public,'' and in addition to issuing a ''Decree of Censure,'' prohibited Respondent ''from prescribing, administering, or dispensing any [c]ontrolled [s]ubstances for a period of five years.'' [5] *Id.*

Substantial evidence also supports a finding that Respondent violated federal law by prescribing controlled substances without being registered in the State of Arizona. *See* ALJ at 35–36 (citing 21 U.S.C. 822(a)(2) & (e); 21 CFR 1301.12(b)(3)); *see also Clarification of Registration Requirements for Individual Practitioners,* 71 FR 69478 (2006).[6] In addition, substantial evidence supports a finding that Respondent violated federal regulations by failing to include required information such as a patient's address on numerous controlled substance prescriptions he issued. ALJ at 31 (citing 21 CFR 1306.05(a)); *see also* GX 3.

I therefore conclude that Respondent has committed acts which render his continued registration inconsistent with the public interest and which support the revocation of his registration. *See* 21 U.S.C. 824(a)(4); *see also* ALJ at 39. Moreover, while the burden then shifted to Respondent to accept responsibility for his misconduct and demonstrate that he will not engage in future misconduct, *see Patrick W. Stodola,* 74 FR 20727, 20734 (2009); the ALJ further found that Respondent lacked ''credibility during numerous material portions of his testimony'' and ''has not accepted responsibility for his * * * misconduct.'' ALJ at 38. *See also MacKay,* 664 F.3d at 821 (''Because Dr. MacKay has not accepted responsibility for his conduct, revocation of his registration is entirely consistent with DEA policy.''). Accordingly, I adopt the ALJ's conclusion that Respondent has not rebutted the Government's *prima facie* case, *id.* at 39; and will order that his registration be revoked and that any pending applications to renew or modify his registration be denied.

[5] Had Respondent been registered in Arizona, the Board's order prohibiting him from dispensing controlled substances would have provided a separate and independent ground to revoke his registration. *See* 21 U.S.C. 824(a)(3).

[6] However, I do not adopt the ALJ's conclusion of law that Respondent violated Arizona Rev. Stat. Ann. § 36–2522(A)(2) because he was not registered in Arizona. The Government raised no such allegation in either the Show Cause Order (ALJ Ex. 1) or its pre-hearing statement (ALJ Ex. 5), and it made no such argument in its brief.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) & 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration AE5382724, issued to James William Eisenberg, M.D., be, and it hereby is, revoked. I further order that any pending application of James William Eisenberg, M.D., to renew or modify his registration, be, and it hereby is, denied. This Order is effective immediately.[7]

Dated: July 24, 2012.

Michele M. Leonhart,

Administrator.

Carrie Bland, Esq., for the Government.

David K. Demergian, Esq., for Respondent.

Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

I. Introduction

This proceeding is an adjudication pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq., to determine whether the Drug Enforcement Administration (DEA, Agency or Government) should revoke a physician's DEA Certificate of Registration (COR) as a practitioner pursuant to 21 U.S.C. 824(a)(4) and deny, pursuant to 21 U.S.C. 823(f), any pending applications for renewal or modification and any applications for any other DEA registrations. Without such registration, the physician, James William Eisenberg, M.D. (Respondent), of the State of California, would be unable to lawfully prescribe, dispense or otherwise handle controlled substances in the course of his practice.

On December 14, 2011, the Administrator, DEA, issued an Order to Show Cause and Immediate Suspension of Registration (OSC/IS) to Respondent. The OSC/IS alleged that Respondent's continued registration constitutes an imminent danger to the public health and safety. The OSC/IS also provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's DEA COR AE5382724, pursuant to 21 U.S.C. 824(a)(4), and deny any pending applications for renewal or modification of that registration and any applications for any additional registrations, pursuant to 21 U.S.C. 823(f), alleging that Respondent's continued registration is inconsistent with the public interest as that term is defined in 21 U.S.C. 823(f). (ALJ Ex. 1, at 1.)

[7] For the same reasons which led me to order the Immediate Suspension of Respondent's registration, I conclude that the public interest necessitates that this Order be effective immediately. 21 CFR 1316.67.

The OSC/IS alleged that Respondent is registered with DEA as a practitioner in Schedules II through V under DEA COR AE5382724 at 8466 Santa Monica Boulevard, West Hollywood, California 90069, with an expiration date of August 31, 2013. (*Id.*) The OSC/IS further alleged the following:

That from August to September 2011, law enforcement personnel conducted two undercover visits to AZ Go Green, a clinic where Respondent authorizes the use of marijuana, located at 426 East Southern Avenue, Suite 102, Tempe, Arizona. That Respondent issued prescriptions for oxycodone, a Schedule II controlled substance, and alprazolam, a Schedule IV controlled substance, to the undercover officers (UCs) without a legitimate medical purpose in the usual course of professional practice, (ALJ Ex. 1, at 1–2);

That Respondent is not authorized by DEA to prescribe, dispense or otherwise handle controlled substances in the State of Arizona; Respondent allowed the UCs to dictate the type and amount of controlled substances prescribed rather than prescribing based on his own medical judgment; and Respondent charged the UCs based on the type of prescriptions rather than on the medical treatment rendered, (ALJ Ex. 1, at 2); and

That Respondent authorized at least 190 controlled substance prescriptions, seventy-five percent of which were for oxycodone, in Arizona without a DEA registration for his Arizona practice location. The prescriptions were issued for other than a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 822, 829, 841(a); 21 CFR 1301.12, 1306.04, (*Id.*).

In addition to the allegations set forth in the OSC/IS, the Government also noticed and alleged in its prehearing statement and documentary evidence that Respondent issued controlled substance prescriptions to the owner and employees of AZ Go Green without documenting the prescriptions in their respective patient charts, (ALJ Ex. 5, at 2); Respondent issued prescriptions using a variety of addresses, including the address for AZ Go Green, that were not registered practice addresses with DEA, (*Id.* at 2–3); Respondent failed to include the patients' addresses on prescriptions in violation of 21 CFR 1306.05, (*Id.* at 3); Respondent issued medical marijuana authorizations and cards to the UCs (*Id.* at 3–4); and on February 3, 2012, the Arizona Medical Board (Board) issued an Order for Letter of Reprimand and Consent to the Same (February 3, 2012 Order) finding that Respondent engaged in unprofessional

conduct by knowingly making a false or fraudulent statement in the practice of medicine, (Gov't Ex. 11).[1]

Following prehearing procedures, a hearing was held in Phoenix, Arizona on February 28, 2012, with the Government and Respondent each represented by counsel. Both parties called witnesses to testify and introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law and argument. All of the evidence and post-hearing submissions have been considered, and to the extent the parties' proposed findings of fact have been adopted, they are substantively incorporated into those set forth below.

II. Issue

Whether the record establishes that Respondent's DEA COR AE5382724 as a practitioner should be revoked and any pending applications for renewal or modification of that registration and any applications for additional registrations should be denied on the grounds that Respondent's continued registration would be inconsistent with the public interest pursuant to 21 U.S.C. 824(a)(4) and 823(f).

III. Evidence and Incorporated Findings of Fact [2]

I find, by a preponderance of the evidence, the following facts:

Respondent graduated with a B.A. degree from the University of Pennsylvania in 1962. He then obtained an M.D. degree in 1967 from the New Jersey College of Medicine.[3] (Tr. 154.) Respondent is licensed to practice medicine in California and Arizona, and he is board certified in internal medicine. (Tr. 154, 158.) Respondent is registered as a practitioner with DEA, with a registered practice address at 8466 Santa Monica Boulevard, West Hollywood, California 90069. (Tr. 28–29; Gov't Ex. 1.)

Respondent practiced at AZ Go Green, located at 325 East Southern Avenue, Suite 120, Tempe, Arizona,[4] from April 2011 until December 2011. (Tr. 154–55; *see* Gov't Ex. 3.) It is undisputed that Respondent did not register AZ Go Green as a practice location with DEA, nor did he register any other Arizona practice location with DEA. (Tr. 165.) Although he is still licensed to practice medicine in Arizona, Respondent no longer practices there. He now conducts medical marijuana evaluations and practices pain management in California. (Tr. 155.)

B. The Government's Evidence

The Government's evidence included testimony from Special Agent (SA) Stephen Lamkin (SA Lamkin) and two UCs—Officer Dustin Melton (Officer Melton) and Officer Bradford Knights (Officer Knights). In addition to testimonial evidence, the Government also introduced various documentary evidence, including, among others: an audio recording and transcript of one undercover visit with Respondent at AZ Go Green; [5] copies of prescriptions issued by Respondent to the UCs and other patients; [6] patient files for the UCs and other patients; [7] and the February 3, 2012 Order entered by the Board.[8]

SA Lamkin [9] testified that DEA began investigating AZ Go Green and Respondent in the summer of 2011, after a former employee of AZ Go Green filed a complaint with the Phoenix Police Department that AZ Go Green was illegally distributing marijuana [10] and oxycodone. (Tr. 22–23, 69–71, 75.) Respondent was the physician at AZ Go Green, responsible for ''assessing and diagnosing patients who came in seeking medical marijuana.'' (Tr. 23.)

SA Lamkin testified that DEA set up four undercover visits, using three UCs, in an attempt to obtain marijuana or pharmaceuticals from AZ Go Green. (Tr. 23–24, 77–78.) On all four visits, the UCs obtained marijuana, and on two of the visits, the UCs obtained prescriptions for oxycodone.[11] (Tr. 26.) The first UC, Officer Melton, went to AZ Go Green on two occasions using the undercover name ''Dustin Darrow.'' (Tr. 48–49.) On his first visit, Officer Melton received prescriptions for 120 tablets of oxycodone 30 milligrams and 90 tablets of Xanax 2 milligrams. (Tr. 50; Gov't Ex. 3, at 1.) Officer Melton did not get oxycodone on his second undercover visit because J.C., the owner of AZ Go Green, told Officer Melton that he could not see Respondent. (Tr. 78–79.) The second UC, Officer Knights, conducted one undercover visit to AZ Go Green using the undercover name ''Bradley Kites.'' (Tr. 50, 77–78.) Officer Knights obtained a prescription for 150 tablets of oxycodone 15 milligrams. (Tr. 50; Gov't Ex. 3, at 6–7.) The third UC, patient L.V., was denied an oxycodone prescription. (Tr. 78.)

SA Lamkin testified that he obtained the prescription monitoring profile for Respondent through the Arizona Controlled Substances Prescription Monitoring Program (CSPMP),[12] which showed that Respondent had issued controlled substance prescriptions in the State of Arizona. (Tr. 33.) SA Lamkin explained, however, that the CSPMP report should not have shown any prescriptions issued by Respondent in Arizona because Respondent did not have a DEA registration in Arizona. (Tr. 30, 32–33.) Respondent's only DEA registration was issued for a practice address at 8466 Santa Monica Boulevard, West Hollywood, California 90069. (Tr. 28–29, 30, 32–33; *see* Gov't Ex. 1.) SA Lamkin explained that if a practitioner maintains a clinic in Arizona, the practitioner must have a DEA registration for Arizona for that practice location. (Tr. 30.)

SA Lamkin testified that he retrieved some of the prescriptions issued by Respondent in Arizona, including those issued to the UCs. (Tr. 33–34; Gov't Ex. 3.) Additionally, SA Lamkin testified that on September 29, 2011, he executed a search warrant at AZ Go Green, where he seized approximately eight patient files, as well as other documentary

[1] I find in this case that the Government's prehearing statements and documentary evidence noticed during prehearing procedures comports with the due process requirement to ''provide a Respondent with notice of those acts which the Agency intends to rely on in seeking the revocation of its registration so as to provide a full and fair opportunity to challenge the factual and legal basis for the Agency's action.'' *CBS Wholesale Distributors,* 74 Fed. Reg. 36,746 (DEA 2009) (citing *NLRB* v. *I.W.G., Inc.,* 144 F.3d 685, 688–89 (10th Cir. 1998); *Pergament United Sales, Inc.,* v. *NLRB,* 920 F.2d 130, 134 (2d Cir. 1990)).

[2] In addition to the evidence discussed in this Section, additional evidence and findings of fact are discussed in later sections of this Recommended Decision.

[3] After graduating from medical school, Respondent interned in the Columbia Division at Belleview Hospital in New York City, and then completed his residency in internal medicine in the Columbia Division at Harlem Hospital in New York City in 1970. (Tr. 154.) He worked as a senior resident and assistant chief resident at New York Hospital/Cornell Medical Center from 1970 to 1971, during which time he was a post-doctoral fellow at the Rockefeller University in New York. (*Id.*)

[4] *But see* ALJ Ex. 1, at 1 (alleging that AZ Go Green is located at 426 East Southern Avenue, Suite 102, Tempe, Arizona).

[5] Gov't Ex. 2.

[6] Gov't Ex. 3.

[7] Gov't Exs. 4–9.

[8] Gov't Ex. 11.

[9] SA Lamkin has been a special agent with DEA for sixteen years. He has been assigned to the Diversion Group, which investigates the illegal use and distribution of pharmaceutical grade controlled substances, since 2005. (Tr. 22.)

[10] SA Lamkin testified that when the investigation was initiated, ''[t]here was no medical marijuana dispensaries allowed to be operating at that time in the state. There was a hold from the Department of Health Services on medical marijuana dispensaries licensing and operating * * *.'' (Tr. 82–83.)

[11] One prescription for oxycodone was entered directly into evidence and the other was actually filled at the pharmacy by the UC. (Tr. 26.)

[12] SA Lamkin testified that the CSPMP is a prescription monitoring program set up by the Arizona Board of Pharmacy that monitors any controlled substances, as defined by Arizona statutes. (Tr. 26–27.) The prescription monitoring profile for Respondent shows ''all of the prescriptions he had written for patients * * * in Arizona that had been filled. * * * The [CS]PMP lists the patient's address as it's given on the prescription.'' (Tr. 28.)

evidence and marijuana products. (Tr. 35–37, 61; Gov't Exs. 4–9.) Although there were more patient files at AZ Go Green, SA Lamkin testified that DEA only seized the patient files ''to show what we needed to show. To marry it up with actual undercover visits or people who were employees of the clinic who probably shouldn't have been getting marijuana in any case from a doctor that worked at the clinic.'' (Tr. 62, 67–68.)

SA Lamkin testified that Respondent issued controlled substance prescriptions to patients M.F., L.H., and R.B., who were all AZ Go Green employees. (Tr. 38–45, 52–54; *see* Gov't Ex. 4, at 4.) In particular, Respondent issued a prescription for oxycodone to M.F. on June 30, 2011. (Tr. 38–40; Gov't Ex. 3, at 23.) On September 2, 2011, Respondent issued a prescription for testosterone to L.H. (Tr. 44–45, 90–91; Gov't Ex. 3, at 25.) Between April 1, 2011 and August 12, 2011, Respondent issued the following controlled substance prescriptions to R.B.: four prescriptions for oxycodone; two prescriptions for Xanax; one prescription for codeine syrup; two prescriptions for Percocet; and one prescription for Adderall. (Tr. 53; Gov't Ex. 3, at 2–3, 8–11, 16–18, 21–22.) SA Lamkin testified that none of these prescriptions were documented in the patient files for M.F., L.H., and R.B. (Tr. 43, 45, 53; Gov't Exs. 4–5, 9.) [13]

Additionally, between April 1, 2011 and October 20, 2011, Respondent issued twelve controlled substance prescriptions to J.C., the owner of AZ Go Green. Specifically, Respondent issued eight prescriptions for oxycodone, two prescriptions for Xanax, one prescription for Adderall, and one prescription for Vicodin. (Tr. 46–47; *see* Gov't Ex. 3, at 2–7, 12–15, 17–20, 24.) SA Lamkin testified that there is nothing contained within J.C.'s patient file to indicate that Respondent issued these prescriptions to J.C. (Tr. 48; *see* Gov't Ex. 6.)

Finally, SA Lamkin testified that the controlled substance prescriptions issued to the UCs were not documented in the patient files for ''Dustin Darrow'' and ''Bradley Kites.'' (Tr. 50–51; Gov't Exs. 7–8.)

Although the prescriptions issued to the UCs and AZ Go Green employees were not documented in the patient files, SA Lamkin testified the prescriptions were ''probably'' written on duplicate or triplicate prescription pads. (Tr. 85.) SA Lamkin testified that there was a prescription pad in Respondent's exam room that may have contained the carbon copies of the prescriptions. (Tr. 88–89, 93.) SA Lamkin testified that he was not medically qualified to assess the appropriateness of the prescriptions, but he is ''qualified to comment on whether [Respondent] met recordkeeping standards'' with respect to those prescriptions and patient files. (Tr. 89, 90, 92, 96, 98, 99.)

Finally, SA Lamkin testified that in the course of his investigation of Respondent and AZ Go Green, he learned that the Board entered the February 3, 2012 Order against Respondent. SA Lamkin understood that the February 3, 2012 Order was the result of Respondent's failure to query the CSPMP before issuing prescriptions. (Tr. 56–57, 84–85; Gov't Ex. 11.)

Officer Melton [14] testified that in August 2011, SA Lamkin asked him to assist with the investigation of Respondent and AZ Go Green. (Tr. 106, 120.) On August 12, 2011, Officer Melton participated in an undercover visit to AZ Go Green, where his mission was to obtain a doctor's referral for a medical marijuana card, marijuana, prescription pills and any other drugs. (Tr. 107, 120.) Officer Melton went into AZ Go Green using the alias ''Dustin Darrow.'' (Tr. 107.) When he arrived at AZ Go Green, he was told he had to leave his bag, which contained a recording device, with security. (Tr. 107–08.) He then went to the receptionist and told her that he wanted to obtain a doctor's referral for a medical marijuana card. She told him it would cost $150.00, which he paid in cash.[15] He then filled out some paperwork about his medical history, on which he indicated that he broke his back in 2010. (Tr. 108–10; Gov't Ex. 7, at 7, 9.)

Officer Melton then met with Respondent. Officer Melton told Respondent that he fell off of an ATV and broke his back at his T3 vertebrae, which Officer Melton actually did fracture. (Tr. 111, 121–23.) He told Respondent that he went to the emergency room, but stated that he did not have a regular doctor. (Tr. 122–24.) When Respondent asked Officer Melton if he had pain, Officer Melton hesitated and then Respondent asked, ''Does the pain come and go from time to time?'' Officer Melton replied ''sure.'' (Tr. 111, 122.) Despite the notation in the patient file for ''Dustin Darrow,'' Officer Melton did not tell Respondent that the pain persisted with activity in cold weather. (*Compare* Gov't Ex. 7, at 10, *with* Tr. 124.) Respondent then asked Officer Melton if marijuana would help relieve his pain and help him sleep, to which Officer Melton replied, ''Okay.'' (Tr. 111–12.) Officer Melton does not recall stating that it would help, but told Respondent that he used marijuana in the past. (Tr. 124.)

Respondent told Officer Melton about the benefits of medical marijuana and explained alternatives to smoking, such as using a vaporizer or taking edible marijuana. (Tr. 112.) Officer Melton testified that Respondent then ''put a pressure cuff on my right arm and he had a stethoscope. Those were the only pieces of medical equipment that I could see in the office.'' (Tr. 112, 127–28.) Respondent instructed Officer Melton to stand up and bend over, and Respondent pushed on the top portion of Officer Melton's spine while having Officer Melton breathe deeply. (Tr. 112, 128.) Officer Melton did not express any pain. (Tr. 128.) After the exam, Respondent told Officer Melton to go to the front desk to complete the paperwork for medical marijuana. (Tr. 113.)

At that point, Officer Melton asked Respondent if he could ''get some oxies,'' referring to oxycodone. Respondent told Officer Melton ''that was a different task'' and would be an additional $200.00. Officer Melton agreed and paid $200.00 cash, which Respondent ''kept himself.'' (Tr. 113, 125–26.) Respondent asked Officer Melton how many oxycodone tablets he would get from his doctor, and Officer Melton told him he had previously been prescribed 180 tablets of oxycodone 30 milligrams. (Tr. 114, 126.) Respondent told him that he would give him a prescription for 120 tablets of oxycodone 30 milligrams. (Tr. 114.) Officer Melton then asked for a Xanax prescription. Respondent told him it would cost another $50.00, and Officer Melton agreed and paid $50.00 cash. (Tr. 115.) Respondent asked Officer Melton how many tablets he wanted, and Officer Melton requested 90 tablets. Respondent issued prescriptions for 120 tablets of oxycodone 30 milligrams and 90 tablets of Xanax 2 milligrams.[16] (Tr. 115–16, 127; Gov't Ex. 3, at 1.)

[13] *But see* Gov't Ex. 5, at 9 (noting that L.H. takes testosterone, Xanax, and Percocet), and Gov't Ex. 9, at 15 (listing four prescriptions issued by Respondent to R.B.).

[14] Officer Melton testified that he has been in law enforcement for approximately seven years. (Tr. 105.) He has worked one year in investigations with the Arizona State University Police Department, one year on a bicycle task force with the City of Tempe, and approximately two years on a narcotics task force with the City of Tempe. (Tr. 105–06.) He has worked with DEA ''[o]n a couple of occasions.'' (Tr. 106.)

[15] Officer Melton also asked for cocaine, but he was told by ''[t]he lady at the back desk'' that it was not available. (Tr. 120–21.)

[16] Officer Melton did not fill the prescriptions. (Tr. 127.)

Officer Melton testified that he never complained of any anxiety to Respondent, but did tell him that he had difficulty sleeping. (Tr. 116, 127.) He also testified that Respondent failed to discuss the risks and benefits of oxycodone or Xanax. (Tr. 116.) Nor did Respondent ever ask Officer Melton whether he was currently taking oxycodone or whether he had ever taken or been prescribed Xanax. (Tr. 116, 127.) Officer Melton did not provide any medical records, and Respondent never requested any medical records. (Tr. 110, 112.) Officer Melton's visit lasted ''[f]ive to ten minutes.'' (Tr. 124–25.) Respondent did not set up a follow-up visit for Officer Melton and did not indicate when he would see Officer Melton again. (Tr. 116–17.)

Officer Melton went to AZ Go Green for a second undercover visit on August 25, 2011. (Tr. 117.) Officer Melton told the receptionist that he wanted to get medical marijuana and that he also wanted to see Respondent. The receptionist told Officer Melton that he would have to ask J.C. if he wanted to see Respondent, and told him to go to the back office to obtain his marijuana. (Tr. 118.) After he obtained his marijuana, Officer Melton asked J.C. if he could see Respondent, but J.C. told him that he could not. J.C. did not give him a reason. (Tr. 119.)

Officer Knights [17] testified that SA Lamkin asked him to participate in an undercover visit to AZ Go Green to attempt to obtain a medical marijuana permit and a prescription for oxycodone. (Tr. 132, 145.) On September 1, 2011, Officer Knights went to AZ Go Green using the alias ''Bradley Kites.'' (Tr. 133, 149; *see* Gov't Ex. 2.) Officer Knights testified that when he entered AZ Go Green, he went to the counter and told the employees that he wanted to be prescribed medical marijuana. He was given three or four sheets of paper to fill out and he paid $150.00 cash for the visit and the medical marijuana card. (Tr. 133–34, 143; Gov't Ex. 8, at 8–13.) [18] He also paid an additional $50.00 fee for AZ Go Green to submit his paperwork to the State of Arizona so that he could get the medical marijuana card. (Tr. 143–44.)

Officer Knights then met with Respondent. (Tr. 134.) Respondent asked Officer Knights why he was there, how much he weighed, and what medical condition he suffered from. (Tr. 137.) Officer Knights told Respondent that he had been suffering from fibromyalgia for the past six years, but that he had not seen a doctor even though his pain had gotten worse. (Tr. 137, 148.) Officer Knights told Respondent that the pain interfered with his sleep, and that smoking cannabis helped with the pain and helped him sleep. He told Respondent that he ''had always been smoking cannabis,'' but that he was not currently taking any other medication. (Tr. 137, 148.)

Officer Knights testified that after Respondent conducted a ''brief physical exam, * * * I told him that oxies helped me and if I could have some of those. And he said that that would be possible.'' (Tr. 137–38, 149.) Respondent told Officer Knights that the prescription would cost $200.00 and then ''he asked me what other prescriptions I wanted.'' (Tr. 138; *see also* Gov't Ex. 2, at 2, 5.) Officer Knights told Respondent that he only wanted ''the cannabis and the oxy,'' and Respondent then asked Officer Knights ''if 15s would be okay. * * * Because if I prescribe the 30's it will raise red flags. * * * But I can write you more of the 15s.'' (Tr. 138, 151; *see also* Gov't Ex. 2, at 5.) Officer Knights asked if the marijuana and oxycodone were $200.00 total, and Respondent replied, ''Oh yeah the $150 is for the marijuana and the $200 is for the oxy * * *.'' (Gov't Ex. 2, at 5.) Officer Knights gave Respondent $200.00 cash, and Respondent issued a prescription for 150 tablets of oxycodone 15 milligrams. (Tr. 138–39; Gov't Ex. 3, at 6.)

Officer Knights testified that during the visit, Respondent ''did talk to me about different ways to imbibe the cannabis and some different things to do for pain, such as swimming, eating correctly, a good diet and things like that.'' (Tr. 139–40; *see* Gov't Ex. 2, at 3–4.) Respondent did not discuss the risks and benefits of taking oxycodone. (Tr. 140.) Officer Knights also testified that he did not bring any medical records and Respondent never asked him for any medical records. When Officer Knights left Respondent's office, Respondent stated, '' 'I'll see you in about a year.' '' (Tr. 140; *see also* Gov't Ex. 2, at 6.)

C. Respondent's Evidence

Respondent's evidence included testimony from Respondent, as well as two patient charts submitted as documentary evidence.[19]

Respondent testified that he is licensed to practice medicine in California and Arizona. (Tr. 154.) He conceded, however, that he is only registered in California, and despite practicing at AZ Go Green in Arizona, he never registered an Arizona practice address with DEA. Respondent testified that he never knew that it was a requirement to register with DEA in each state. (Tr. 165.)

Respondent testified that he has never had any of his state medical licenses suspended, revoked, or denied. (Tr. 154, 159.) He testified that he consented to the February 3, 2012 Order entered by the Board. (Tr. 159; *see* Gov't Ex. 11.) He explained that before qualifying a patient for medical marijuana in Arizona, a physician is required to certify that the physician has reviewed the patient's profile on the Arizona Board of Pharmacy's CSPMP.[20] (Tr. 160–62; *see, e.g.,* Gov't Ex. 8, at 10.) Respondent testified:

> I had no idea what this Arizona Board of Pharmacy database was or how to apply for it. There is nothing comparable in California for physicians,[21] so I was checking the boxes really based upon my reviewing the * * * patient's medical records or their statements to me * * *. As soon as I realized that—or became aware that—of how to do it, I applied for and received my ID and password and from that point onward continued to check the database on every subsequent patient.

(Tr. 162.) Respondent admitted to the Board that from the time he applied to the database until the time he received the information to access the database, he continued to represent that he had verified each patient's profile. (Tr. 164.) Respondent testified that he did not obtain the patient profiles for any of the AZ Go Green employees to whom he issued prescriptions. (Tr. 201–02.)

Respondent next testified that while the goal of a pain management practitioner is to relieve suffering, he is sensitive about addictive issues. (Tr. 156.) He explained, however, that sometimes patients do not want to take medical marijuana because they may be drug tested at work, they're worried about dosage, or they travel across state lines. Instead they prefer to take oxycodone. (Tr. 174–75.) He also testified that sometimes medical

[17] Officer Knights went to the Arizona Law Enforcement Academy in 1999, and then he worked in patrol for approximately six years. In 2006, Officer Knights became a narcotics detective with the City of Peoria, where he has worked for the past six years. He spent two-and-a-half years assigned with the DEA Diversion Task Force. (Tr. 131–32.)

[18] Officer Knights testified that although he filled out pages 8 through 13 of the patient file for ''Bradley Kites,'' pages 10 and 13 also include somebody else's writing. (Tr. 143; *see* Gov't Ex. 8, at 10, 13.)

[19] Resp't Exs. 1, 3.

[20] The patient's CSPMP profile indicates whether the patient has received any controlled substances, but it does not indicate whether the patient has received medical marijuana. (Tr. 162–63.)

[21] Respondent later clarified that California has something similar to the Arizona CSPMP, called CURE, but ''it's not a requirement for doctors to use that as opposed to'' Arizona. (Tr. 196–97.)

marijuana does not ''completely control their pain and so they require some additional medication in order to control their pain.'' (Tr. 175.)

Respondent testified that during his time practicing at AZ Go Green, from April 2011 to December 2011, he saw approximately 800 to 1,000 patients. He testified that only about one percent of the patients asked for a prescription other than marijuana. (Tr. 154–55, 166–67.) Of that one percent, Respondent declined a prescription for something other than marijuana to ''[p]robably fifty percent.'' (Tr. 167.)

Respondent testified that he refused to issue an oxycodone prescription to the third UC, patient L.V., who requested an oxycodone prescription at the end of her exam. (Tr. 167.) Likewise, L.V. asked for Xanax, which Respondent also denied, explaining that ''[a]t that point I just wasn't writing [prescriptions], other than for the people who were already under my care.'' (Tr. 168; *see* Resp't Ex. 3.) Additionally, Respondent testified that he stopped treating patient A.C., who was receiving oxycodone prescriptions, ''because it seemed that he was possibly diverting these medications. * * *'' (Tr. 174.) Respondent conceded that there is nothing in A.C.'s patient file indicating that Respondent stopped treating A.C. (Tr. 208; *see* Resp't Ex. 1.)

Respondent next testified that he is aware of a regulation that discourages physicians from issuing prescriptions to family members, but he is not aware of any similar regulation prohibiting physicians from issuing prescriptions to employees. (Tr. 166.) Respondent testified that he issued a prescription to M.F. for 120 tablets of oxycodone 30 milligrams because she had back pain and ''she felt [she] was in need of additional medication and that was corroborated by my exam. * * *'' (Tr. 177.) Before issuing the prescription, Respondent testified that he obtained her medical history and performed a physical examination. (Tr. 178.) Additionally, because M.F. worked at AZ Go Green, he ''had some idea of both the nature of her illness and her reliability.'' (Tr. 181.) Respondent testified that the prescription was issued for a legitimate medical purpose in the course of his practice, explaining that M.F.'s back pain was increasing despite using cannabis. (Tr. 177, 179.) Respondent conceded, however, that although M.F. had not taken oxycodone before, he prescribed her the highest dosage unit possible. (Tr. 200–01.)

Next, Respondent testified that he prescribed testosterone to L.H., the security guard at AZ Go Green, because he was a body builder and L.H. ''felt that he was * * * starting to have just physical weakness * * * so he requested the testosterone as a way of maintaining his energy.'' (Tr. 181–82.) Respondent testified that in his opinion, it was an appropriate prescription issued for a legitimate medical purpose in the usual course of practice. (Tr. 182.)

Respondent testified that he initially issued a prescription for Percocet to J.C., who had an MRI-documented herniated disc. Respondent determined ''it was safer'' to prescribe just oxycodone rather than Percocet, which is a combination of oxycodone and acetaminophen. (Tr. 184–85.) Respondent also prescribed Xanax to J.C., stating, ''I think he lived a complicated life. Let me just put it that way. And so he was having high levels of anxiety and asked for Xanax to help him sleep.'' (Tr. 185.) Based on J.C.'s medical history and the physical examination, Respondent opined that Xanax was an appropriate prescription. (Tr. 185–86.) Additionally, Respondent prescribed Adderall to J.C. because J.C. was ''having trouble concentrating and he was kind of a hyper guy. * * *'' (Tr. 186.) Respondent testified that all of the medications were issued for a legitimate medical purpose in the usual course of practice. Respondent followed J.C. on these medications and they were all successful. (Tr. 186.)

Respondent testified that R.B. suffered from anxiety and ''some ADD,'' and she also suffered from severe low back pain from an injury she suffered while moving. (Tr. 191.) Respondent testified that he saw R.B. on ''a more or less daily basis,'' and he observed that she was in pain. (Tr. 191–92.) Respondent prescribed oxycodone for her severe lower back pain. (Tr. 191.) Respondent testified, however, that despite issuing so many prescriptions so frequently to J.C. and R.B., he never required either patient to take a urine drug screen to confirm that they were actually taking the medication as prescribed. (Tr. 206.)

With respect to the UCs, Respondent testified that Officer Knights told Respondent that he suffered from fibromyalgia, and a physical examination corroborated Officer Knights' complaints. (Tr. 187.) Although Officer Knights told Respondent he had not seen another doctor, Respondent testified that fibromyalgia can be self-diagnosed. (Tr. 210, 213.) Respondent also testified that while there is no objective test to diagnose fibromyalgia, such as an x-ray or MRI, the ''symptom complex [is] pretty well-defined'' and Officer Knights met each of the criteria. (Tr. 188–89.) Respondent conceded though that Officer Knights never told Respondent where he had pain until Respondent asked if he had pain in his back and shoulders. (Tr. 203–04.)

Respondent testified that he told Officer Knights that oxycodone 30 milligrams would raise a red flag, explaining that

> several patients that I had had who had gone—especially those without insurance, who had gone to a pharmacy with a prescription for 30 milligrams of oxycodone and paid cash, found that the pharmacists either were unwilling to fill the prescription or made them wait while they contacted me, and since I was not here in Arizona continually, there were problems getting back to me for verification of the prescriptions.

(Tr. 211.) He testified that it was not an effort to conceal his prescription writing patterns. (*Id.*) Respondent testified that he based the prescription to Officer Knights on the patient history and the physical examination, and he ''prescribed the oxycodone because [Officer Knights] said that he had been taking it for two years.'' (Tr. 214.)

As for Officer Melton's undercover visit with Respondent, Respondent testified that Officer Melton indicated that he suffered a fracture of his T3 when he fell from an ATV. (Tr. 189.) Respondent conducted a physical examination, which was consistent with Officer Melton's complaint. (Tr. 189.) Although Officer Melton did not say ''ouch'' or verbally indicate pain during the exam, Respondent testified that Officer Melton agreed when he asked Officer Melton if the pain came and went. (Tr. 202–03.) Respondent testified that he could have further confirmed Officer Melton's complaint by ''tak[ing] another x-ray of his thoracic spine and see[ing] the fracture, but * * * [h]e had said he had gone to the emergency room and they told him he had a T3 fracture. I don't think an additional x-ray would be of any value.'' (Tr. 190.)

Respondent conceded that he charged the UCs $200.00 each for the oxycodone portion of the visit in addition to the $150.00 fee that he charged them for the office visit. (Tr. 197–98.) He explained, however, that since oxycodone can only be prescribed for a one-month supply, he charges his patients $200.00 at the initial visit, but that charge includes two additional ''follow-up prescriptions and * * * additional exam[s] at no charge because they'd already paid.'' (Tr. 156–57, 176.) He testified that he failed to tell either of the UCs that the $200.00 fee was good for three months though. (Tr. 197.)

Nonetheless, Respondent testified that in his opinion, the prescriptions to the UCs were issued for a legitimate medical purpose in the usual course of professional practice. (Tr. 187–88, 190–91.) Respondent conceded that he

issued the prescriptions without asking either of the UCs for past medical records. (Tr. 207–08.) He also testified that while he believed he kept adequate patient records, he agreed that there was nothing in the UCs' respective patient files to show that they were prescribed oxycodone. (Tr. 205.)

Respondent testified that he kept carbon copies of all prescriptions that he wrote, which would ''eventually'' get put into the patient's file. (Tr. 170–71.) He did not have a timeframe for putting the copies into the patient files and agreed that waiting five to six months was a long time. (Tr. 204, 205–06.) Respondent also testified that to his knowledge he has not issued a prescription that was not for a legitimate medical purpose in the usual course of practice. (Tr. 159.) He explained:

> I come from a prior era of medical care where * * * MRI's were not available. And so I was taught about physical diagnosis. That you took a careful history from the patient, you performed a physical examination on the patient carefully and that was more valuable than even many diagnostic tests, which could be equivocal. And so that's part of how I practice medicine over the years as I've been trying to keep cost conscious and not over utilize diagnostic testing unless it's absolutely necessary.

(Tr. 193.)

IV. Discussion

A. The Applicable Statutory and Regulatory Provisions

The Controlled Substances Act (CSA) provides that any person who dispenses (including prescribing) a controlled substance must obtain a registration issued by the DEA in accordance with applicable rules and regulations.[22] ''A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner'' with a corresponding responsibility on the pharmacist who fills the prescription.[23] It is unlawful for any person to possess a controlled substance unless that substance was obtained pursuant to a valid prescription from a practitioner acting in the course of his professional practice.[24]

B. The Public Interest Standard

The CSA, at 21 U.S.C. 824(a)(4), provides, insofar as pertinent to this proceeding, that the Administrator may revoke a DEA COR if she finds that the continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f). In determining the public interest, the Administrator is required to consider the following factors:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing or conducting research with respect to controlled substances.

(3) The applicant's conviction record under federal or state laws relating to the manufacture, distribution or dispensing of controlled substances.

(4) Compliance with applicable state, federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.[25]

As a threshold matter, these factors are to be considered in the disjunctive: The Administrator may properly rely on any one or a combination of those factors, and give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied. *See David H. Gillis, M.D.,* 58 FR 37,507, 37,508 (DEA 1993); *see also D & S Sales,* 71 FR 37,607, 37,610 (DEA 2006); *Joy's Ideas,* 70 FR 33,195, 33,197 (DEA 2005); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16,422, 16,424 (DEA 1989). Application of the public interest factors requires an individualized determination and assessment of prescribing and record-keeping practices that are ''tethered securely to state law * * * and federal regulations.'' *Volkman* v. *DEA,* 567 F.3d 215, 223 (6th Cir. 2009). Additionally, in an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied.[26] The burden of proof shifts to the respondent once the Government has made its prima facie case.[27]

C. The Factors To Be Considered

Factor 1: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority

In this case, regarding Factor One, it is undisputed that Respondent currently holds valid medical licenses in Arizona and California, but Respondent's Arizona medical license has been the subject of recent disciplinary action.[28] On December 21, 2011, Respondent signed a consent agreement with the Arizona Medical Board (Board), which ultimately resulted in a February 3, 2012 Order for Letter of Reprimand and Consent to the Same (February 3, 2012 Order).[29] (Gov't Ex. 11.) The February 3, 2012 Order included various factual findings to include Respondent's admission to the allegation that he ''wrote 483 Medical Marijuana Certifications in which he attested to reviewing the qualifying patient's profile on the Arizona Board of Pharmacy Controlled Substances Prescription Monitoring Program (CSPMP) database prior to ever accessing the database through the Arizona Board of Pharmacy (Pharmacy Board) Web site.'' (*Id.* at 1.) Additionally, during the relevant time period, Respondent had not registered with the database ''so he was unable to access or make queries of the CSPMP prior to that time.'' (*Id.;* Tr. 163–64.)

The Board concluded that Respondent's conduct constituted ''unprofessional conduct pursuant to A.R.S. § 32–1401(27)(t) ('[k]nowingly making any false or fraudulent statement, written or oral, in connection with the practice of medicine or if applying for privileges or renewing an application for privileges at a health care institution').'' (*Id.* at 2.) As a result of the foregoing findings of fact and conclusions of law, the Board issued Respondent a ''Letter of Reprimand.'' (*Id.*)

The Board's action reflects a determination that Respondent, notwithstanding findings of unprofessional conduct in the recent past, can be entrusted with a medical

[22] 21 U.S.C. §§ 802(1), 822(a)(2).

[23] 21 CFR 1306.04(a).

[24] 21 U.S.C. 844(a).

[25] I conclude that the reference to ''other conduct which may threaten the public health and safety'' would as a matter of statutory interpretation logically encompass the factors listed in § 824(a). *See Kuen H. Chen, M.D.,* 58 FR 65,401, 65,402 (DEA 1993).

[26] *See* 21 CFR 1301.44(e).

[27] *See Medicine Shoppe—Jonesborough,* 73 Fed. Reg. 364, 380 (DEA 2008); *see also Thomas E. Johnston,* 45 FR 72311 (DEA 1980).

[28] Respondent has never had his medical license in any state where he has held one suspended, revoked, or denied. (Tr. 159.)

[29] Respondent asserts that the February 3, 2012 Order includes a provision that his admissions to the Board for purposes of the February 3, 2012 Order were ''not intended or made for any other use, such as in the context of another State or Federal government regulatory agency proceeding, * * *'' (Resp't Br., at 9.) I do not find this argument to be persuasive, however, because the Government was not a party to those proceedings and is not bound by those terms. *Cf. Robert Raymond Reppy, D.O.,* 76 FR 61,154, 61,159–60 (DEA 2011) (refusing to apply *res judicata* where the respondent was not a party to the prior proceedings); *see also United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus., Steamfitters and Refrigeration Unit* v. *Valley Engineers,* 975 F.2d 611, 615 (9th Cir. 1992) (''The general rule is that a litigant is not bound by a prior decision in a proceeding to which it was not a party.'' (citing *Hansberry* v. *Lee,* 311 U.S. 32, 40 (1940))).

license. While not dispositive,[30] this action by the State of Arizona does weigh against a finding that Respondent's continued registration would be inconsistent with the public interest under Factor One. *Cf. Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (DEA 2003) (under Factor One, prior suspension of respondent's state medical license held not dispositive where state license currently under no restrictions).

Factor 3: Conviction Record under Federal or State Laws Relating to the Manufacture, Distribution or Dispensing of Controlled Substances

Regarding Factor Three, there is no evidence that Respondent has ever been convicted under any federal or state law relating to the manufacture, distribution or dispensing of controlled substances. (*See* Tr. 159.) I therefore find that this factor, although not dispositive, *see Leslie,* 68 FR at 15,230, weighs against a finding that Respondent's registration would be inconsistent with the public interest.

Factors 2 and 4: Respondent's Experience in Handling Controlled Substances; and Compliance with Applicable State, Federal or Local Laws Relating to Controlled Substances

In this case, the evidence demonstrates that Respondent has failed to remain in compliance with applicable federal and state law relating to controlled substances, and that his past experience in prescribing controlled substances is inconsistent with the public interest. Additionally, evidence at hearing centered on Respondent's record-keeping practices, as well as his dispensing practices from an unregistered location.

1. Respondent's Prescribing Practices

Evaluation of Respondent's prescribing conduct in this case is governed by applicable federal and state law. The applicable standard under federal law is whether a prescription for a controlled substance is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). The standard of care refers to that generally recognized and accepted in the medical community rather than a standard unique to the practitioner. *Robert L. Dougherty, M.D.,* 76 FR 16,823, 16,832 (DEA 2011) (citing *Brown* v. *Colm,* 11 Cal. 3d 639, 642–43 (1974)). Although it is recognized that state law is a relevant factor in determining whether a practitioner is acting in the ''usual course of professional practice,'' it is also appropriate, in the context of an inquiry under federal law, to consider ''generally recognized and accepted medical practices'' in the United States. *Bienvenido Tan, M.D.,* 76 FR 17,673, 17,681 (DEA 2011).

''Under the CSA, it is fundamental that a practitioner must establish a bona fide doctor-patient relationship in order to act 'in the usual course of * * * professional practice' and to issue a prescription for a 'legitimate medical purpose' as required by 21 CFR 1306.04(a).'' *Gilbert Eugene Johnson, M.D.,* 75 FR 65,663, 65,666 (DEA 2010) (citing *Patrick W. Stodola, M.D.,* 74 FR 20,727, 20,731 (DEA 2009) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975))). ''The CSA generally looks to state law to determine 'whether a doctor and patient have established a bona fide patient relationship.' '' *Id.; see also Kamir Garces-Mejias, M.D.,* 72 FR 54,931, 54,935 (DEA 2007); *United Prescription Services, Inc.,* 72 FR 50,397, 50,407 (DEA 2007).

Under applicable Arizona law, grounds for disciplinary action include ''[u]nprofessional conduct'' further defined as ''[v]iolating any federal or state laws, rules or regulations applicable to the practice of medicine.'' Ariz. Rev. Stat. § 32–1401(27)(a). Additionally, unprofessional conduct includes ''[a]ny conduct or practice that is or might be harmful or dangerous to the health of the patient or the public.'' Ariz. Rev. Stat. § 32–1401(27)(q).

(a) Undercover Law Enforcement Patient Visits

Turning to the evidence in the instant case, the Government alleged and presented evidence that Respondent issued prescriptions for controlled substances in Arizona to two undercover law enforcement officers (UCs) posing as patients on August 12, 2011 and September 1, 2011, that were not issued for a legitimate medical purpose and outside the usual course of professional practice.[31] (ALJ Ex. 1, at 1–2; Gov't Exs. 2–3.) The Government's evidence also credibly established through the testimony of SA Lamkin that the undercover visits with Respondent during 2011 were initiated based on information provided by a former employee of Respondent's practice location, AZ Go Green, that Respondent and the owner of the clinic ''were illegally distributing marijuana out of the clinic and prescriptions for oxycodone as well.'' (Tr. 23.) SA Lamkin further explained that the primary purpose of his investigation was the oxycodone distribution. (Tr. 75.)

With regard to the August 12, 2011 undercover patient visit with Respondent, the Government presented testimony from Officer Melton, who credibly testified in substance that he visited Respondent's Arizona practice location for the purpose of obtaining a medical marijuana card and prescription pills. (Tr. 107.) Notably, office staff informed Officer Melton that any backpacks or purses must be left by the front door of the clinic.[32] (Tr. 108.) The visit required the payment of $150.00 cash in advance to the receptionist, who informed Officer Melton the fee was required to ''obtain a referral from the doctor.'' (Tr. 109.) Prior to seeing Respondent, Officer Melton was also required to fill out forms to include a patient attestation not to divert marijuana and a form entitled Medical Marijuana Patient Summary, on which Officer Melton indicated a medical history of ''Broken Back 10/2010.'' (Tr. 108–10; Gov't Ex. 7, at 7, 9.)

The testimony from Officer Melton also reflects that Respondent neither asked for nor obtained any medical records during the visit, and was told upon inquiry that Officer Melton did not currently have a doctor. (Tr. 110–12.) Respondent nonetheless falsely indicated in the patient chart that he had reviewed the patient's medical records, including medical records from other treating physicians. (Gov't Ex. 7, at 6.) The evidence further reflects that Respondent asked Officer Melton if he had pain from his broken back, suggesting that the pain comes and goes from time to time, to which Officer Melton agreed. (Tr. 111.) After this exchange, Respondent asked if medical marijuana would help with pain and sleep, and Officer Melton replied ''Okay.'' (Tr. 111–12.) Respondent then explained the benefits of marijuana and alternative means of ingestion, followed by an examination of Officer Melton that consisted of a ''pressure cuff'' and stethoscope, along with having Officer Melton stand, bend, and take deep breaths. Additionally, Respondent pushed on the top portions of Officer

[30] *Mortimer B. Levin, D.O.,* 55 Fed. Reg. 8,209, 8,210 (DEA 1990) (finding DEA maintains separate oversight responsibility and statutory obligation to make independent determination whether to grant registration).

[31] The evidence at hearing also referenced a third UC, patient L.V., who went to Respondent's practice on September 22, 2011, but was denied oxycodone and Xanax prescriptions by Respondent. (Tr. 77–78, 169; Resp't Ex. 3.)

[32] Officer Melton was equipped with a recording device for purposes of the undercover visit, but it was not located on his person. Accordingly, the device remained with his belongings in the lobby area and no recording was made of his encounter with Respondent. (Tr. 107.)

Melton's spine, followed by a statement that the ''exam was over.'' (Tr. 112.)

Respondent then informed Officer Melton about ''edibles'' and how to obtain marijuana, and ''walked him to the door suggesting we should leave.'' (Tr. 113.) At that point Officer Melton asked Respondent if he ''could obtain some oxies'' referring to an oxycodone prescription, to which Respondent replied that was a ''different task'' and would require payment of an additional $200.00, to which Officer Melton stated ''fine'' and paid Respondent $200.00 in cash. (Tr. 114.) Officer Melton described Respondent's issuance of a prescription for 120 tablets of oxycodone 30 milligrams and 90 tablets of Xanax 2 milligrams as follows:

> He then sat down at the desk and filled out a prescription pad, which he gave to me. He asked me questions. He said, 'How many would you get from your doctor?' I said, '180.' He said he would only write it for 120. And actually before he asked that, I told him I got 30's from my doctor and he did complete the prescription for 30 milligram oxycodone at a quantity of 120.

(*Id.*)

Officer Melton testified that after Respondent handed him the prescription for oxycodone,[33] he then asked Respondent for Xanax:

> I asked him if I could get a prescription for Xanax and he said that would cost an additional $50.00. I said that was okay and I gave him $50.00 cash and he began to fill out another prescription. He asked how many I wanted. I said, '90.' And he completed a prescription for 90 2 milligram Xanax tablets and gave me the prescription for those.

(Tr. 115; Gov't Ex. 3, at 1.)

Of significance, the evidence reflected that upon Officer Melton's return to Respondent's practice on August 25, 2011, he was told that he could not see Respondent, although no reason was given. (Tr. 119.)

With regard to the September 1, 2011 undercover patient visit with Respondent, the Government presented testimony from Officer Knights, who credibly testified that he visited Respondent's Arizona practice location for the purpose of obtaining a ''medical marijuana license and a prescription for oxycodone.''[34] (Tr. 132.) Upon arrival, he indicated to AZ Go Green staff that he wanted to be prescribed marijuana and was given paperwork to fill out. He paid $150.00 cash for the visit and an additional $50.00 fee for the staff to submit his paperwork to the State of Arizona. (Tr. 143–44.)

The recording and transcript of the encounter with Respondent reflects that Officer Knights related to Respondent a six-year history of fibromyalgia with problems in the shoulders and neck, and pain becoming worse. (Tr. 137; Gov't Ex. 2, at 1.) Officer Knights also noted sleep disturbance and told Respondent that he had not treated with a doctor at the time nor had he seen one after the pain became worse. (Gov't Ex. 2, at 1.) Officer Knights indicated to Respondent that he was not taking any medications, but stated cannabis had helped in the past. Prior to any physical examination, Officer Knights inquired of Respondent if oxycodone prescriptions were possible.

> [RESPONDENT]: Do you have a regular doctor that you see now?
> KNIGHTS: Um, no not regularly. But, um I mean oxy seemed to help too, I don't know if you guys doing anything like that here or * * *?
> [RESPONDENT]: Have * * * how long have you been taking oxycodone?
> KNIGHTS: Um, when I can get it for probably about 2 years.
> [RESPONDENT]: Mm-hmm.
> KNIGHTS: On and off.
> [RESPONDENT]: Mm-hmm.
> KNIGHTS: But um that really seems to help too.
> [RESPONDENT]: Okay, that's a separate fee but we can, I can write you a prescription.
> KNIGHTS: I, that would be great that would be awesome.

(Gov't Ex. 2, at 2.)

Notably, Respondent's statement that he can write a prescription for oxycodone at the outset of the patient visit, prior to any examination and in response to a specific request by the patient, is inconsistent with a prescription being issued for a legitimate medical purpose or in the usual course of professional practice. 21 CFR 1306.04(a).

The patient visit continued with Respondent discussing diet along with alternatives to using marijuana, as well as a discussion about the appropriate amount to use to relieve symptoms. (Gov't Ex. 2, at 4.) The patient visit next turned back to the issue of oxycodone:

> [RESPONDENT]: Okay. Now it's $200 for today. I only do 15s. Is that ok?
> KNIGHTS: Oxy 15s?
> [RESPONDENT]: Yeah.
> KNIGHTS: I mean if that's all you can do I guess.
> [RESPONDENT]: Yeah that's all * * * it's just, it's such a red flag, the 30s are such a red flag, you know, but I will give you a few more, I'll give you a little bit more so that should help.
> * * * * *
> KNIGHTS: How many can you do?
> [RESPONDENT]: 150.
> KNIGHTS: Alright 15s?
> [RESPONDENT]: Yeah.
> KNIGHTS: Alright. What's a, what's a red flag? What do you mean?
> [RESPONDENT]: You know when you go to the pharmacy when you bring in (unintelligible) you know they flag it with the Board of Pharmacy and it just becomes a problem for you and for me.
> KNIGHTS: Oh really?
> [RESPONDENT]: Yeah, (unintelligible) * * * with the 15s they don't really they don't have a problem with, but when you do the 30s, that's when they get, you know, they just, they make a red flag and you know my name and your name get on to a list and you end up you know with a problem.
> KNIGHTS: Wow, I didn't know.

(Gov't Ex. 2, at 6.)

Respondent concluded the visit with Officer Knights by stating that ''we will see you in another year.'' (*Id.*) Respondent issued a prescription to Officer Knights for 150 tablets of oxycodone 15 milligrams. (Gov't Ex. 3, at 6.)

In response to the evidence regarding the two undercover visits by Officers Melton and Knights, Respondent testified in relevant part that he was of the opinion that his prescriptions in each instance were issued for a legitimate medical purpose while acting in the usual course of his professional practice. (Tr. 187–88, 190–91.) I do not find Respondent's testimony credible in various respects. As an initial matter, I find Respondent's prescribing of controlled substances to Officers Melton and Knights to reflect a cash transaction for controlled substances at the request of the UCs, to include a negotiated quantity, strength, and type, which was effectively devoid of any credible relationship to the purported medical reason for the visit. Simply put, these were transparent unlawful ''drug deals.''[35] 21 U.S.C. 841 (a)(1); *see Homayoun Homayouni, M.D.,* 61 FR 1,406, 1,408–09 (DEA 1996).

Respondent's relatively brief testimony explaining the basis for his prescribing controlled substances to Officers Melton and Knights was inconsistent with other objective and credible evidence of record. Respondent testified in relevant part that he was of the opinion after his examination of

[33] Gov't Ex. 3, at 1.

[34] Officer Knights was wearing a recording device during the visit, the results of which are reflected in an audio recording and transcript admitted at hearing. (Gov't Ex. 2.)

[35] The credible evidence at hearing is consistent with the hearsay statement from a former employee of AZ Go Green that Respondent was illegally prescribing oxycodone. For purposes of this recommended decision, I find that the foregoing hearsay statement by the former employee constitutes substantial evidence, particularly in light of the fact that the informant was known to SA Melton and corroborated by extensive credible evidence of record. *Calhoun* v. *Bailar,* 626 F.2d 145, 149 (9th Cir. 1980); *see also Richardson* v. *Perales,* 402 U.S. 389, 402–06 (1971).

Officer Knights that the results were consistent with a diagnosis of fibromyalgia, which ''sometimes is associated with chronic fatigue.'' (Tr. 187.) While the patient file for Officer Knights briefly notes ''fibromyalgia,'' the transcript of the encounter clearly demonstrates that Respondent had already agreed to issue Officer Knights a prescription for oxycodone in exchange for a separate cash fee in advance of the examination. Even more telling is Respondent's later statement to Officer Knights that he only does ''15s,'' followed by asking Officer Knights if that ''is ok'' with him, essentially deferring the strength of the prescription to the patient. Respondent's added explanation that issuance of 30s raises red flags with the pharmacy board, and that he will give Officer Knights ''a few more'' is fully inconsistent with any arguable legitimate medical purpose. Rather, it is fully consistent with an unlawful drug transaction.

Respondent's testimony explaining the controlled substance prescriptions for oxycodone and Xanax to Officer Melton is equally incredible. Respondent testified in relevant part that in his experience fractures of the type reported by Officer Melton are ''very'' painful, and found Officer Melton's symptomology consistent with that type of injury. (Tr. 189.) Respondent further explained that the examination performed for the medical marijuana evaluation encompassed many of the same things that would be examined for an oxycodone prescription, noting that he did not ''think that an additional x-ray would be of any value.'' (Tr. 190.)

Respondent's testimony is significantly at odds with the credible testimony of Officer Melton. The timing of Respondent's issuance of two prescriptions to Officer Melton significantly undermines any legitimacy to Respondent's actions, as well as the credibility of his testimony at hearing. The issue of oxycodone came up after Respondent's examination was over and Officer Melton was being escorted to the door. Only after Officer Melton raised the issue of ''oxies'' did Respondent indicate that would be a different task and fee, and immediately proceed to sit down and issue a prescription for oxycodone in a strength that Officer Melton requested. Respondent's reluctance to issue the requested quantity of 150, settling instead on a quantity of 120, is consistent with Respondent's concerns expressed to Officer Knights about ''red flags'' with the pharmacy board.

Officer Melton's patient file and evaluation is also inconsistent with Respondent's purported basis for issuing the oxycodone prescription. Respondent asked Officer Melton how many he would get from his doctor, yet Respondent's signed evaluation notes indicate ''none'' for physician and medication.[36] Respondent's own documentation reflects his actual knowledge that Officer Melton's statement of how many he would get from his doctor had no correlation to ongoing medical care.

Respondent's testimony regarding his refusal to prescribe controlled substances to undercover patient L.V. on September 22, 2011, is also inconsistent with other credible evidence of record. (Tr. 167–68; Resp't Ex. 3.) Respondent testified that he refused to issue a requested prescription for oxycodone and Xanax, explaining that ''[a]t that point I just wasn't writing * * * other than [for] the people who were, you know, in their cycle of receiving the prescriptions from previously—previous exams.'' (Tr. 168.) Respondent also testified that the $200.00 fee associated with the first examination for controlled substance prescriptions was good for two additional follow-up visits for three months.[37] (Tr. 157, 176, 197.) Respondent elaborated on the purpose of the additional examinations: ''I wanted to see how they responded to the medication and how their condition had changed in any way. And of course, I thought it was necessary to do an exam before I could prescribe the medication.'' (Tr. 176.)

While Respondent's testimony that he was no longer writing controlled substance prescriptions for new patients as of September 22, 2011 may be accurate, his assertion that he was only writing prescriptions for patients ''in their cycle of receiving'' prescriptions is wholly at odds with his prescribing practices for Officers Melton and Knights. In the case of Officer Knights, Respondent concluded the visit with a statement that ''we will see you in another year.'' (Tr. 140; Gov't Ex. 2, at 6.) No follow-up appointment was scheduled nor is one indicated in the patient chart. (Gov't Ex. 8.) Contrary to Respondent's testimony, the evidence clearly indicates no intention to follow-up with Officer Knights during the three-month period after the initial visit.

Respondent's prescribing practice with regard to Officer Melton is similar. At no time during the visit did Respondent indicate when or if he would see Officer Melton again. (Tr. 117.) Nor is there any mention of follow-up in the patient chart. (Gov't Ex. 7.) In fact, when Officer Melton returned to Respondent's Arizona office on August 25, 2011, his request to see Respondent was refused.

In light of the foregoing, I do not find Respondent's testimony that he issued controlled substances to Officers Melton and Knights for a legitimate medical purpose and in the usual course of his medical practice remotely credible. Although the Government did not present any expert testimony pertaining to the undercover visits to AZ Go Green, other credible substantial evidence of record supports a finding by a preponderance of the evidence that Respondent's prescriptions for oxycodone and Xanax to Officer Melton on August 12, 2011, and his prescription of oxycodone to Officer Knights on September 1, 2011, were unlawful. 21 U.S.C. 841(a)(1); 21 CFR 1306.04(a); Ariz. Rev. Stat. § 32–1401(27)(a). *See Cynthia M. Cadet, M.D.,* 76 FR 19,450, 19,450 n.3 (DEA 2011) (explaining that in cases of particularly flagrant conduct by a registrant ''expert testimony adds little to the proof necessary to establish a violation of Federal law''); *see also Randall L. Wolff, M.D.,* 77 FR 5,106, 5,151–52 (DEA 2012) (giving little weight to the respondent's testimony that a prescription issued to an undercover agent was appropriate, despite the lack of medical expert testimony to the contrary, in light of other record evidence).[38]

(b) Lack of Patient Address on Controlled Substance Prescriptions

The Government alleged and presented evidence at hearing that Respondent failed to include patient addresses on controlled substance prescriptions in violation of 21 CFR 1306.05(a). (*See* ALJ Ex. 5, at 3.) Although the Government did not produce any testimonial evidence regarding this allegation, it introduced approximately thirty controlled substance prescriptions issued by Respondent between April 2011 and

[36] Tr. 114; Gov't Ex. 7, at 10.

[37] Respondent acknowledged during cross-examination that he never informed the undercover patients that the fees related to oxycodone and Xanax prescriptions included follow-up visits good for three months. (Tr. 197.)

[38] Respondent argues that the prescriptions presented by the Government, including those issued to the UCs, ''were written for legitimate medical purposes in the course of Respondent's practices, *the evidence is undisputed* that they were. The government has introduced not a scintilla of evidence to the contrary.'' (Resp't Br., at 13–14.) While I acknowledge Respondent's argument, I wholly reject it with regards to the prescriptions issued to the UCs. As noted above, I find Respondent's self-serving testimony on this matter incredible, and the evidence of record demonstrates that Respondent's prescribing to the UCs were transparent unlawful drug deals.

October 2011, to patients C.C., J.C., R.B., J.B., D.B., M.F., and L.H., as well as the UCs, that do not include the patients' addresses on the prescriptions. (Gov't Ex. 3.) Respondent did not dispute that he issued these prescriptions. (*See* Tr. 177–92.)

In light of the undisputed evidence of record, I find by a preponderance of the evidence that Respondent knowingly issued numerous prescriptions between April and October 2011 in violation of 21 CFR 1306.05(a) (''All prescriptions for controlled substances shall * * * bear the full name and address of the patient, * * *.''). *See Christopher E. Castle, M.D.,* 67 Fed. Reg. 71,196, 71,198 (DEA 2002).

(c) Respondent's Positive Prescribing Practices

Respondent presented evidence to demonstrate that in other cases, he acted in accord with the public interest standard. Respondent testified that he has not, to his knowledge, ever issued a prescription that was not for a legitimate medical purpose in the usual course of his practice. (Tr. 159.) He testified that he is ''sensitive to patients increasing their usage,'' and often denies prescribing the ''amount or frequency'' that a patient requests. (Tr. 157.) He also testified that he has declined to issue controlled substance prescriptions to many patients, and he has stopped prescribing to patients who were receiving medication from other physicians. (Tr. 158, 166.) In particular, Respondent testified that he denied issuing prescriptions for oxycodone to undercover patient L.V., and he stopped treating patient A.C. after learning that A.C. was ''possibly diverting'' his oxycodone. (Tr. 167–68, 172–74.)

I do not find Respondent's testimony to credibly demonstrate positive prescribing practices. With regards to patient L.V., Respondent testified that he did not issue a controlled substance prescription to her because at the time of her undercover visit, he was not writing prescriptions for people who were not already receiving controlled substances prescriptions. (Tr. 168.) His basis for denying her a controlled substance prescription was not related in any way to his medical evaluation of L.V., or his medical judgment that a controlled substance prescription would not be appropriate for that particular patient. Regarding patient A.C., I do not find Respondent's testimony credible in light of the fact that A.C.'s patient chart contains no documentation that Respondent was either concerned with A.C. diverting medication or that Respondent ultimately terminated treatment of A.C. (*See* Resp't Ex. 1.)

Even if Respondent's testimony was credible, it is, nonetheless, unavailing. Agency precedent has held that even a single act of intentional diversion is sufficient grounds upon which to revoke a registration,[39] and ''evidence that a practitioner has properly treated thousands of patients does not negate a prima facie showing that the practitioner has committed acts inconsistent with the public interest.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (DEA 2009).

2. Respondent's Record-Keeping Practices

Under Arizona law, unprofessional conduct includes ''[f]ailing or refusing to maintain adequate records on a patient.'' Ariz. Rev. Stat. § 32–1401(27)(e). ''Adequate records'' is further defined as follows:

> [L]egible medical records containing, at a minimum, sufficient information to identify the patient, support the diagnosis, justify the treatment, accurately document the results, indicate advice and cautionary warnings provided to the patient and provide sufficient information for another practitioner to assume continuity of the patient's care at any point in the course of treatment.

Ariz. Rev. Stat. § 32–1401(2).

Although the Government did not allege violations of federal record-keeping regulations, it did allege that Respondent violated state law by failing to maintain adequate patient records. In particular, the Government alleged that Respondent prescribed Schedule II and IV controlled substances to various employees, as well as the owner of AZ Go Green, between April 2011 and October 2011, but made ''no reference to the controlled substances prescribed were [sic] found in the medical files seized in violation of Arizona law.'' (ALJ Ex. 5, at 2.)

Specifically, Respondent prescribed controlled substances to M.F., L.H., J.C., and R.B., however, SA Lamkin testified that there was nothing contained within each patient's chart to show that Respondent issued those prescriptions. (Gov't Exs. 3–6, 9; Tr. 38–45, 52–54.) Respondent did not dispute issuing these prescriptions, but instead testified that he is not aware of any regulation prohibiting him from writing prescriptions to employees of the clinic. (Tr. 166.) Respondent further testified, consistent with SA Lamkin's testimony, that he maintained carbon copies of prescriptions for controlled substances that he wrote on a prescription pad. (Tr. 93; 170–71.) Respondent testified that his intent was that ''[e]ventually they would get to the file.'' (Tr. 171.)

The foregoing evidence arguably supports a finding that Respondent's failure to reference prescriptions for controlled substances in the patient files is contrary to applicable Arizona law. However, the plain language of the statute does not specifically require documentation of controlled substance prescriptions,[40] and the Government offered no authority to support a finding that a patient chart must contain a carbon copy of a prescription for controlled substance. Nor did the Government produce any medical expert testimony or other qualified opinion evidence to establish that Respondent's charts for patients M.F., L.H., J.C., and R.B., were inadequately maintained under applicable Arizona law. In fact, the patient chart for R.B. does include a prescribing history for oxycodone and alprazolam on various dates in 2011.[41] (Gov't Ex. 9, at 15.)

While I do not find Respondent's testimony that carbon copies of the prescriptions for controlled substances would ''eventually'' get to the patient file particularly credible, especially in light of his testimony as a whole, I nonetheless find that the Government has not sustained its burden to establish by a preponderance of the evidence that Respondent's record-keeping for Patients M.F., L.H., J.C., and R.B. violated applicable Arizona law.[42]

3. Respondent's Prescribing From an Unregistered Location

Federal law requires every person who dispenses (including prescribing) any controlled substance to obtain a registration from the Attorney General.[43] ''A separate registration shall be required at each principal place of business or professional practice where the applicant manufactures, distributes, or dispenses controlled substances or list I chemicals.[44] Federal regulations further mandate that a ''separate

[39] *See, e.g., Cynthia M. Cadet, M.D.,* 76 FR 19,450, 19,450 n.3 (DEA 2011).

[40] *See* Arizona Medical Board, *Guidelines for the Use of Controlled Substances for the Treatment of Chronic Pain* (available at *http://www.azmd.gov/Statutes-Rules/7_policy.aspx*) (stating that to maintain ''adequate records'' for a chronic pain patient, ''the documentation *should* include * * * [p]rescribed medications and treatment.'' (emphasis supplied)).

[41] While the prescribing history is not complete, notably, Respondent submits that none of the prescriptions were noted in R.B.'s patient file. (*See* Resp't Br., at 7–8.)

[42] Similarly, I do not find that the Government has adequately alleged or established a violation of Arizona law as it relates to Respondent's prescribing of controlled substances to ''employees,'' as compared to immediate family members. *See e.g.* Ariz. Rev. Stat. § 32–1401(13).

[43] 21 U.S.C. 822(a)(2).

[44] 21 U.S.C. 822(e).

registration is required for each principal place of business or professional practice at one general location where controlled substances are manufactured, distributed, imported, exported, or dispensed by a person.'' [45]

Applicable regulations exempt certain locations from the requirement of a separate registration to include ''a practitioner (who is registered at another location in the same state or jurisdiction of the United States) where controlled substances are prescribed but neither administered or dispensed as a regular part of the professional practice of the practitioner at such office * * *.''[46] On December 1, 2006, DEA amended its registration regulations to make it clear that when an individual practitioner practices in more than one state, the practitioner must obtain a separate DEA registration for each state. *Clarification of Registration Requirements for Individual Practitioners,* 71 FR 69,478 (DEA 2006.) The amended regulation makes clear that the secondary location exemption is limited to ''location[s] within the same State in which the practitioner maintains his/her registration.'' *Id.* at 69,479.

Additionally, Arizona law requires that ''[e]very person who * * * prescribes * * * any controlled substance within this state * * * *must* first * * * [b]e a registrant under the federal controlled substances act (Pub. L. 91–513; 84 Stat. 1242; 21 United States Code section 801 et seq.).'' Ariz. Rev. Stat. Ann. § 36–2522(A)(2) (emphasis supplied).

The evidence of record establishes that Respondent is licensed to practice medicine in Arizona and California, and his DEA registered practice address is 8466 Santa Monica Boulevard, West Hollywood, California 90069. (Gov't Ex. 1; *see also* Tr. 28–29, 154.) From April 2011 until December 2011, Respondent practiced at AZ Go Green, located at 325 East Southern Avenue, Suite 120, Tempe, Arizona 85282. (Tr. 154–55; *see* Gov't Ex. 3.) Respondent admits that he did not obtain a DEA registration for AZ Go Green, or any other Arizona practice location. (Tr. 165.)

Despite not having a DEA registration in the State of Arizona, SA Lamkin testified that the CSPMP showed that Respondent issued controlled substance prescriptions to patients in Arizona.[47] (Tr. 28–33.) Specifically, Respondent issued at least twenty-three controlled substance prescriptions between June 2011 and October 2011 while practicing at AZ Go Green in Arizona to patients M.F., L.H., R.B., J.C., C.C., J.B. and D.B., as well as to the UCs. (*See* Gov't Ex. 3, at 1–11, 16–20, 23–32.) Additionally, from April 2011 to May 2011, while Respondent was practicing at AZ Go Green in Arizona, he issued at least seven prescriptions to patients J.C., J.B., and R.B. using a prescription pad that listed an unregistered California address: 1017 North La Cienega Boulevard, Suite 110, West Hollywood, California 90069. (*See* Gov't Ex. 3, at 12–15, 17–18, 21–22; Tr. 28–29, 30, 154–55.) [48]

Respondent testified in relevant part that he never registered his Arizona practice location with DEA, explaining that in his over forty years of practice, he ''had never heard that that was a requirement.'' (Tr. 165.) Respondent elaborated: ''I mean, just my common sense, I'm wrong of course, but my common sense is, it's a federal drug license. So why shouldn't it be transferable from state-to-state?'' (*Id.*) As with other areas of Respondent's testimony, I do not find his testimony that he had never heard of the requirement credible. For example, a review of Respondent's DEA COR, issued on July 21, 2010, bearing a registration address in West Hollywood, California, states in bold print: ''THIS CERTIFICATE IS NOT TRANSFERABLE ON CHANGE OF OWNERSHIP, CONTROL, LOCATION, OR BUSINESS ACTIVITY, AND IS NOT VALID AFTER THE EXPIRATION DATE.'' (Gov't Ex. 1.)

Aside from the statutory and regulatory notice, Respondent was clearly on actual notice that his DEA registration was not transferable to an Arizona location.[49] Thus, I find by substantial evidence that Respondent knowingly issued prescriptions for controlled substances from an unregistered practice location on numerous occasions between April and October 2011 in violation of applicable state and federal law. 21 U.S.C. 822 (a)(2), (e); 21 CFR 1301.12 (b)(3); Ariz. Rev. Stat. Ann. § 36–2522(A)(2).

Based upon the foregoing, I find the Government has established by a preponderance of the evidence under Factors Two and Four that Respondent's prescribing practices and compliance with applicable state and federal law from April 2011 until October 2011 was inconsistent with the public interest. This weighs heavily in favor of a finding that Respondent's continued registration would be inconsistent with the public interest.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

Under Factor Five, the Administrator is authorized to consider ''other conduct which may threaten the public health and safety.'' 5 U.S.C. 823(f)(5). The Agency has accordingly held that ''where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his or her actions and demonstrate that he or she will not engage in future misconduct. *Patrick W. Stodola,* 74 FR 20,727, 20,734 (DEA 2009).[50] A ''[r]espondent's lack of candor and inconsistent explanations'' may serve as a basis for denial of a registration. *John Stanford Noell, M.D.,* 59 FR 47,359, 47,361 (DEA 1994). Additionally, ''[c]onsideration of the deterrent effect of a potential sanction is supported by the CSA's purpose of protecting the public interest.'' *Joseph Gaudio, M.D.,* 74 FR 10,083, 10,094 (DEA 2009).

Turning first to ''other conduct,'' the Government alleged and presented evidence related to the illegal distribution of marijuana at Respondent's Arizona practice location. The evidence included testimony from SA Lamkin that a former employee of AZ Go Green stated Respondent and the owner of the clinic ''were illegally distributing marijuana out of the clinic and prescriptions for oxycodone as well.'' (Tr. 23.) While the evidence of record corroborated the prescribing of oxycodone by Respondent, SA Lamkin's credible testimony at hearing does not support a finding that Respondent participated in the illegal distribution of marijuana.

SA Lamkin testified that Respondent ''took it a little farther'' than just

[45] 21 CFR 1301.12(a). The term dispense includes the delivery of a controlled substance by prescribing. 21 U.S.C. § 802(10).

[46] 21 CFR 1301.12(b)(3).

[47] Despite the allegation in the OSC/IS that Respondent ''authorized at least 190 prescriptions for controlled substances, more than 75 percent of which were for oxycodone,'' in Arizona, (ALJ Ex. 1, at 1; *see also* ALJ Ex. 5, at 2) there was no evidence produced at hearing to indicate the total number of controlled substance prescriptions Respondent issued in Arizona, or what percentage of those prescriptions pertained to oxycodone. *See Gregg & Son Distributors,* 74 FR 17,517, 17,517 n.1 (DEA 2009) (noting that it is the Government's obligation, as part of its burden of proof, ''to sift through the records and highlight that information which is probative of the issues in the proceeding'').

[48] There is evidence of record that Respondent prescribed controlled substances while in Arizona using his 1017 North La Cienega Boulevard address. (*Compare* Gov't Ex. 3, at 14, *with* Gov't Ex. 6, at 5.)

[49] Although Respondent stopped practicing in Arizona in December 2011, I do not find this to be sufficient mitigating evidence, particularly in light of the fact that the OSC/IS was issued in December 2011. (*See* ALJ Ex. 1, at 1.)

[50] *See also Hoxie* v. *DEA,* 419 F.3d 477, 484 (6th Cir. 2005) (decision to revoke registration ''consistent with the DEA's view of the importance of physician candor and cooperation.'')

certifying or diagnosing a patient as needing medical marijuana, but acknowledged a lack of investigative information that Respondent ''ever handed any marijuana to anybody for cash.'' (Tr. 77–78.) The weight of the evidence demonstrates that Respondent's activities, as it relates to marijuana, were primarily limited to medical marijuana recommendations. (*See, e.g.,* Gov't Ex. 2, at 3–4.)

Accordingly, I find that the Government has not established by a preponderance of the evidence that Respondent ''distributed marijuana[,] * * * aided and abetted the distribution of marijuana[,]'' or engaged in other related conduct. *Cf. Marion ''Molly'' Fry, M.D.,* 67 Fed. Reg. 78,015 (DEA 2002) (the respondent's registration not revoked '''merely because' she recommended marijuana to a patient 'based on a sincere medical judgment' '' but primarily because she distributed marijuana and aided and abetted in distribution of marijuana).

A remaining issue in this case is whether Respondent has accepted responsibility for his past misconduct, and demonstrated that he will not engage in future misconduct. The Government argues that there ''is nothing in the record that evinces Respondent's acceptance of responsibility * * *.'' (Gov't Br., at 18.) The Government also notes that Respondent lacked candor throughout his testimony, simply claiming that he was unaware of certain regulations or attempting to justify his prescribing practices by ''fabricat[ing] a story * * *.'' (*Id.* at 18–19.) Respondent does not specifically address acceptance of responsibility in his post-hearing brief, but he instead claims that the Government did not meet its burden of proof because he did not intentionally violate any state or federal regulations, and because ''the government's case rests entirely upon a web of lies spun by two undercover agents * * *.'' (Resp't Br., at 14–15.)

As discussed above, Respondent's testimony as a whole fails to adequately accept responsibility for his past misconduct, particularly with regard to his prescribing practices to the UCs. Under Agency precedent, in the absence of a credible explanation by the practitioner, as few as two incidents of diversion are sufficient to revoke a registration. *Alan H. Olefsky, M.D.,* 57 FR 928, 929 (DEA 1992). Respondent's lack of credibility during numerous material portions of his testimony weighs heavily against a finding that Respondent has accepted responsibility, let alone demonstrated that he will not engage in future misconduct. *See Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005) (DEA properly considers physician's candor, forthrightness in assisting investigation, and admitting of fault as important factors in determining whether registration is consistent with public interest).

I find by a preponderance of the evidence that Respondent has not accepted responsibility for his past misconduct, nor has he credibly demonstrated that he has learned from his past mistakes and would properly handle controlled substances in the future. An ''agency rationally may conclude that past performance is the best predictor of future performance.'' *Alra Labs, Inc.* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995). I find that Factor Five weighs heavily in favor of a finding that Respondent's registration would be inconsistent with the public interest.

VI. Conclusion and Recommendation

After balancing the foregoing public interest factors, I find that the Government has established by substantial evidence a prima facie case in support of revoking Respondent's DEA COR AE5382724, based on Factors Two, Four and Five of 21 U.S.C. 823(f). Once DEA has made its prima facie case for revocation or denial, the burden shifts to the respondent to show that, given the totality of the facts and circumstances in the record, revoking or denying the registration would not be appropriate. *See Morall* v. *DEA,* 412 F.3d 165, 174 (DC Cir. 2005); *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *United States Dep't of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 Fed. Reg. 72, 311 (DEA 1980).

The record reveals that Respondent has not sustained his burden in this regard. In fact, as discussed above, Respondent's testimony in numerous instances was not credible and reflected an overall lack of admission of past misconduct. Respondent's testimony was also effectively devoid of any credible demonstration that he has learned from his past mistakes and will not engage in future misconduct. In light of the foregoing, Respondent's evidence as a whole fails to sustain his burden to accept responsibility for his past misconduct and demonstrate that he will not engage in future misconduct.

I recommend revocation of Respondent's DEA COR AE5382724 as a practitioner, and denial of any pending applications for renewal or modification, on the grounds that Respondent's continued registration would be fully inconsistent with the public interest as that term is used in 21 U.S.C.§ 824(a)(4) and 823(f).

Dated: April 5, 2012

s/Timothy D. Wing
Administrative Law Judge

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–57]

Margy Temponeras, M.D.; Decision and Order

On December 15, 2011, Administrative Law Judge (ALJ) Timothy D. Wing issued the attached recommended decision. Neither party filed exceptions to the decision.

Having considered the entire record, I have decided to adopt the ALJ's recommended rulings, factual findings, and his legal conclusions, except as discussed below.[1] I further hold that the record establishes that Respondent engaged in acts which are sufficiently egregious to warrant the revocation of her registration and that she has not rebutted this conclusion.[2]

[1] All citations to the ALJ's recommend decision are to the slip opinion.

[2] In discussing the public interest factors of 21 U.S.C. 823(f), the ALJ ''conclude[d] that the reference in 21 U.S.C. 823(f)(5) to 'other conduct which may threaten public health and safety' would as a matter of statutory interpretation logically encompasses the factors listed in Section 824(a).'' ALJ at 19 n.24 (citing *Kuen H. Chen, M.D.,* 58 FR 65401, 65402 (1993)).

To be sure, the Agency decision in *Chen* stated that ''[t]he administrative law judge has concluded here that the reference in 21 U.S.C. 823(f)(5) to 'other conduct which may threaten the public health and safety' would as a matter of statutory interpretation logically encompass the bases listed in 21 U.S.C. 824(a).'' 58 FR at 65402. However, whether this constitutes a holding or merely dictum, *Chen* is totally devoid of any indication that the traditional tools of statutory construction (*i.e,* text, structure, statutory purpose, and legislative history) were employed in reaching this conclusion. Indeed, while factor five focuses on ''other conduct,'' several of the grounds for revocation are based on a registrant's status and do not require inquiry into the nature of the underlying conduct. *See* 21 U.S.C. 824(a)(3) (authorizing revocation where registrant ''has had his State license or registration suspended, revoked, or denied by competent State authority and is no longer authorized'' to engage in controlled substance activities or such sanction has been recommended by competent state authority); *id.* § 824(a)(5) (authorizing revocation where registrant has been excluded or is subject to exclusion from participating in federal healthcare programs under mandatory exclusion provisions). In addition, construing factor five in this manner renders superfluous factor one, which authorizes the Agency to consider the recommendation of the state licensing board or disciplinary authority, as well as the provision of section 823(f) stating that the ''[t]he Attorney General shall register practitioners * * * if the applicant is authorized to dispense * * * controlled substances under the laws of the State in which he practices.''

Continued

The ALJ's Footnote 9

Among the allegations raised by the Government were: (1) That Respondent had failed to include required information on various prescriptions (such as a patient's address) in violation of 21 CFR 1306.05(a); (2) that she failed to take initial and biennial inventories of the controlled substances she obtained and dispensed, in violation of 21 CFR 1304.11(b) & (c); and (3) that she failed to properly complete various order forms for schedule II controlled substances (DEA Form 222), in violation of 21 CFR 1305.13(e). ALJ Ex. 1, at 3 (Order to Show Cause). According to the record, the prescriptions were seized pursuant to a search warrant executed at a local pharmacy. Tr. 53–55. As for the inventories and DEA 222s, these were apparently seized during the execution of a search warrant at Respondent's registered location.

At the hearing, Respondent's counsel requested that the Government turn over the prescriptions, *see* Tr. 124–25; some fifty DEA Form 222s, *see id.* at 80–81, 353–54; and the daily inventories done by the employees of Respondent's dispensary. *Id.* at 423. The Government objected to each of these requests on the ground that there is no right to discovery in these proceedings. *See id.* at 80, 128, 423. The ALJ denied each of these requests, explaining in his opinion that the requests were ''untimely and unsupported by applicable legal authority.'' ALJ at 6 n.9 (citing *Roy E. Berkowitz,* 74 FR 36,578, 36,760 (2009) (holding that there is no ''general right to discovery under either the APA or DEA regulations'') (citing *Nicholas A. Sychak, d/b/a Medicap Pharmacy,* 65 FR 75,959. 75,961 (2000))).

While I adopt the ALJ's rulings, I do so only because the requests were untimely. In his Supplemental Pre-Hearing Ruling, which was issued on August 5, 2011, the ALJ made clear that ''[a]ny requests for subpoenas by either party are to be filed no later than 4:00 p.m. EDT on August 26, 2011.'' ALJ Ex. 8, at 7. Respondent did not comply with the ALJ's order and instead waited until the hearing to request the documents. Respondent, however, had notice of the Government's intent to litigate these issues from the outset of the proceeding; thus, she cannot claim that she was unaware until the hearing that she would need the various documents to respond to the allegations.[3] Because Respondent failed to timely request the documents, the ALJ properly denied those requests.[4]

The ALJ's Legal Conclusions Regarding Respondent's Operation of a Dispensary

The gravamen of the Government's case was Respondent's operation of a dispensary, which in the Government's view was illegal because Respondent dispensed thousands of controlled substance prescriptions which were issued by her father, who was not registered at the location of Respondent's practice, and Respondent does not hold a pharmacy registration under the Controlled Substances Act. *See* ALJ Ex. 1, at 1. The evidence showed that beginning in either November or December 2008, Respondent began dispensing controlled substances at her practice location and that during the period in which it operated, the dispensary filled 3,397 prescriptions for controlled substances issued by her father, most of which were for oxycodone, a schedule II narcotic, and Xanax, a schedule IV benzodiazepine. Tr. 210–11. In addition, the evidence showed that the prescriptions were filled and delivered to the patients by employees who were not licensed as pharmacists.

The ALJ concluded that Respondent violated Ohio law because she was not licensed as a Terminal Distributor of Dangerous Drugs and did not fall within the exemption provided under state law for ''a business practice with a sole shareholder who is a licensed health professional.'' *See* ALJ at 21 (citing Ohio Rev. Code Ann. § 4729.51(B)(1)(j)).[5] The ALJ based his reasoning in part on the evidence showing ''that Respondent established, solely owned, and operated two limited liability companies, Unique Pain Management ([her] medical practice) and Unique Relief ([her] dispensary), both of which are located at 418 Center Street, Wheelersburg, Ohio,'' and that the two entities were ''physically separate'' from each other, although Respondent could observe the dispensary through a system of security cameras and a monitor she maintained in her office. *Id.* The ALJ also noted that the dispensary also filled ''a significant

Finally, it should be noted that since shortly after the CSA's enactment and years before section 823(f) was amended to include the public interest factors, DEA ''has consistently held that where a registration can be revoked under section 824, it can, a fortiori, be denied under section 823 since the law would not require an agency to indulge in the useless act of granting a license on one day only to withdraw it on the next.'' *Serling Drug Co.* v. *Detroit Prescription Wholesaler, Inc.,* 40 FR 11918, 11919 (1975). *See also John R. Amato,* 40 FR 22852 (1975) (Denying application where practitioner's state license had been revoked, holding that section 823(f) ''must logically give the Administrator the authority to deny a registration if the practitioner is not authorized by the State to dispense controlled substances. * * * To hold otherwise would mean that all applications would have to be granted only to be revoked the next day under 21 U.S.C. 824(a)(3). This [A]gency has consistently held that where a registration can be revoked under section 824, it can, a fortiori, be denied under section 823.'').

Indeed, no court has ever questioned the Agency's longstanding and consistent interpretation that it has authority to deny an application on any of the grounds set forth in section 824(a). *Cf. National Muffler Dealers Assn., Inc.,* v. *United States,* 440 U.S. 472,477 (2011) (''A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.''); *EEOC v. Associated Dry Goods Corp.,* 449 U.S. 590, 600 n.17 (1981) (''a contemporaneous construction deserves special deference when it has remained consistent over a long period of time'').

[3] Moreover, having reviewed the record, it contains substantial evidence (as the ALJ found) to support each of these allegations.

[4] That there is no general right to discovery in these proceedings would not have barred a timely request for these documents. Respondent did not seek broad-based discovery of whatever the Government had obtained in the course of its investigation, but rather, specific documents which were clearly relevant and material to these three allegations because they are the very basis for the three allegations. Thus, if the requests had been timely, this case would have been governed by the principle that ''[d]iscovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.'' *McClellan* v. *Andrus,* 606 F.2d 1278, 1286 (DC Cir. 1979) (noting that report was subject to discovery in administrative proceeding because it was potentially ''uniquely relevant to appellant's case'' and ordering agency to turn over report to administrative tribunal for *in camera* review to determine relevancy and to allow Government to assert any claim of privilege). *See also Echostar Communications Corp.* v. *FCC,* 292 F.3d 749, 756 (DC Cir. 2002) (noting that ''McClelland was seeking a specific document 'uniquely relevant to [his] case' ''). *See also* 5 U.S.C. 555(d) (''Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought.''). *See also* 21 U.S.C. 875 & 876.

As the Agency has previous noted, under *Goldberg* v. *Kelly,* 397 U.S. 254, 270 (1970), '' 'where governmental action seriously injures an individual, and the reasonableness of the action depend on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.' '' *Beau Boshers, M.D.,* 76 FR 19401, 19403 (2011) (quoting 397 U.S. at 270). Moreover, the Supreme Court has further explained that '' 'the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.' '' *Id.* (quoting *Bowman Transp., Inc.,* v. *Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 288 n.4 (1974)). Where the Government alleges that one has failed to properly maintain or complete required records, it cannot seize those records and then refuse to turn them over in response to a timely request for them.

[5] The ALJ also noted that an Ohio Board of Pharmacy guidance document, which interprets this provision, states that ''if the business practice has a single prescriber * * * who is the sole shareholder, member, or owner of the practice, then this business practice is not required to be licensed as a Terminal Distributor of Dangerous Drugs with the Ohio Board of Pharmacy. Previously, this exemption was only for a prescriber who practices as a Sole Proprietor.'' ALJ at 21 (quoting Ohio State Board of Pharmacy, *Licensing Issues For Prescribers—Updated* (July 2008)).

portion'' of the prescriptions issued by Respondent's father. *Id.* at 22.

Continuing, the ALJ reasoned that:

> [t]o the extent Ohio law permits a sole practitioner to dispense or personally furnish controlled substances directly to a patient without a Terminal Distributor license, Respondent's dispensing practices were well outside of those parameters. Respondent established a distinctly separate legal entity to fill prescriptions that was physically separate from Respondent's medical office. Furthermore, Respondent's dispensary was not limited to filling prescriptions issued only by Respondent, but also routinely filled prescriptions issued by Respondent's father, notwithstanding the fact that Respondent did not have a Terminal Distributor license as required by state law.

Id. (citing Ohio Rev. Code Ann. §§ 4729.51(B)(1)(j) & 4729.551).

However, I need not decide whether under Ohio law, Respondent's creation of ''a distinctly separately legal entity to fill prescriptions,'' *id.,* required her to hold a Terminal Distributor license, because the Government did not raise this issue in either the Order to Show Cause or its pre-hearing statements. Nor are the few fragments of testimony regarding this license (which primarily involved the Board of Pharmacy Compliance Agent's statements regarding the reason for his February 2011 visit to the dispensary) sufficient to conclude that the parties litigated the issue by implied consent. Indeed, any such conclusion is belied by the fact that when Respondent's counsel attempted to question the Board's Compliance Agent about whether a Board employee had told Respondent's staff that she did not need to have a Terminal Distributor's License, the Government objected that the questions were outside the scope of direct examination as well as irrelevant and the ALJ sustained the objections.[6] Tr. 345–47.

Under these circumstances, it is clear that the issue was not ''fairly and fully litigated at [the] hearing'' and therefore cannot be the basis for a sanction. *Yellow Freight System, Inc.,* v. *Martin,* 954 F.2d 353, 358 (6th Cir. 1992). As the Sixth Circuit further explained:

> [A]n agency may not base its decision upon an issue the parties tried inadvertently. Implied consent is not established merely because one party introduced evidence relevant to an unpleaded issue and the opposing party failed to object to its introduction. It must appear that the parties understood the evidence to be aimed at the unpleaded issue.

Id. (citing *MBI Motor Co., Inc.* v. *Lotus/East, Inc.,* 506 F.2d 709, 711 (6th Cir. 1974)).

Moreover, ''where the Government's case 'focus[es] on another issue and [the] evidence of [an] uncharged violation [is] ''at most incidental,' '' the Government has not satisfied its constitutional obligation to provide a full and fair opportunity to litigate the issue and it cannot rely on the incidental issue as a basis for imposing a sanction.'' *CBS Wholesale Distributors,* 74 FR 36746, 36750 (2009) (quoting *Pergament United Sales, Inc.,* v. *NLRB,* 920 F.2d 130, 136 (2d Cir.1990) (quoting *NLRB* v. *Majestic Weaving Co.,* 355 F.2d 854, 861–62 (2d Cir. 1966))). Thus, because the issue was not properly raised and the evidence was at most incidental, I reject the ALJ's legal conclusion (and his discussion of Ohio law) that Respondent violated Ohio law because she failed to obtain an Ohio Terminal Distributor's license.

However, the ALJ also concluded that Respondent violated federal law because she ''dispensed or directed and authorized the dispensing of controlled substances from an unregistered location on numerous occasions between November 2008 and May 2011.'' ALJ at 24 (citing 21 U.S.C. 822(a)(2) & (e); *id.* § 841; 21 CFR 1306.06). The ALJ offered no further explanation for this conclusion. While I hold that the ALJ erred in concluding that she violated section 822(e), which requires ''[a] separate registration * * * at each principal place of business or professional practice where the applicant * * * dispenses controlled substances,'' 21 U.S.C. 822(e), the record clearly supports a finding that Respondent's dispensing activities violated the CSA.

The evidence of record shows that Respondent's dispensary was located at the same address as her medical practice. This was also the address at which Respondent was registered with the Agency.[7] *See* GX 1. Thus, Respondent did not violate the requirement that she obtain a separate registration for each principal place of professional practice where she dispensed controlled substances.

Rather, Respondent violated the CSA because she exceeded the authority granted by her registration when she dispensed controlled substance prescriptions issued by her father without holding a pharmacy registration. Under 21 U.S.C. 822(b), ''[p]ersons registered by the [Agency] under this subchapter to * * * dispense controlled substances * * * are authorized to possess * * * or dispense such substances * * * *to the extent authorized by their registration and in conformity with the other provisions of this subchapter.''* (emphasis added).

Under Federal law and DEA regulations, a registered physician is authorized to prescribe, administer or ''dispense directly'' to her patients in the course of professional practice. *See* 21 CFR 1306.11(b) (''An individual practitioner may administer or dispense directly a controlled substance listed in Schedule II in the course of his professional practice without a prescription. * * *''); *id.* § 1306.21(b) (''An individual practitioner may administer or dispense directly a controlled substance listed in Schedule III, IV, or V in the course of his/her professional practice without a prescription * * *.''). *See also* 21 U.S.C. 829 (''Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug under the Federal Food, Drug, and Cosmetic Act * * * may be dispensed without'' a prescription); *id.* § 829(b) (schedule III & IV).

In addition, DEA regulations provide that ''[a] prescription for a controlled substance may only be filled by a pharmacist, acting in the usual course of his professional practice and either registered individually or employed in a registered pharmacy, or registered institutional practitioner.'' 21 CFR 1306.06. Accordingly, Respondent, who did not hold a pharmacy registration, exceeded the authority of her registration because she authorized her employees to fill prescriptions issued by her father.[8] *See* 21 U.S.C. 822(b); *id.* § 841(a) (rendering unlawful the knowing or intentional dispensing of a controlled substance ''[e]xcept as authorized by this subchapter''). And in filling her father's prescriptions, she also violated 21 CFR 1306.06.

So too, Respondent violated Ohio law because she allowed unlicensed

[6] Subsequently, Respondent succeeded in eliciting testimony from one of her employees regarding a phone conversation he had with an employee of the pharmacy board regarding whether she was required to have a Terminal Distributor's license. Tr. 567. However, given that the Government had already argued that this line of questioning was irrelevant, which it was in light of the Government's failure to disclose its intent to litigate the issue in either the Show Cause Order or its pre-hearing statement, I conclude that this testimony is not enough to establish implied consent and that the issue is not properly before the Agency.

[7] There is no evidence that the dispensary had a separate suite number as might be the case in a large medical office building.

[8] The evidence also showed that Respondent's father did not hold a registration at the address of Respondent's dispensary.

personnel to fill the prescriptions and failed to personally furnish the controlled substances to her patients.[9] *See* ALJ at 23–24. As the ALJ found, Respondent used unlicensed personnel to fill the prescriptions which her dispensary delivered to her patients. While Ohio law exempts ''a prescriber,'' which includes a physician who is authorized to practice medicine and prescribe drugs, *see* Ohio Rev. Code Ann. § 4729.01(I), from the prohibition against the unauthorized practice of pharmacy under Ohio Rev. Code Ann. § 4729.28, the exemption requires that the physician ''personally furnish [ ] the [prescriber's] patients with drugs, within the prescriber's scope of professional practice.'' *Id.* § 4729.29(A)(1).[10] Moreover, ''[w]hen a prescriber personally furnishes drugs to a patient pursuant to [the exemption], the prescriber shall ensure that the drugs are labeled and packaged in accordance with state and federal drug laws and any rules and regulations adopted pursuant to those laws.'' *Id.* § 4729.29(B).

Respondent did present evidence that she had a security camera system and monitor in her office which allowed her to observe the operation of her dispensary. *See* Resp. Br. 3 (citing Tr. 400). However, given that she was actively seeing patients, her counsel's suggestion that she observed the actually delivery of the drugs to the patients, and thus was in compliance with Ohio's requirement that she ''personally furnish'' the drugs, is, as a factual matter, ludicrous. I thus hold that she violated Ohio law because she did not personally furnish the controlled substances to her patients.[11]

In her brief, Respondent further claims that she ''was ill-advised by counsel'' as to whether she needed a pharmacy registration ''and was specifically told she was doing everything correctly with respect to operating the dispensary.'' Resp. Br. 7. Respondent then maintains that ''[i]f a mistake was made it was not the Respondent's.'' *Id.* While the ALJ recounted the testimony of one Respondent's employees regarding the purported legal advice she received, *see* ALJ at 17 (citing Tr. 545, 559–60), he did not address Respondent's contention.

I do and I reject the contention. Even crediting the testimony of Respondent's employee that he had a discussion with an attorney regarding the dispensary's compliance with DEA regulations and was told that ''we were doing it perfectly,'' Tr. 545, the employee's testimony was exceedingly vague as to what issues were discussed and does not establish that Respondent discussed whether she needed to obtain a DEA pharmacy registration because she was filling the prescriptions issued by her father. Thus, even were the Agency to recognize a defense of good faith reliance on legal advice, the defense fails here because Respondent has not established that there was a ''full disclosure of all pertinent facts'' to the attorney and that her reliance was ''in good faith.'' *United States* v. *Lindo,* 18 F.3d 353, 356 (6th Cir.1994); *see also United States* v. *Painter,* 314 F.2d 939, 943 (4th Cir. 1963). Indeed, the contention is belied by the employee's testimony that he really ''didn't trust some of the opinions [he] was getting from'' the attorney and that upon looking at the DEA rules, he determined that Respondent's father had to be registered at her clinic if narcotics were stored there.[12] Tr. 559–60. Moreover, because Respondent invoked her Fifth Amendment privilege and declined to answer any questions (other than to state her name and that she had a registration as an individual practitioner), she cannot establish that she relied in good faith on the attorney's advice.

The Inventory Violations

The ALJ found that Respondent violated DEA regulations requiring that she take initial and biennial inventories. ALJ at 27–29. While I agree that the evidence establishes various violations, I find much of the ALJ's discussion of the evidence and his reasoning confusing.

The ALJ found that Respondent did not have an initial inventory as required by DEA regulations. *See* ALJ at 27 (citing 21 CFR 1304.11(b) & (c)). While I adopt this finding, I do so based solely on the evidence that when the Board of Pharmacy Compliance Agent conducted his February 9, 2011 inspection, Respondent's dispensary manager stated that ''one had not been done.'' Tr. 314. Under Federal law, ''every registrant * * * shall * * * as soon * * * as such registrant first engages in the * * * dispensing of controlled substances, and every second year thereafter, make a complete and accurate record of all stocks thereof on hand.'' 21 U.S.C. 827(a). Moreover, under DEA regulations, ''[i]n the event a person commences business with no controlled substances on hand, he/she shall record this fact as the initial inventory.'' 21 CFR 1304.11(b). While under DEA regulations, a registrant is required to keep, and make available for inspection, an inventory for only two years, *see* 21 U.S.C. 827(b), a period which, given the evidence that Respondent opened the dispensary in November or December 2008, would have lapsed at the time of the February 2011 inspection, the statement of the dispensary manager is sufficient to find that this violation occurred.

Moreover, by the date of the February 2011 Pharmacy Board inspection, Respondent was required to have performed a biennial inventory. *See id.* § 827(a); 21 CFR 1304.11(c). However, while Respondent had an ''on-hand inventory'' that ''was within the computer itself,'' Tr. 314, this did not comply with DEA regulations which require that an inventory ''be maintained in written, typewritten, or printed form.'' 21 CFR 1304.11(a). And while there is evidence showing that during the May 2011 search, documents that were labeled as ''biannual inventories'' were seized, the fact remains that Respondent was required to have on hand a proper biennial inventory at the time of the February 2011 inspection.[13]

[9] In contrast to the issue of whether Respondent was required to hold an Ohio Terminal Distributor's license, the Government provided notice of its intent to litigate the issue of Respondent's use of unlicensed individuals to fill controlled substance prescriptions. ALJ Ex. 5, at 5.

[10] This citation, as well as the citation to section 4729.29(B), are to the provisions which were in effect during the period at issue here.

[11] As for the other violations, I agree with the ALJ's conclusions that Respondent failed to properly complete DEA Form 222s for the schedule II controlled substances she purchased, and that the records were not kept separate from other records as required by DEA regulations. *See* ALJ at 25–26 (citations omitted). I also agree with the ALJ's conclusion that Respondent failed to include required information on some prescriptions. *See* ALJ at 30 (citing GX 7).

[12] Having concluded that the Government did not provide adequate notice of its intent to litigate the issue of whether Respondent was required to hold a Terminal Distributor's license, it is unnecessary to decide the issue of whether Respondent properly relied on the statement of an Ohio Pharmacy Board employee that Respondent did not need to hold this license. Tr. 548.

[13] Had Respondent produced at the February 2011 inspection an inventory which complied with 21 CFR 1304.11(a) & (c), I would not place any weight on the fact that the inventory was labeled as a ''biannual'' rather than ''biennial.''

The ALJ further noted that it was ''[o]f significance, [that] no invoices, DEA Form 222s, or dispensing logs were used to conduct the biennial inventory.'' ALJ at 28 (citing Tr. 480–82). However, while the CSA requires that a registrant retain its invoices, form 222s, as well as a dispensing log, for at least two years, *see* 21 U.S.C. 827(b), taking an inventory does not require doing anything more than counting the drugs on hand and making a record which includes the information required under 21 CFR 1304.11(e).

The ALJ further concluded that ''no compliant * * *tory was * * *the May 17, 2011 search.'' ALJ at 28. However, the DI who seized the inventories during the May 17, 2011 search did not offer any

Conclusion

Having adopted the ALJ's conclusion (as modified herein) that Respondent violated the CSA by dispensing thousands of controlled substance prescriptions issued by her father and thus acted outside of the authority granted by her registration, I conclude that this conduct is egregious and warrants the conclusion that she has committed acts which render her continued registration inconsistent with the public interest and is sufficient by itself to support the revocation of her registration. *See* 21 U.S.C. 824(a)(4). The additional violations established on this record—her failure to have inventories, failure to complete form 222s, failure to include required information on prescriptions, her commingling of schedule II records with other records, as well as her state law violations of failing to personally furnish the drugs to her patients—buttress this conclusion. Because I further adopt the ALJ's findings that Respondent has presented no evidence that she accepts responsibility for her misconduct, I will order that her registration be revoked and that any pending application be denied.[14]

Order

Pursuant to the authority vested in me by 21 U.S.C. 824(a)(4) and 28 CFR 0.100(b), I order that DEA Certificate of Registration BT5598214, issued to Margy Temponeras, M.D., be, and it hereby is, revoked. I further order that any pending application of Margy Temponeras, M.D., to renew or modify her registration, be, and it hereby is, denied. This Order is effective August 31, 2012.

Dated: July 24, 2012.

Michele M. Leonhart,

Administrator.

D. Linden Barber, Esq. & Frank Mann, Esq., for the Government.

Bradley Davis Barbin, Esq., for the Respondent.

Recommended Ruling, Findings of Fact, Conclusions of Law and Decision of the Administrative Law Judge

I. Introduction

Timothy D. Wing, Administrative Law Judge. This proceeding is an adjudication pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., to determine whether the Drug Enforcement Administration (DEA, Agency or Government) should revoke a physician's DEA Certificate of Registration (COR) as a practitioner pursuant to 21 U.S.C. 824(a)(4) and deny, pursuant to 21 U.S.C. 823(f), any pending applications for renewal or modification thereof and any application for a new COR. Without this registration, Margy Temponeras, M.D. (Respondent), of Wheelersburg, Ohio, will be unable to lawfully prescribe, dispense or otherwise handle controlled substances in the course of her practice.

On May 16, 2011, the Administrator, DEA, issued an Order to Show Cause and Immediate Suspension of Registration (OSC/IS), which was personally served upon Respondent on May 17, 2011.[1] The OSC/IS immediately suspended Respondent's DEA COR as a practitioner, and also provided notice to Respondent of an opportunity to show cause as to why the DEA should not revoke Respondent's COR, pursuant to 21 U.S.C. 824(a)(4), and deny, pursuant to 21 U.S.C. 823(f), any pending applications for renewal or modification thereof and any applications for a new COR, alleging that Respondent's continued registration is inconsistent with the public interest as that term is defined in 21 U.S.C. 823(f).

The OSC/IS alleged that Respondent is registered as a practitioner authorized to handle controlled substances in Schedules II through V under DEA COR BT5598214.

The OSC/IS further alleged in relevant part:[2]

That between approximately January 1, 2007 and November 3, 2009, Respondent made approximately 3,397 unauthorized distributions of controlled substances. These distributions from Respondent's registered location were purportedly based on prescriptions issued by Dr. John Temponeras, who is registered with DEA as a practitioner in Portsmouth, Ohio. Respondent is not registered with DEA as a pharmacy. All in violation of 21 U.S.C. 841 and 21 CFR 1306.06;

That Respondent failed to take an initial inventory and biennial inventories of the controlled substances in the dispensary that Respondent operated in violation of 21 CFR 1304.11(b) and (c);

That Respondent failed to make and keep complete and accurate records of the receipt of controlled substances by, among other things, failing to complete DEA Form 222 with the amount and date received of controlled substances in violation of 21 CFR 1305.13(e); and

That Respondent frequently issued prescriptions for controlled substances that did not contain all of the information required by 21 CFR 1306.05(a).[3]

Following prehearing procedures, a hearing was held in Cincinnati, Ohio between September 13, 2011, and September 14, 2011, with the Government and Respondent each represented by counsel. Both parties called witnesses to testify and both introduced documentary evidence. After the hearing, both parties filed proposed findings of fact, conclusions of law, and argument. All of the evidence and post-hearing submissions have been considered, and to the extent the parties' proposed findings of fact have been adopted, they are substantively incorporated into those set forth below.

II. Issue

Whether the record establishes that Respondent's DEA COR BT5598214 as a practitioner should be revoked and any pending applications for renewal or modification of that registration should be denied on the grounds that Respondent's continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 824(a)(4) and 823(f).

III. Evidence and Incorporated Findings of Fact[4]

I find, by a preponderance of the evidence, the following facts:

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testimony that the inventories were not compliant other than because they were not done within two years of the opening of the dispensary. Tr. 84. The ALJ further noted the testimony of one of Respondent's employees ''that the process to conduct a biennial inventory consisted of [her] husband using a computer printout while she physically counted the controlled substances, adding that she did not 'document anything' from the inventory.'' ALJ at 28 (quoting 481–82).

It should be noted that even if the counts matched the printout, at a minimum, the inventories would have been required to document whether they were done on the opening of business or on the closing of business. *See* 21 CFR 1304.11(a). However, because the inventories were not submitted into evidence, there is no basis for concluding that they did not contain the required information.

[14] The ALJ noted that Respondent did not present ''any evidence demonstrating that she will not engage in future misconduct.'' ALJ at 31. This is not entirely accurate as the record suggests that following the February 2011 visit of the Pharmacy Board's Compliance Agent, her employees did take inventories. However, Respondent did not put on any other evidence as to remedial measures and her failure to testify warrants, as the ALJ held, the adverse inference that she does not accept responsibility for her misconduct. *See id.* (citing cases).

[1] ALJ Exs. 1, 3.

[2] The Government represented prior to hearing that it intended to proceed against Respondent only with regard to allegations contained in numbered paragraphs two, eight, nine, and ten of the OSC/IS.

[3] The section requires in relevant part that ''[a]ll prescriptions for controlled substances shall * * * bear the full name and address of the patient * * * [and] directions for use * * *.''

[4] In addition to the evidence discussed in this Section, additional evidence and findings of fact are discussed in later Sections of this Recommended Decision.

A. The Government's Evidence

The Government's evidence included testimony from five witnesses: Respondent; DEA Diversion Investigator (DI) Christopher Kresnak (DI Kresnak); DI Paula Albert (DI Albert); Ohio State Board of Pharmacy Compliance Agent Joseph Kinneer (Agent Kinneer); and DI Stephanie Burkhart (DI Burkhart). In addition to testimonial evidence, the Government also introduced various documentary exhibits, to include: Respondent's COR record; [5] three DEA Form 222 purchaser records;[6] copies of prescriptions issued by Respondent between August and November 2006; [7] and a document reflecting standard procedures for Unique Pain Management.[8]

Respondent was called to testify but refused to answer any questions related to the relevant allegations in the OSC/IS by asserting her Fifth Amendment privilege. (Tr. 35–36; 41–42.)

DI Kresnak testified in substance that he has approximately eight years of experience with DEA as a DI. (Tr.45.) DI Kresnak testified that Respondent is registered with DEA as a practitioner under DEA COR BT5598214 with an expiration date of November 30, 2012, and a current status listed as ''under suspension.'' (Tr. 47; Gov't Ex. 1.) DI Kresnak further testified that Respondent has never held any other type of DEA registration, including a pharmacy registration. (Tr. 48.) Respondent has never been registered with the State of Ohio as a pharmacist and has never held a pharmacy license in Ohio. (*Id.*)

DI Kresnak next testified that Respondent owns and operates two limited liability companies–her medical practice, Unique Pain Management, and her dispensary, Unique Relief. (Tr. 48–49.) Both of Respondent's businesses are located in the same building at 418 Center Street, Wheelersburg, Ohio. (Tr. 49.) DI Kresnak testified that he was present inside both businesses on May 17, 2011, and he described the physical layout of the location to include Respondent's office on the far left hand corner from the entrance, with the ''dispensary* * * on the right-hand side of the building, * * *.'' (Tr. 50–51.) DI Kresnak testified that he interviewed Respondent on that same day, and in response to a question about why the dispensary was operating, Respondent ''said words to the effect that many of the local pharmacies stopped filling for her prescriptions and that she wanted to provide a low-cost convenience for her patients.'' (Tr. 52.)

DI Kresnak also testified that pursuant to a search warrant at Prime Pharmacy Group d/b/a Medi-Mart Pharmacy, in Portsmouth, Ohio, he obtained prescriptions covering the time period 2005 to 2006 for Schedule III through V controlled substances, and identified twelve controlled substance prescriptions issued by Respondent. (Tr. 53, 54–55.) The twelve prescriptions related to more than one patient, but DI Kresnak did not know how many patients exactly, nor could he recall any of the patients' names.[9] (Tr. 118, 188.) DI Kresnak testified that of the twelve prescriptions, only one was compliant with DEA regulations. Eleven were noncompliant because they lacked a patient address. (Tr. 54; 123–24.)

DI Kresnak next explained that DEA Form 222s are used by industry to order Schedule II controlled substances, and are issued to registrants by DEA. (Tr. 55.) DI Kresnak testified that a DEA Form 222 contains, among other information, the name and address of a registrant, ''what the registrant is authorized to order,'' and a serial number. (Tr. 56.) A DEA Form 222 consists of three copies: the ''brown sheet,'' which goes to the distributor; a carbonated second ''green'' copy, which also goes to the distributor; and a ''blue'' copy, which is maintained at the registrant or practitioner's registered address when the registrant or practitioner orders Schedule II controlled substances. (Tr. 56–57.) DI Kresnak further explained that the distributor completes relevant information on the Form 222 at time of shipping, to include the National Drug Code (NDC) and number of controlled substances shipped. (Tr. 58.) The distributor then sends the green carbonated copy to the DEA office where the distributor is located. (Tr. 58.)

DI Kresnak testified that he reviewed approximately fifty DEA Form 222s seized from Respondent's dispensary, and on approximately six to ten forms he observed various discrepancies:

> Many of them weren't filled out properly, missing information. Several of them didn't even indicate whether a shipment had been received. One * * * just doesn't reflect anything. There were several, maybe seven lines filled out on it and there's nothing indicating any product was received.

(Tr. 60.) DI Kresnak compared the green copies of DEA Form 222s sent to DEA by the distributor with those seized from Respondent's dispensary, and testified that he recalled a specific discrepancy:

> I observed one particular 222 * * * where the distributor indicated that they [sic] did not fill the order. The blue copy of the 222, which is found in the dispensary, which is required by the Code to fill out how many is [sic] received, indicated that there were 60 received. There were 60 ordered. The blue copy was indicating 60 received, but the distributor's copy to DEA indicate[d] they did not fill that order.

(Tr. 63.) DI Kresnak further testified that he reviewed data from DEA's Automated Reports and Consolidated Order System (ARCOS),[10] which confirmed that the information reflected on the distributor's DEA Form 222 was accurate. (Tr. 63–64.)

DI Kresnak also testified about three specific DEA Form 222s seized from Respondent's dispensary on May 17, 2011, which he found to be deficient. (Tr. 64–65; Gov't Ex. 6.) DI Kresnak testified that one was deficient ''[i]f these drugs were received * * * [because] a date received is omitted.'' (Tr. 65; Gov't Ex. 6, at 1.) A second form is deficient because the ''number of packages received is omitted and the date received is omitted.'' (Tr. 66; Gov't Ex. 6, at 2.) A third form is deficient because the ''number of packages is omitted on both items and the date received.'' (Tr. 66; Gov't Ex. 3, at 3.) DI Kresnak further testified somewhat tepidly with regard to whether the controlled substances were actually shipped to Respondent, that he ''believed they were'' further explaining that he believed ''we found

[5] Gov't Ex. 1.

[6] Gov't Ex. 6.

[7] Gov't Ex. 7.

[8] Gov't Ex. 8.

[9] None of the twelve prescriptions were produced by the Government at hearing, and DI Kresnak was uncertain if any of the twelve were the same as those contained in Government Exhibit 7. (Tr. 118–20.) Respondent requested production of the records at hearing and the Government objected, arguing in substance the lack of legal authority for such a discovery request. I denied Respondent's discovery request since it was untimely and unsupported by applicable legal authority. There is no ''general right to discovery under either the APA or DEA regulations, but rather only a limited right to receive in advance of hearing the documentary evidence and summaries of the testimony which the Government intends to rely upon.'' *Roy E. Berkowitz, M.D.,* 74 FR 36,758, 36,760 (DEA 2009) (citing *Nicholas A. Sychak, d/b/a Medicap Pharmacy,* 65 FR 75,959, 75,961 (DEA 2000). Respondent made various untimely requests for discovery throughout hearing with regard to other documents, such as original Form 222s, which were denied for similar reasons.

[10] ''Registrants are also required to report records of sales or acquisitions of controlled substances in Schedules I and II, of narcotic controlled substances listed in Schedules III, IV and V, and of psychotropic controlled substances listed in Schedules III and IV with the DEA's Automation of Reports and Consolidated Orders System (ARCOS). 21 CFR 1304.33(c); 21 U.S.C. [§] 827(d). These reports must be filed every quarter not later than the 15th day of the month succeeding the quarter for which it is submitted. 21 CFR 1304.33(b).'' *Easy Returns Worldwide, Inc.* v. *United States,* 266 F. Supp. 2d 1014, 1016 (E.D. Mo. 2003).

documentation that these were shipped, yes.'' [11] (Tr. 82.)

DI Kresnak testified that during the first two years that Respondent operated her dispensary, the majority of Respondent's ordering was completed through an electronic DEA controlled substance ordering system (CSOS), rather than using paper Form 222s. (Tr. 195–96.)[12]

DI Kresnak next testified that during the search of Respondent's dispensary, documents related to inventories were found, to include one marked opening inventory, which ''indicated that the date that they opened the dispensary there was a zero inventory.'' (Tr. 83.) ''No biennial inventory was ever found.'' (Tr. 84.) Rather, several documents entitled ''Biannual Inventories'' were found in a folder marked ''DEA inventories.'' (Tr. 144.) DI Kresnak testified that Respondent's dispensary opened ''sometime in November 2008, maybe December 2008.'' (Tr. 99.) Although DI Kresnak could not recall all of the details, he testified that the inventories appeared to be computer generated, listing the drugs on the far left and dollar values in another column. DI Kresnak did not know what the dollar values represented. He also testified that each inventory was marked ''biannual,'' contained a date, and appeared to be signed by Respondent. (Tr. 136–137.) DI Kresnak testified that as a result of his investigation he determined that ''there was one particular oxycodone product that 100% was missing for the month of April, 2011.'' (Tr. 150.) DI Kresnak further explained that he does not ''recall the number of dosages * * * missing * * * without referring to the audit.'' [13] (Tr. 153.) DI Kresnak testified that he has not seen any inventories in electronic format seized from Respondent, but noted that he has not as yet looked for any. (Tr. 173.)

DI Kresnak next testified that Respondent and Respondent's father, Dr. John Temponeras, were the only practitioners who issued prescriptions for controlled substances in Schedules II through V that were filled at Respondent's dispensary. (Tr. 101.) DI Kresnak further testified that Dr. John Temponeras had previously been a DEA registrant with a registered location in Portsmouth, Ohio. DI Kresnak interviewed Dr. John Temponeras regarding his application for a DEA registration at Respondent's Center Street location in Wheelersburg, Ohio, and learned ''he had written prescriptions [for controlled substances] that were filled at the dispensary, and he basically said he was needing a DEA registration at that location because his daughter said he needed one there.'' (Tr. 102.)

DI Albert testified in substance that she has eleven years of experience with DEA as a diversion investigator. DI Albert testified that she was present at Respondent's business location in Wheelersburg, Ohio, on May 17, 2011, assisting in the execution of a federal search warrant and service of the OSC/IS. (Tr. 202.) DI Albert described the location as ''a medical clinic and a—I guess, a dispensary.'' (Tr. 202.) By dispensary, DI Albert testified that she meant ''[t]hey filled prescriptions and dispense[d] medication to patients.'' (*Id.*) The location was described as having the doctor's office on the left of the building, and on the right after passing through a door there was another lobby and ''[i]nside that lobby there was a set of windows with thick glass, and behind those windows were [sic] the dispensary.'' (Tr. 203.)

DI Albert further testified that Darryl Leadingham (Mr. Leadingham) and Sue Leadingham (Mrs. Leadingham) were working in the dispensary on May 17, 2011. DI Albert interviewed Mr. Leadingham regarding his responsibilities in the pharmacy, and learned that ''he was responsible for the computer system, the security system in the whole building, the cameras. * * * [H]e ordered the controlled substances that were dispensed out of the dispensary, and he also worked as far as entering patient information into the computer system, printing labels, dispensing the controlled substances, billing patients' insurance, * * *.'' (Tr. 203–04.) In terms of dispensing, Mr. Leadingham indicated that patients would bring a physical hard copy prescription that either Respondent or Respondent's father had issued with an original signature. The information was entered in the computer system which would generate three labels, the first for the prescription bottle, second for the original hard copy prescriptions, and third on the outside bag containing all of the bottles of medicine distributed. (Tr. 208.)

DI Albert testified that Mrs. Leadingham similarly stated that ''she was there to dispense the medication and put the information, print the labels and bill the insurance or accept cash.'' (Tr. 209.) DI Albert further testified that both Mr. Leadingham and Mrs. Leadingham stated during the May 17, 2011 interview:

> Dr. John Temponeras had filled in and had seen [Respondent's] patients and that there were prescriptions that patients brought to the dispensary with [Dr. John Temponeras'] name on them. And Darryl Leadingham told me that at some point he figured out that it was no longer—or that they shouldn't be doing that and that he had told [Respondent] that her father needed to get his own DEA registration for that location.

(Tr. 213.)

DI Albert testified that based on information contained within the Ohio Automated Rx Reporting System (OARRS),[14] the only prescriptions filled at the dispensary were issued by Respondent or Respondent's father. (Tr. 209.) DI Albert testified that OARRS data reflected that from November or December 2008 until 2011, Respondent's dispensary filled approximately 3,397 prescriptions issued by Respondent's father for controlled substances, ''mostly oxycodone products and Xanax or the Schedule IV.'' (Tr. 210–11.) Regarding prescriptions issued by Respondent, DI Albert testified in April 2010 alone, Respondent ''filled 500 prescriptions at her dispensary, which came out to—after I compared that to other pharmacies, it was over eighty-three percent of her prescriptions were filled by herself.'' (Tr. 211.) DI Albert did not know why eighty-three percent of the patients chose to go to Respondent's dispensary and no cost analysis of pharmacies in the region was conducted by DI Albert. (Tr. 231.)

DI Albert next testified that as part of her investigation of Respondent, she reviewed ARCOS system data pertaining to ''all the oxycodone products [Respondent] ordered'' from the opening of the dispensary in 2008 until her last order in May 2011, finding a total of ''approximately 1.6 million dosage units'' of oxycodone, a Schedule II controlled substance. (Tr. 206–07.) DI Albert testified that she recalled the presence of various drugs at the dispensary on May 17, 2011, described as ''mostly controlled substances, oxycodone, OxyContin, benzos,[15] Xanax, Valium.'' (Tr. 204.) DI Albert believed there may have been a small quantity of hydrocodone and ''a couple

[11] DI Kresnak's testimony was further qualified by his statement that ''[w]e found invoices that reflect some of these.'' (Tr. 83.) Additionally, DI Kresnak explained that ARCOS reports indicated shipments of the relevant controlled substances to Respondent. (Tr. 134–36.)

[12] 21 CFR1300.03. DI Kresnak explained that CSOS is only for Schedule II controlled substances and is ''used to eliminate paper flow.'' (Tr. 194.)

[13] No audit was produced at hearing.

[14] DI Albert testified that OARRS is a prescription monitoring system run by the Ohio Board of Pharmacy based on information submitted by pharmacies. (Tr. 209–10.) *See also* Ohio Admin. Code R. 4729–37–03 (2011).

[15] DI Albert explained her use of the term ''benzos'' was short-hand for benzodiazepines, a Schedule IV controlled substance. (Tr. 205.)

of other Schedule II substances, such as morphine.'' (Tr. 204–05.)

DI Albert further testified that she has reviewed the originals of the DEA Form 222s reflected in Government Exhibit 6, which were seized from Respondent's dispensary on May 17, 2011, and did not remove any attachments from the originals nor was she aware of any other DEA personnel removing attachments. (Tr. 215.) DI Albert testified that she reviewed and compared distributor copies of the Form 222s with copies retained by Respondent, and found discrepancies between what the distributors indicated they shipped and what Respondent reported receiving. (Tr. 216–17.) DI Albert elaborated:

> I believe there were times where … on the distributor's copy, or the one that [the distributor] provide[d] to DEA, it indicates that they actually shipped a different quantity or they voided out the line, where, in fact, the copy that we found in the dispensary will show that they received a quantity and the distributor says that [the distributor] voided it.

(Tr. 218; Gov't Ex. 6.)

Finally, DI Albert testified that she reviewed various prescriptions for controlled substances issued to Patient [IM] by Respondent, dated between August and November 2006, and determined that the prescriptions were missing the address of the patient, as required by regulation. (Tr. 220–21, 249–50; Gov't Ex. 7.)

Agent Kinneer testified that he has been employed with the Ohio Board of Pharmacy as a Compliance Agent for approximately seventeen years.[16] Agent Kinneer further testified that he was familiar with Respondent's professional practice, explaining that in December 2010, Respondent applied for a Terminal Distributor license,[17] which would allow for the purchase of prescription drugs and controlled substances. (Tr. 301–02.)

Agent Kinneer next testified that based on Respondent's application for a Terminal Distributor license, he conducted an inspection of Respondent's location on February 9, 2011. (Tr. 303.) As a result of the inspection, Agent Kinneer determined that the dispensary was operated by Mr. Leadingham, who had been introduced as the dispensary manager. (Tr. 307.) Agent Kinneer further determined that for the past two years, Respondent had no role in the physical delivery of controlled substances to her patients. (Tr. 307, 334.)

Agent Kinneer explained that during his inspection, he observed a dispensing practice that failed to properly document the filling of prescriptions. ''What would happen is, you had one prescription that had all three labels on it * * * [a]nd then the other two had no labels at all. So there was no way to document that those prescriptions had actually been filled.'' (Tr. 313.)

Agent Kinneer testified that he requested an opening inventory and none was produced. Instead, Mr. Leadingham stated that ''one had not been done.'' (Tr. 314.) Mr. Leadingham was also unable to produce a biennial inventory. (Tr. 315.) Agent Kinneer further testified that he conducted a series of audits of individual drugs using a running inventory from the computer in Respondent's dispensary. (Tr. 316–17.) He determined a slight overage for two controlled substances and a shortage of two other controlled substances. (Tr. 317.) Agent Kinneer testified that ''our demonstration was to show Mr. Leadingham that you cannot rely on a running inventory. There actually needs to be a hard copy. And the purpose of it was to show that those things can be off.'' (Tr. 317.) The running audit also revealed that ''[t]here was drugs [sic] that were dead on.'' (Tr. 318.) Agent Kinneer further testified that there was no way to tell whether Respondent's dispensary had significant shortages or overages, since the absence of a starting point for the audit precluded a true inventory of controlled substances within Respondent's dispensary.

> Remember, this [running inventory] was just a tool to show Darryl Leadingham and Sue Leadingham that they cannot rely on the running inventory as a true inventory, that they needed an opening inventory as well as their DEA inventory. In order for me to do an audit I need a starting point. And that's what I am trying to express to them.

(Tr. 373–75.)

Agent Kinneer also reviewed DEA Form 222s during his inspection, specifically requesting the production of ''their blue copy where they actually receipted the medication.'' (Tr. 318.) Based on a review of a two to three inch stack of DEA Form 222s on the counter at the dispensary, Agent Kinneer testified that none had been ''receipted,'' explaining that none ''had a date or quantity on a filled-out line for those individual drugs that had been ordered and received.'' (Tr. 319, 362–63.) A review of DEA Form 222s kept in a vault within the dispensary also revealed that none had been receipted.[18] Agent Kinneer testified that Mr. Leadingham was unaware of the requirement to do so, instead indicating ''that he had been trained just to * * * do the invoices * * * [and] documenting it in the computer that they had received them.'' (Tr. 320.) Agent Kinneer further testified that he did not recall seeing invoices attached to the DEA Form 222s that he looked at, noting that it did not matter since that is not the requirement. (Tr. 320–21.) Agent Kinneer does not recall seeing staple marks on the DEA Form 222s that he reviewed, but explained he was not looking for staple marks. (Tr. 348.)

Agent Kinneer testified that controlled substances were ordered by the dispensary manager, Mr. Leadingham, using Respondent's DEA registration, but there was no indication that Respondent was active or accountable for the accuracy and completeness of the dispensary's records. (Tr. 321–22.) Agent Kinneer further testified that at the completion of the inspection, he informed Mr. Leadingham that ''from what we were witnessing he was running a pharmacy, which was illegal.'' (Tr. 323.) Agent Kinneer testified that Respondent's dispensary was not registered with the Ohio Board of Pharmacy as a pharmacy, nor were any personnel working in the dispensary licensed as pharmacists in Ohio. (Tr. 324–25.)

DI Burkhart was called in rebuttal by the Government, and testified in substance that she participated in the execution of a federal search warrant at Respondent's location on May 17, 2011, to include seizing the blue copies of DEA Form 222s. (Tr. 600–01.) Specifically, DI Burkhart testified that she seized and reviewed approximately fifty DEA Form 222s and only two blue copies had an invoice stapled to the back of them. (Tr. 601.) The fifty seized DEA Form 222s included the three reflected in Government Exhibit 6, which did not have any documents or invoices stapled to them at the time they were seized. (*Id.*) DI Burkhart further testified that she seized the DEA Form 222s from within the dispensary vault and in other places in the dispensary. (Tr. 607–08.)

I find the foregoing witness testimony fully credible in that each of the witnesses presented testimony that was internally consistent and evidenced a

[16] Agent Kinneer's duties include inspection of entities licensed by the Ohio Board of Pharmacy, to include physicians, pharmacies, pharmacists, dentists, and paramedics. Agent Kinneer's duties further include investigation of drug diversion. (Tr. 300.)

[17] The license was for Respondent's dispensary, Unique Relief, located within the same building as Respondent's medical practice. (Tr. 308.)

[18] Agent Kinneer testified that his inspection did not focus on how many dispensary orders were electronic as compared with orders using hand-written Form 222's with an accompanying blue copy. ''We were solely looking at the blue copies.'' (Tr. 360.)

reasonable level of memory for past events. Each witness presented testimony in a professional manner and the material portions of the testimony were consistent with other credible evidence of record, as discussed more fully below.

C. Respondent's Evidence

Respondent's evidence included testimony from two witnesses: Mrs. Leadingham and Mr. Leadingham. Respondent also introduced a letter dated April 27, 2010, from the Director of the Ohio Department of Health.[19] Mrs. Leadingham testified in substance as to her background and experience, to include having worked for approximately five years at an assisted living center before beginning work in Respondent's dispensary in or about November 2008. (Tr. 385, 390.) Prior to working for Respondent, Mrs. Leadingham had no prior working experience dispensing drugs at a pharmacy. (Tr. 457.) Mrs. Leadingham testified that when hired in November 2008, she worked for Ken Days (Mr. Days) in Respondent's dispensary. (Tr. 390–91.) Mrs. Leadingham described her duties to include counting pills, labeling medicine bottles, helping with inventory, filing, and handling invoices and DEA Form 222s. (Tr. 391.) Mrs. Leadingham further testified that she loved working for Respondent, who she described as caring and ''the best employer I have ever had.'' (*Id.*) Mrs. Leadingham explained that Respondent's dispensary operated like a pharmacy to include the use of pharmacy software called Rx30, as well as printed prescriptions, labeled drugs, and the filling of prescriptions, all consistent with that of a pharmacy. (Tr. 473.) Mrs. Leadingham testified that the dispensary filled controlled substance prescriptions for Respondent and Respondent's father, on a regular basis between 2008 and late 2010, when Respondent's father stopped issuing prescriptions. (Tr. 485.)

Mrs. Leadingham next testified that Respondent's role in the dispensary included stopping by every morning and evening to answer questions or discuss issues. (Tr. 400.) ''She had a monitor in her office that she watched us the whole time we were at work. She could see everything we did at any given time.'' (*Id.*) Mrs. Leadingham later contradicted this testimony, admitting that Respondent could not watch the dispensary while she was examining patients throughout the day. (Tr. 478.) No monitors were present in patient examination rooms. (Tr. 469.) Mrs. Leadingham further testified to the physical layout of the dispensary, to include security measures. (Tr. 403–04.)

Mrs. Leadingham testified that the dispensary kept detailed daily inventories, and also completed a biennial inventory every two years that was kept ''in a file in the vault.'' (Tr. 407.) Other than working from a computerized printout, Mrs. Leadingham testified that she did not document anything from the biennial inventory. (Tr. 481–82.) Mrs. Leadingham further testified that she believes the physical copy of the inventory was seized by DEA on May 17, 2011, since the folder was gone from the dispensary after that date. (Tr. 408, 412.)

Mrs. Leadingham testified that she worked in Respondent's dispensary until April 2009, when she was fired along with Mr. Leadingham. (Tr. 419.) Mrs. Leadingham testified that she returned to work at Respondent's dispensary on July 1, 2009, along with Mr. Leadingham, explaining the circumstances of why Respondent asked them to return to work:

> [Respondent] was very, very concerned with the way the dispensary was being run. She was allowed no access to the dispensary itself in these two months that we were gone. When we got back, I know we got a lot of complaints from the patients that there was pills missing, they weren't treated well, * * *.''

(Tr. 421.) Mrs. Leadingham further testified that upon her return to Respondent's dispensary in July 2009 she observed pills that had been put in unmarked vials, to include some pills that appeared to have been crushed. (Tr. 427.)

Mrs. Leadingham also testified as to her understanding and practice with regard to DEA Form 222s, stating in substance that she always stapled the invoices for incoming controlled substances to the Form 222. (Tr. 428.) Mrs. Leadingham further testified that most controlled substance orders were placed electronically, but approximately fifty paper copies of DEA Form 222s would have been present in the dispensary within folders identified by suppliers. (Tr. 440–41.) Prior to February 2010, the dispensary practice was not to put the date and amount of controlled substances received on DEA Form 222s, but rather to staple the invoice for controlled substances to the form. (Tr. 462–63.) Mrs. Leadingham testified that following the Ohio Pharmacy Board inspection of the dispensary in February 2011, she personally wrote the amount and date received on DEA Form 222s. (Tr. 464–65.)

Mrs. Leadingham next testified to completing pill counts within the dispensary to ensure that the numbers on hand matched the computer records, and does not recall any significant discrepancies of greater than one percent. (Tr. 446.) Mrs. Leadingham further testified that Respondent has been present in the dispensary on at least one occasion and counted medications which were matched with inventories. Additionally, Respondent received daily inventories from the dispensary. (Tr. 453–54.)

Mrs. Leadingham was called by Respondent in rebuttal, and testified in substance that she had separated existing DEA Form 222s from the invoices two to three weeks prior to May 16, 2011, in order to prepare copies for submission to the Ohio Medical Board. (Tr. 629.) Mrs. Leadingham further testified that during the week prior to May 16, 2011, she stapled the DEA Form 222s and invoices together again, and filed them in the dispensary vault. (Tr. 631.)

Mr. Leadingham testified in substance as to his background and experience, to include work in Respondent's dispensary, Unique Relief, beginning in November 2008. (Tr. 513.) Unique Relief was a separately operated business from Respondent's medical practice, Unique Pain Management. (Tr. 572.) The dispensary's sole purpose was to fill prescriptions issued by Respondent and Respondent's father. (Tr. 572–73.) Mr. Leadingham testified that he worked as the manager of the dispensary, to include pricing, printing labels for prescriptions, and ordering. (*Id.*) Mr. Leadingham testified that he received no training prior to dispensing controlled substances from Respondent's dispensary, other than to travel to an existing pharmacy to observe a pharmacist for approximately two hours. (Tr. 576, 580.) Mr. Leadingham explained that he worked for Mr. Days and Respondent, describing his relationship with Mr. Days as ''very contentious'' because Mr. Days kept telling Mr. Leadingham what to tell Respondent to do, which Mr. Leadingham would not. (Tr. 514–15.) In April 2009, Mr. Leadingham and Mrs. Leadingham were fired by Mr. Days. (Tr. 517.)

Mr. Leadingham testified that he returned to work for Respondent in July 2009, after the departure of Mr. Days. (Tr. 520.) Upon return, Mr. Leadingham testified that he completed an inventory, which was placed in a folder and ''we had written on it that it was for a DEA biennial.'' (*Id.*) A similar inventory was

[19] Resp't Ex. 6. This was the only exhibit offered by Respondent at hearing.

done in February 2011, and marked ''DEA Biannual Report.'' (Tr. 521.) Mr. Leadingham testified that the two files were present in the dispensary on May 17, 2011, but following that date ''[t]here was no paperwork left in the vault.'' (Tr. 522.) Mr. Leadingham testified that between July 2009 and May 17, 2011, there were never any large amounts of drugs missing, and with regard to oxycodones, Mr. Leadingham did not believe variances existed of ''even one-tenth of a percent.'' (Tr. 561.)

Mr. Leadingham testified that with regard to his compliance with federal regulations for the operation of Respondent's dispensary, he received legal advice that ''we were doing it perfectly.'' (Tr. 545.) Mr. Leadingham further testified that he later questioned the legal advice he was getting with regard to filling prescriptions issued by Respondent's father and looked up the DEA rules ''that stated there had to be a DEA license address for the [d]octor at that address, with that address, if there was a Schedule II narcotics there.'' (Tr. 559–60.) Mr. Leadingham testified that he provided a printout of the rules to Respondent, who then applied to DEA for a license for her father at Respondent's address. (Tr. 560.) Mr. Leadingham testified, however, that he did not see the DEA regulation that DEA Form 222s had to be kept separate from all other records, and the dispensary was ''[a]pparently not'' complying with that regulation. (Tr. 568.)

Respondent's witnesses presented their testimony in a professional and serious manner, but as more fully explained in the discussion section below, I find it only partially credible in several material respects.

IV. Discussion

A. The Applicable Statutory and Regulatory Provisions

The Controlled Substances Act (CSA) provides that any person who dispenses (including prescribing) a controlled substance must obtain a registration issued by the DEA in accordance with applicable rules and regulations.[20] ''A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner'' with a corresponding responsibility on the pharmacist who fills the prescription.[21] It is unlawful for any person to possess a controlled substance unless that substance was obtained pursuant to a valid prescription from a practitioner acting in the course of their professional practice.[22] It is also unlawful to refuse or negligently fail to make, keep or furnish required records.[23]

B. The Public Interest Standard

The CSA, at 21 U.S.C. 824(a)(4), provides, insofar as pertinent to this proceeding, that the Administrator may revoke a DEA COR if she finds that the continued registration would be inconsistent with the public interest as that term is used in 21 U.S.C. 823(f). Pursuant to 21 U.S.C. 823(f), the Administrator may deny an application for a DEA COR if she determines that such registration would be inconsistent with the public interest. In determining the public interest, the Administrator is required to consider the following factors:

(1) The recommendation of the appropriate state licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing or conducting research with respect to controlled substances.

(3) The applicant's conviction record under federal or state laws relating to the manufacture, distribution or dispensing of controlled substances.

(4) Compliance with applicable state, federal or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.[24]

As a threshold matter, the factors specified in Section 823(f) are to be considered in the disjunctive: The Administrator may properly rely on any one or a combination of those factors, and give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied. *See David H. Gillis, M.D.,* 58 FR 37,507, 37,508 (DEA 1993); *see also D & S Sales,* 71 FR 37,607, 37,610 (DEA 2006); *Joy's Ideas,* 70 FR 33,195, 33,197 (DEA 2005); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16,422, 16,424 (DEA 1989). Application of the public interest factors requires an individualized determination and assessment of prescribing and record-keeping practices that are ''tethered securely to state law * * * and federal regulations.'' *Volkman* v. *DEA,* 567 F.3d 215, 223 (6th Cir. 2009). Additionally, in an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied.[25] The burden of proof shifts to the respondent once the Government has made its prima facie case.[26]

C. The Factors to Be Considered

Factors 1 and 3: The Recommendation of the Appropriate State Licensing Board or Professional Disciplinary Authority and Conviction Record Under Federal or State Laws Relating to the Manufacture, Distribution or Dispensing of Controlled Substances

In this case, regarding Factor One, it is undisputed that Respondent currently holds a valid, unrestricted medical license in Ohio. Although not dispositive, Respondent's possession of a valid unrestricted medical license in Ohio weighs against a finding that Respondent's registration would be inconsistent with the public interest. *See Robert A. Leslie, M.D.,* 68 FR 15,227, 15,230 (DEA 2003) (state license is a necessary, but not a sufficient condition for registration, and therefore, this factor is not dispositive).

Regarding Factor Three, there is no evidence that Respondent has ever been convicted under any federal or state law relating to the manufacture, distribution or dispensing of controlled substances. I therefore find that this factor, although not dispositive, *see Leslie,* 68 FR at 15,230, weighs against a finding that Respondent's registration would be inconsistent with the public interest.

Factors 2 and 4: Respondent's Experience in Handling Controlled Substances and Compliance with Applicable State, Federal or Local Laws Relating to Controlled Substances

In this case, there is indeed evidence that Respondent has failed to remain in compliance with applicable federal and state law relating to controlled substances, and that her past experience in handling controlled substances and compliance with applicable laws is inconsistent with the public interest.

1. Respondent's Dispensing Practices

Federal law requires every person who dispenses (including prescribing) any controlled substance to obtain a registration from the Attorney

[20] 21 U.S.C. 802(10), 822(a)(2).

[21] 21 CFR 1306.04(a).

[22] 21 U.S.C. 844(a).

[23] 21 U.S.C. 842(a)(5).

[24] In addition, I conclude that the reference in 21 U.S.C. 823(f)(5) to ''other conduct which may threaten the public health and safety'' would as a matter of statutory interpretation logically encompass the factors listed in Section 824(a). *See Kuen H. Chen, M.D.,* 58 FR 65,401, 65,402 (DEA 1993).

[25] *See* 21 CFR 1301.44(e).

[26] *See Medicine Shoppe—Jonesborough,* 73 FR 364,380 (DEA 2008); *see also Thomas E. Johnston,* 45 FR 72,311, 72,311 (DEA 1980).

General.[27] Additionally, a separate registration must be obtained for each principal place of practice where a registrant dispenses controlled substances and a registrant must report any change of address by applying to modify her registration, which shall be treated as an application for registration.[28] The Code of Federal Regulations delineates the procedures a registrant must follow to request a change in registered address.[29] Federal regulations also mandate that a ''prescription for a controlled substance may only be filled by a pharmacist, acting in the usual course of his professional practice and either registered individually or employed in a registered pharmacy, a registered central fill pharmacy, or registered institutional practitioner.'' [30]

Ohio law requires ''[e]ach person * * * who sells dangerous drugs [31] at retail for delivery or distribution to persons residing in this state, shall be licensed as a terminal distributor of dangerous drugs pursuant to sections 4729.54 and 4729.55 of the Revised Code.'' Ohio Rev. Code Ann. § 4729.551 (2011). It further requires that to operate a pharmacy, a ''person not a pharmacist, who owns, manages, or conducts a pharmacy, shall employ a pharmacist to be in full and actual charge of such pharmacy, * * * .'' Ohio Rev. Code Ann. § 4729.27 (2011).

Various provisions of Ohio law authorize a licensed health professional, including a physician,[32] to prescribe, administer, or personally furnish controlled substances to a patient, or ''[c]ause * * * controlled substances to be administered under the prescriber's direction and supervision.'' Ohio Rev. Code Ann. § 3719.06 (2011).[33] Furthermore, Ohio law exempts, under defined circumstances, a business practice with a sole shareholder who is a licensed health professional from the requirement of obtaining a terminal distributor license. Ohio Rev. Code Ann. § 4729.51 (B)(1)(j) (2011) (effective September 2008). The parameters of this exemption are set forth in a guidance document published by the Ohio State Board of Pharmacy:

> [S]ection 4729.51(B)(1)(j) which will now allow registered wholesale distributors of dangerous drugs to sell dangerous drugs to a business practice that is a corporation, limited liability company, or professional association if the business practice has a *SOLE SHAREHOLDER* who is a licensed health professional authorized to prescribe drugs (prescriber) and is authorized to provide the professional services being offered by the practice.
>
> This means that if the business practice has a single prescriber (M.D. * * *) who *is the sole shareholder, member, or owner* of the practice, then this business practice is not required to be licensed as a Terminal Distributor of Dangerous Drugs with the Ohio Board of Pharmacy. Previously, this exemption was only for a prescriber who practiced as a Sole Proprietor.

(Emphasis in original).[34]

The credible evidence at hearing demonstrated that Respondent established, solely owned, and operated two limited liability companies, Unique Pain Management (medical practice) and Unique Relief (dispensary), both of which are located at 418 Center Street, Wheelersburg, Ohio. (Tr. 48–49, 302–03.) Respondent's medical practice, which included her office and patient examination rooms, was physically separate from the dispensary, although a system of security cameras allowed some level of observing the dispensary operation by Respondent from a monitor located in her medical practice office. (Tr. 400.) The dispensary filled prescriptions issued by Respondent, as well as by Respondent's father, Dr. John Temponeras. The evidence of record reflects that between November 2008 and May 2011, a total of approximately 1.6 million dosage units of oxycodone, a Schedule II controlled substance, were ordered by Respondent, among other controlled substances. (Tr. 206–07.) The evidence further reflects that Respondent's father issued a large number of prescriptions for controlled substances while working at Respondent's medical practice at least one day a week from 2008 until late 2010, a significant portion of which were filled at Respondent's dispensary. (Tr. 181, 484–87.) Respondent's father was registered with DEA as an individual practitioner in Portsmouth, Ohio, but was not registered at Respondent's practice location. (Tr. 214.)

To the extent Ohio law permits a sole practitioner to dispense or personally furnish controlled substances directly to a patient without a Terminal Distributor license, Respondent's dispensing practices were well outside of those parameters. Respondent established a distinctly separate legal entity to fill prescriptions that was physically separate from Respondent's medical office. Furthermore, Respondent's dispensary was not limited to filling prescriptions issued only by Respondent, but also routinely filled prescriptions issued by Respondent's father, notwithstanding the fact that Respondent did not have a Terminal Distributor license as required by state law. Compare Ohio Rev. Code Ann. § 4729.551, with § 4729.51(B)(1)(j) (2011). Respondent's dispensary was not registered with DEA as a pharmacy and none of the dispensary employees was licensed in Ohio as a pharmacist, as required by state and federal law.[35] (Tr. 103–04.)

In addition to the foregoing violations, Respondent also failed to directly monitor or supervise the dispensing activities of her employees, none of whom were licensed, trained, or qualified to handle and dispense controlled substances in Ohio. Rather, Respondent's employees operated in large measure as an independent pharmacy filling prescriptions for Respondent and Respondent's father. The weight of the evidence demonstrated that Respondent and her father were not personally administering, dispensing, or furnishing controlled substances to their patients, but rather issued prescriptions for patients to be filled either at Respondent's dispensary or at other pharmacies. (Tr. 210–11.) The fact that patients had the option to fill prescriptions at other locations, which occurred to some extent, is inconsistent with personally administering or furnishing controlled substances.[36] While the majority of prescriptions issued by Respondent or her father were filled at Respondent's dispensary, there is no credible evidence of record that Respondent or her father had any personal role or supervision of that process. Instead, the process was left to Respondent's employees, who were unlicensed, untrained, and unqualified to handle or distribute controlled substances.

I do not find the testimonial evidence with regard to cameras in the dispensary and a monitor within Respondent's office credible insofar as establishing, consistent with Ohio law, that Respondent effectively supervised her employees dispensing or furnishing of

[27] 21 U.S.C. 822(a)(2).

[28] 21 U.S.C. 822(e), 827(g); 21 CFR 1301.51.

[29] *See* 21 CFR 1301.51.

[30] 21 CFR 1306.06

[31] Dangerous drugs under Ohio law includes any ''drug that may be dispensed only upon a prescription.'' Ohio Rev. Code Ann. § 4729.01(F) (2011).

[32] Ohio Rev. Code Ann. § 4729.01(I)(4) (2011).

[33] *See also* Ohio Rev. Code Ann. §§ 4729.29, 4729.291 (2011).

[34] Ohio State Board of Pharmacy, Licensing Issues for Prescribers (Updated July 2008), *http://www.pharmacy.ohio.gov/Licensing_Issues_for_Prescribers_07252008.pdf.*

[35] 21 CFR 1306.06 (2011); Ohio Rev. Code Ann. § 4729.27 (2011).

[36] A sampling of data for a one month time period in April 2010 revealed that Respondent filled approximately eighty-three percent of her prescriptions, with the remainder filled at other pharmacies. (Tr. 211.)

controlled substances. For example, Mrs. Leadingham testified that Respondent could not monitor the dispensary while treating patients in the examination rooms, nor did the screen on the monitor allow for the reading of labels on prescription bottles. (Tr. 471, 478.) The evidence of record establishes at most a system of cameras that was designed for security of the premises, rather than Respondent's direct supervision of the dispensing or furnishing of controlled substances. Moreover, Mrs. Leadingham testified that upon her return to work at Respondent's dispensary in July 2009, Respondent was very concerned with the way the dispensary had been run, to include complaints from patients and missing pills. (Tr. 421.) Respondent ''was allowed no access to the dispensary itself in these two months that we were gone.'' (*Id.*) The fact that Respondent continued to operate a dispensary from April to July 2009, with admittedly no access at all, is fully consistent with other credible evidence of record, to include testimony by Agent Kinneer, that Respondent had for significant periods of time essentially no role in the physical delivery of controlled substances to her patients. (Tr. 307.)

Respondent also offered at hearing one documentary exhibit, namely a letter from the Ohio Department of Health, dated April 27, 2010, which apparently was in reply to a document submitted by Respondent entitled: ''Policy and Procedure for Initial Intake, Screening, Verification of Identity and Medical Records, Monthly Processing of Patient.'' (Resp't Ex. 6; Gov't Ex. 8.) The reply letter in relevant part complimented Respondent and her staff ''on your thoroughness and intense efforts for security in preventing prescription drug abuse.'' (*Id.*) For purposes of this recommended decision, I have given this letter little weight. While the document facially confirms that Respondent had a written policy related to prevention of drug abuse, it does not address or rebut the specific evidence of Respondent's noncompliance with various provisions of state and federal law related to her handling of controlled substances alleged in the OSC/IS. Additionally, there is no credible evidence of record to suggest that the Ohio Department of Health, through Alvin D. Jackson, Director, was aware in April 2010 of the evidence of Respondent's specific misconduct which forms the basis of the instant proceeding, a significant portion of which became known to state and federal authorities after April 2010.

I find by a preponderance of the evidence that Respondent dispensed or directed and authorized the dispensing of controlled substances from an unregistered location on numerous occasions between November 2008 and May 2011, in violation of 21 U.S.C. 841 and 822(a)(2) and (e), as well as 21 CFR 1306.06.[37] I further find that Respondent's dispensing practices and lack of supervision of employees during that time period violated applicable state law. Ohio Rev. Code Ann. §§ 4729.551, 4729.27, and 3719.06 (2011).

2. Respondent's Record-Keeping Practices

Pursuant to 21 CFR 1304.03(b), 1304.21(a), 1304.22(a)(2)(iv), 1304.22(a)(2)(ix) and 1304.22(c), a registered individual practitioner is required to maintain records of controlled substances in Schedules II through V that are dispensed and received, including the number of dosage units, the date of receipt or disposal and the name, address and registration number of the distributor. It is unlawful to refuse or negligently fail to make, keep or furnish required records.[38] DEA regulations require that ''each registered individual practitioner required to keep records'' shall maintain inventories and records of Schedule II controlled substances ''separately from all of the records of the registrant;'' inventories and records of Schedule III through V controlled substances ''shall be maintained either separately from all other records of the registrant or in such form that the information required is readily retrievable from the ordinary business records of the registrant.'' [39] DEA registrants are required to maintain ''a complete and accurate record of all controlled substances on hand * * * .'' [40] They must ''take a new inventory * * * at least every two years.'' [41] The inventory ''must be kept by the registrant and be available[] for at least 2 years'' from the date of its creation.[42] ''The inventory may be taken either as of opening of business or as of the close of business on the inventory date and it shall be indicated on the inventory.'' [43]

Under longstanding Agency precedent, ''the failure to comply with record keeping requirements is a basis for revoking a registration.'' *Alexander Drug Co.,* 66 FR 18,299, 18,303 (DEA 2001) (citing *Singer-Andreini Pharmacy, Inc.,* 63 FR 4,668 (DEA 1998); *Arthur Sklar, d/b/a King Pharmacy,* 54 FR 34,623 (DEA 1989); *Summer Grove Pharmacy,* 54 FR 28,522 (DEA 1989); and *The Boro Pharmacy and Bell Apothecary,* 53 FR 15,151 (DEA 1988)). The CSA's emphasis on record-keeping constitutes '' 'an attempt to regulate closely the distribution of certain substances determined by Congress to pose dangers, if freely available, to the public at large.' '' *United States* v. *Poulin,* 926 F. Supp. 246, 250 (D. Mass. 1996) (quoting *United States* v. *Averi,* 715 F. Supp. 1508, 1510 (M.D. Ala. 1989)).

One mandatory record-keeping vehicle is DEA Form 222, the ''official triplicate order form[] used by physicians to order scheduled narcotics'' and other controlled substances.[44] A menu of federal regulations specifies procedures relating to DEA Form 222, such as obtaining, 21 CFR 1305.11, executing, § 1305.12, filling, § 1305.13, and endorsing DEA Form 222, § 1305.14, among other procedures.[45] In addition, 21 CFR 1305.03 requires that a DEA Form 222 be used for each distribution of a controlled substance listed in Schedules I or II, and Section 1305.17 provides that these order forms must be maintained separately from all other records and that they ''are required to be kept available for inspection for a period of 2 years.''

The evidence at hearing reflected numerous record-keeping violations by Respondent. The evidence credibly reflects that Respondent did not properly prepare or maintain DEA Form 222s as required by law. The evidence also demonstrated with regard to Respondent's dispensary, that Schedule II controlled substance records were improperly commingled with other controlled substance records, contrary to 21 CFR 1304.04.

Respondent's evidence did not deny the record-keeping violations with regard to DEA Form 222 alleged by the Government in the OSC/IS. Respondent's witnesses admitted that paper copies of DEA Form 222 were not properly maintained with required

[37] The OSC/IS alleged misconduct beginning on January 1, 2007, but the undisputed evidence of record established that Respondent opened her dispensary in or about November 2008, and no other relevant evidence was offered by the Government pertaining to ''unauthorized distributions of controlled substances'' by Respondent prior to that date. *See* ALJ Ex. 1, at 1.

[38] 21 U.S.C. 842(a)(5).

[39] 21 CFR 1304.04(g), (f)(2).

[40] 21 CFR 1304.11(a).

[41] 21 CFR 1304.11(c); *see also* 21 CFR 1304.04(a) (''every inventory * * * must be kept by the registrant and be available * * * for at least two years from the date of such inventory'').

[42] 21 CFR 1304.04(a).

[43] 21 CFR 1304.11(a).

[44] *Robert L. Dougherty, Jr., M.D.,* 60 FR 55,047, 55,048 (DEA 1995).

[45] *See, e.g.,* 21 CFR 1305.15–.19.

information, or in separate locations from other records. Rather, the testimony focused on whether the improperly completed DEA Form 222s had distributor invoices stapled to them in an apparent attempt to comply with the substance and spirit of the applicable DEA regulations.

As a factual matter, the testimony from Respondent's witnesses that invoices were routinely stapled to DEA Form 222s was directly contradicted by physical evidence at hearing, namely three purchaser copies of Form 222 seized from Respondent's dispensary on May 17, 2011, none of which was accompanied by an invoice. (Tr. 64–65; Gov't Ex. 6.) Additionally, all of the Government witnesses were consistent in describing the absence of stapled invoices in the vast majority of DEA Form 222s observed and seized from Respondent's dispensary.

Agent Kinneer credibly testified that during his February 9, 2011 inspection of Respondent's dispensary he reviewed a two to three inch stack of Form 222s on the dispensary counter with no attached invoices, noting that ''none of them had a date or quantity on a filled-out line for those individual drugs that had been ordered and received.'' (Tr. 319.) Agent Kinneer also testified that he reviewed a box kept in the dispensary vault with folders full of blue Form 222s, and none of them had the requisite receipt information, to include date or quantity received. (Tr. 319–20.) With regard to attached invoices, Agent Kinneer testified that he did not go through all of the forms in the box, but none of those he recalls reviewing had an invoice attached. (Tr. 320.)

Consistent with Agent Kinneer's testimony, DI Burkhart credibly testified that she participated in the execution of a federal search warrant at Respondent's dispensary on May 17, 2011, resulting in the seizure of approximately fifty blue purchaser copies of DEA Form 222, among other items. (Tr. 600–01.) Of the fifty, only two had an invoice stapled to the back of them. (Tr. 601.)

In light of the foregoing testimony credibly demonstrating that on February 9, 2011, and May 17, 2011, the vast majority of DEA Form 222s present in Respondent's dispensary did not have accompanying invoices attached, I do not find credible the testimony of Respondent's witnesses to the contrary. Even if there had been credible evidence offered to establish that Respondent routinely attached invoices to DEA Form 222s, such evidence would ''not obsolve [a registrant] from its obligation to adhere to the law.'' *Alexander Drug Co.,* 66 FR at 18,303.

> The efficacy of the closed system of distribution for controlled substances and certain chemicals mandated by Congress through the Controlled Substances Act depends upon strict adherence by all registrants to all record keeping requirements including those set forth at 21 U.S.C. [§§] 827, 828, 829, and 830, and all implementing regulations found in Title 21 Code of Federal Regulations, as well as all applicable state laws and regulations.

(*Id.*)

The evidence at hearing also demonstrated that Respondent did not take an initial inventory or biennial inventories, contrary to applicable regulations. 21 CFR 1304.11(b) and (c). Agent Kinneer credibly testified that during his February 9, 2011 inspection, he requested an opening inventory but was informed by Mr. Leadingham that ''one had not been done.'' (Tr. 314.) Nor was a biennial inventory produced during the inspection. DI Kresnak credibly testified that as a result of the May 2011 search of Respondent's dispensary, documents related to inventories were found, none of which reflected a ''biennial inventory.'' For example, there is evidence of record that documents were seized from Respondent's dispensary reflecting ''biannual inventories,'' and one marked ''opening inventory'' which ''indicated that the date that they opened the dispensary there was a zero inventory.'' (Tr. 83.)

Respondent's evidence with regard to inventories centered primarily on testimony by Respondent's dispensary employees that frequently during ''down time'' they would count on-hand drugs, including controlled substances, to ensure a match with computer records. Mrs. Leadingham testified that the dispensary kept detailed daily inventories, and completed a biennial inventory every two years, which was kept in the dispensary vault. (Tr. 407.) Later contradicting that testimony, Mrs. Leadingham testified that the process to conduct a biennial inventory consisted of Mr. Leadingham using a computer printout while she physically counted the controlled substances, adding that she did not ''document anything'' from the inventory. (Tr. 481–82.) The lack of documentation undermines the credibility of Mrs. Leadingham's assertions that detailed inventories were kept. Of significance, no invoices, DEA Form 222s, or dispensing logs were used to conduct the biennial inventory. (Tr. 480–82.) Nor is there any credible evidence that Respondent participated in the inventory process in any meaningful way to ensure an accurate inventory was taken and proper records maintained.[46] Instead, the credible evidence of record reflects that Respondent delegated that task to employees who were neither trained nor properly supervised to perform the task.

The evidence at hearing unequivocally demonstrates that Respondent's employees, however well-intentioned, lacked the qualifications, training, or supervision to conduct an appropriate initial or biennial inventory, as required by applicable law and regulation. The fact that no compliant initial or biennial inventory was produced by Respondent or her employees during the February 9, 2011 inspection, nor seized during the May 17, 2011 search, amply demonstrates Respondent's blatant non-compliance with this important record-keeping requirement. As Agent Kinneer succinctly testified, a ''running inventory'' is no substitute for a true inventory, since in ''order for me to do an audit I need a starting point.'' (Tr. 373–74.) There is no evidence that such a starting point existed within Respondent's dispensary records, nor any other compliant inventory records.

Contrary to Respondent's assertion that the foregoing represents ''highly technical paperwork errors,'' (Resp't Br. At 7), the failure by Respondent to properly maintain required records prevented investigators, as well as Respondent, from determining whether Respondent's dispensary had significant shortages or overages. (*See, e.g.,* Tr. 375.) The sheer volume of controlled substances handled by Respondent, which between November 2008 and May 2011, totaled approximately 1.6 million dosage units of the Schedule II controlled substance oxycodone alone, demonstrates that overages or shortages had the potential to be quantitatively significant. (*See* Tr. 375.) Nor was the risk of diversion purely speculative with regard to Respondent's dispensary given, for example, the testimony by Mrs. Leadingham that during May and June 2009, Respondent was not allowed access to her own dispensary. (Tr. 421.) Additionally, Mrs. Leadingham testified that when she returned to work in Respondent's dispensary in July 2009, she observed crushed pills and pills in unmarked vials, and received complaints from customers of missing pills. (Tr. 421, 427.) Rather than being technical paperwork errors, I find

[46] I have carefully considered and reject as not credible testimony by Respondent's employees that Respondent actively participated or supervised the inventory process. (*See, e.g.,* Tr. 453–54.) Even if such testimony was found to be credible, the methodology used to conduct the inventory, with or without the Respondent, was clearly contrary to law.

Respondent's blatant disregard for fundamental record-keeping requirements, among other violations, to be significantly at odds with the public interest.

Accordingly I find by a preponderance of the evidence that Respondent unlawfully failed to make, keep or furnish required records relating to her handling of controlled substances, during the time period from November 2008 to May 2011, in violation of applicable federal law.[47]

3. Respondent's Issuance of Prescriptions Without Required Information

Pursuant to 21 CFR 1306.05(a), ''[a]ll prescriptions for controlled substances shall * * * bear the full name and address of the patient * * * [and] directions for use * * *.'' The evidence of record included approximately eleven prescriptions issued by Respondent for various controlled substances to a single patient covering the time period August to November 2006. (Tr. 219–20; Gov't Ex. 7.) Each of the eleven prescriptions was deficient by failing to include the patient's address. (Tr. 220–21; *see* Gov't Ex. 7.)

Additionally, the Government introduced testimony by DI Kresnak that he reviewed approximately twelve prescriptions seized from a Portsmouth, Ohio pharmacy that Respondent had issued for controlled substances to more than one patient between 2005 and 2006. Of the twelve reviewed, DI Kresnak testified that eleven lacked a patient address. (Tr. 53–55, 123–24.) None of these prescriptions were introduced by the Government at hearing, and DI Kresnak was uncertain if any of the prescriptions he recalled reviewing from the Portsmouth, Ohio pharmacy were the same as those identified in Government Exhibit 7. Nor could DI Kresnak recall any of the patient names from memory without reviewing copies of the prescriptions.[48] (Tr. 118.) In light of this testimony, I give little overall weight to the testimony offered by the Government with regard to the eleven prescriptions seized from the Portsmouth, Ohio pharmacy, since those prescriptions may or may not be the same as those contained within Government Exhibit 7. ''Speculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence.'' *White ex rel. Smith* v. *Apfel,* 167 F.3d 369, 375 (7th Cir. 1999) (citing *Erhardt* v. *Sec'y, DHS,* 969 F.2d 534, 538 (7th Cir. 1992)).

Accordingly, I find by a preponderance of the evidence that Respondent issued approximately eleven prescriptions between August and November 2006 for controlled substances without providing a patient address, in violation of applicable federal regulations.

All of the above findings regarding Respondent's violation of applicable law and regulation as it pertains to her prescribing practices, record-keeping, and dispensing from an unregistered location weigh heavily against a finding under Factors Two and Four of 21 U.S.C. 823(f) that Respondent's continued registration would be consistent with the public interest.

Factor 5: Such Other Conduct Which May Threaten the Public Health and Safety

Under Factor Five, the Administrator is authorized to consider ''other conduct which may threaten the public health and safety.'' 5 U.S.C. 823(f)(5). The Agency has accordingly held that ''where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his or her actions and demonstrate that he or she will not engage in future misconduct. *Patrick W. Stodola,* 74 FR 20,727, 20,734 (DEA 2009).[49] A ''[r]espondent's lack of candor and inconsistent explanations'' may serve as a basis for denial of a registration. *John Stanford Noell, M.D.,* 59 FR 47,359, 47,361 (DEA 1994).

In this case Respondent was called by the Government to testify, but refused to answer questions by invoking her Fifth Amendment privilege. ''It is well established that the Agency may draw an adverse inference from a respondent's failure 'to testify in response to probative evidence offered against' [her].'' *Surinder Dang, M.D.,* 76 FR 51,417, 51,422 (DEA 2011) (citing *Baxter* v. *Palmigiano,* 425 U.S. 308, 318 (1976)). I find it appropriate on the facts of this case to draw an adverse inference against Respondent where the Government presented evidence of misconduct involving Respondent's prescribing, dispensing, and record-keeping practices, yet Respondent failed to testify and respond to this evidence. Additionally, Respondent presented no evidence of acceptance of responsibility for past misconduct, nor any evidence demonstrating that she will not engage in future misconduct, which weighs heavily against a finding under Factor Five of 21 U.S.C. 823(f) that Respondent's continued registration would be consistent with the public interest.

V. Conclusion and Recommendation

After balancing the foregoing public interest factors, I find that the Government has established by substantial evidence a prima facie case in support of revoking Respondent's DEA COR BT5598214, based on Factors Two, Four and Five of 21 U.S.C. 823(f). Once DEA has made its prima facie case for revocation or denial, the burden shifts to the respondent to show that, given the totality of the facts and circumstances in the record, revoking or denying the registration would not be appropriate. *See Morall* v. *DEA,* 412 F.3d 165, 174 (D.C. Cir. 2005); *Humphreys* v. *DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz* v. *United States Dep't of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 FR 72,311 (DEA 1980). The record reveals that Respondent has not sustained her burden in this regard. In light of the foregoing, Respondent's evidence as a whole fails to sustain her burden to accept responsibility for her misconduct and demonstrate that she will not engage in future misconduct.

I recommend revocation of Respondent's DEA COR BT5598214 as a practitioner, and denial of any pending applications for renewal or modification, on the grounds that Respondent's continued registration would be fully inconsistent with the public interest as that term is used in 21 U.S.C. 824(a)(4) and 823(f).

Dated: December 15, 2011.

Timothy D. Wing,

Administrative Law Judge.

[FR Doc. 2012–18749 Filed 7–31–12; 8:45 am]

BILLING CODE 4410–09–P

[47] *See* 21 U.S.C. 827(a), 842(a)(5); 13 CFR 1304.11 (b) and (c), 1305.13(e).

[48] The Government did not seek to refresh DI Kresnak's recollection with any documents, nor were the prescriptions at issue introduced at hearing. *See supra* note 9.

[49] *See also Hoxie* v. *DEA,* 419 F.3d 477, 484 (6th Cir. 2005) (decision to revoke registration ''consistent with the DEA's view of the importance of physician candor and cooperation'').

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–364]

Electronic Prescriptions for Controlled Substances Notice of Approved Certification Process

AGENCY: Drug Enforcement Administration (DEA), Department of Justice.

ACTION: Notice.

SUMMARY: DEA is announcing a new DEA-approved certification process for Electronic Prescriptions for Controlled

Substances (EPCS). Certifying organizations with a certification process approved by DEA pursuant to 21 Code of Federal Regulations (CFR) 1311.300(e) are posted on DEA's Web site once approved.

FOR FURTHER INFORMATION CONTACT: Alan G. Santos, Associate Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 307–7165.

SUPPLEMENTARY INFORMATION:

Background

The Drug Enforcement Administration (DEA) is a component of the Department of Justice and is the primary agency responsible for coordinating the drug law enforcement activities of the United States. DEA also assists in the implementation of the President's National Drug Control Strategy. The Diversion Control Program (DCP) is a strategic component of the DEA's law enforcement mission. It is primarily the DCP within DEA that implements and enforces Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act of 1970, often referred to as the Controlled Substances Act (CSA) and the Controlled Substances Import and Export Act (CSIEA) (21 U.S.C. 801–971), as amended (hereinafter, ''CSA'').[1] DEA drafts and publishes the implementing regulations for these statutes in Title 21 of the Code of Federal Regulations (CFR), Parts 1300 to 1321. The CSA together with these regulations are designed to establish a closed system for controlled substances and to prevent, detect, and eliminate the diversion of controlled substances and listed chemicals into the illicit market while ensuring a sufficient supply of controlled substances and listed chemicals for legitimate medical, scientific, research, and industrial purposes.

The CSA and DEA's implementing regulations establish the legal requirements for possession and dispensing of controlled substances, most notably pursuant to a prescription issued for a legitimate medical purpose by a practitioner acting in the usual course of professional practice. ''The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription.'' 21 CFR 1306.04(a). A prescription serves both as a record of the practitioner's determination of the legitimate medical need for the drug to be dispensed, and as a record of the dispensing, providing the pharmacy with the legal justification and authority to dispense the medication prescribed by the practitioner. The prescription also provides a record of the actual dispensing of the controlled substance to the ultimate user (the patient) and, therefore, is critical to documenting that controlled substances held by a pharmacy have been dispensed legally. The maintenance by pharmacies of complete and accurate prescription records is an essential part of the overall CSA regulatory scheme established by Congress.

Electronic Prescriptions for Controlled Substances (EPCS)

Historically, where federal law required that a prescription for a controlled substance be issued in writing, that requirement could only be satisfied through the issuance of a paper prescription. Given advancements in technology and security capabilities for electronic applications, DEA recently amended its regulations to provide practitioners with the option of issuing electronic prescriptions for controlled substances (EPCS) in lieu of paper prescriptions. Efforts to develop EPCS have been underway for a number of years. DEA's Interim Final Rule for Electronic Prescriptions for Controlled Substances was published on March 31, 2010, at 75 FR 16236–16319, and became effective on June 1, 2010. While these regulations have paved the way for controlled substance prescriptions to be issued electronically, not all states have authorized electronic prescriptions for controlled substances, particularly Schedule II controlled substances, which have a significant potential for abuse.

Update

All certifying organizations with a certification process approved by DEA pursuant to 21 CFR 1311.300(e) are posted on DEA's Web site once approved.

As noted above, the Interim Final Rule provides that, as an alternative to the audit requirements of 21 CFR 1311(b) through (d), an electronic prescription or pharmacy application may be verified and certified as meeting the requirements of 21 CFR part 1311 by a certifying organization whose certification process has been approved by DEA. The preamble to the Interim Final Rule further indicated that, once a qualified certifying organization's certification process has been approved by DEA in accordance with 21 CFR 1311.300(e), such information will be posted on DEA's Web site. 75 FR 16243, March 31, 2010. On May 22, 2012, DEA approved the certification processes developed by Drummond Group and by iBeta LLC. iBeta's approved certification process is limited to the certification of the biometrics subsystem, including its interfaces, to the requirements of the overall regulations and specifically to those in 1311.116. Relevant information has been posted on DEA's Web site at *http://www.DEAdiversion.usdoj.gov*.

Dated: July 25, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control.

[FR Doc. 2012–18748 Filed 7–31–12; 8:45 am]

BILLING CODE 4410–09–P

[1] The Attorney General's delegation of authority to DEA may be found at 28 CFR 0.100.

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; The 1,2-Dibromo-3-Chloropropane Standard

ACTION: Notice.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, ''The 1,2-Dibromo-3-Chloropropane Standard,'' to the Office of Management and Budget (OMB) for review and approval for continued use in accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3501 et seq.).

DATES: Submit comments on or before August 31, 2012.

ADDRESSES: A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained from the RegInfo.gov Web site, *http://www.reginfo.gov/public/do/PRAMain,* on the day following publication of this notice or by contacting Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or sending an email to *DOL_PRA_PUBLIC@dol.gov.*

Submit comments about this request to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–OSHA, Office of Management and Budget, Room 10235, 725 17th Street, NW., Washington, DC 20503, Telephone: 202–395–6929/Fax: 202–395–6881 (these are not toll-free numbers), email: *OIRA_submission@omb.eop.gov.*

FOR FURTHER INFORMATION: Contact Michel Smyth by telephone at 202–693–4129 (this is not a toll-free number) or by email at *DOL_PRA_PUBLIC@dol.gov.*

Authority: 44 U.S.C. 3507(a)(1)(D).

SUPPLEMENTARY INFORMATION: The 1,2-Dibromo-3-Chloropropane (DBCP) Standard codified at 29 CFR 1910–1044 makes it mandatory for covered employers to train workers about the hazards of DBCP, to monitor worker exposure, to provide medical surveillance, and to maintain accurate records of worker exposure to DBCP. Employers, workers, physicians, and the Government use these records to ensure workers are not harmed by exposure to DBCP in the workplace.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information if the collection of information does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1218–0101. The current approval is scheduled to expire on August 31, 2012; however, it should be noted that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional information, see the related notice published in the **Federal Register** on April 6, 2012 (77 FR 20850).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within 30 days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1218–0101. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–OSHA.

Title of Collection: The 1,2-Dibromo-3-Chloropropane Standard.

OMB Control Number: 1218–0101.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 1.

Total Estimated Number of Responses: 1.

Total Estimated Annual Burden Hours: 1.

Total Estimated Annual Other Costs Burden: $0.

Dated: July 26, 2012.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2012–18817 Filed 7–31–12; 8:45 a.m.]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions From Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of Individual Exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: D–11517, JPMorgan Chase & Co. and its Current Subsidiaries, 2012–14; D–11582, South Plains Financial, Inc. Employee Stock Ownership Plan, 2012–15; D–11649, Meridian Medical Associates, S.C. Employees' Retirement Plan and Trust, 2012–16; D–11668, TIB Financial Corp. Employee Stock Ownership Plan with 401(k) Provisions, 2012–17; and D–11714, Ed Laur Defined Benefit Plan, 2012–18.

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant each such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition, the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). Each applicant has represented that it has complied with the requirements of the notification to interested persons. No requests for a hearing were received by the Department. Public comments were received by the Department as described in the granted exemption.

Each notice of proposed exemption was issued and each exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011) [1] and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

JPMorgan Chase & Co. and Its Current and Future Affiliates and Subsidiaries (JPMorgan Chase) Located in New York, New York

[Prohibited Transaction Exemption 2012–14, Exemption Application No. D–11517].

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

Exemption

Section I. Sales of Auction Rate Securities From Plans to JPMorgan Chase: Unrelated to a Settlement Agreement

The restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan (as defined in section V(e)) of an Auction Rate Security (as defined in section V(c)) to JPMorgan Chase, where such sale (an Unrelated Sale) is unrelated to, and not made in connection with, a Settlement Agreement (as defined in section V(f)), provided that the conditions set forth in section II have been met.[2]

Section II. Conditions Applicable to Transactions Described in Section I

(a) The Plan acquired the Auction Rate Security in connection with brokerage or advisory services provided by JPMorgan Chase;

(b) The last auction for the Auction Rate Security was unsuccessful;

(c) Except in the case of a Plan sponsored by JPMorgan Chase for its own employees (a JPMorgan Chase Plan), the Unrelated Sale is made pursuant to a written offer by JPMorgan Chase (the Offer) containing all of the material terms of the Unrelated Sale, including, but not limited to the most recent rate information for the Auction Rate Security (if reliable information is available). Either the Offer or other materials available to the Plan provide the identity and par value of the Auction Rate Security. Notwithstanding the foregoing, in the case of a pooled fund maintained or advised by JPMorgan Chase, this condition shall be deemed met to the extent each Plan invested in the pooled fund (other than a JPMorgan Chase Plan) receives written notice regarding the Unrelated Sale, where such notice contains the material terms of the Unrelated Sale, including, but not limited to, the material terms described in the preceding sentence;

(d) The Unrelated Sale is for no consideration other than cash payment against prompt delivery of the Auction Rate Security;

(e) The sales price for the Auction Rate Security is equal to the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends;[3]

(f) The Plan does not waive any rights or claims in connection with the Unrelated Sale;

(g) The decision to accept the Offer or retain the Auction Rate Security is made by a Plan fiduciary or Plan participant or IRA owner who is independent (as defined in section V(d)) of JPMorgan Chase. Notwithstanding the foregoing: (1) in the case of an individual retirement account (an IRA, as described in section V(e) below) which is beneficially owned by an employee, officer, director or partner of JPMorgan Chase, or a relative of any such persons, the decision to accept the Offer or retain the Auction Rate Security may be made by such employee, officer, director, partner, or relative; or (2) in the case of a JPMorgan Chase Plan or a pooled fund maintained or advised by JPMorgan Chase, the decision to accept the Offer may be made by JPMorgan Chase after JPMorgan Chase has determined that such purchase is in the best interest of the JPMorgan Chase Plan or pooled fund;[4]

(h) Except in the case of a JPMorgan Chase Plan or a pooled fund maintained or advised by JPMorgan Chase, neither JPMorgan Chase nor any affiliate exercises investment discretion or renders investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to the decision to accept the Offer or retain the Auction Rate Security;

(i) The Plan does not pay any commissions or transaction costs with respect to the Unrelated Sale;

(j) The Unrelated Sale is not part of an arrangement, agreement or understanding designed to benefit a party in interest to the Plan;

(k) JPMorgan Chase and its affiliates, as applicable, maintain, or cause to be maintained, for a period of six (6) years from the date of the Unrelated Sale, such records as are necessary to enable the persons described below in paragraph (l)(1), to determine whether the conditions of this exemption have been met, except that—

(1) No party in interest with respect to a Plan which engages in an Unrelated Sale, other than JPMorgan Chase and its affiliates, as applicable, shall be subject to a civil penalty under section 502(i) of the Act or the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or not available for examination, as required, below, by paragraph (l)(1); and

(2) A separate prohibited transaction shall not be considered to have occurred solely because, due to circumstances beyond the control of JPMorgan Chase or its affiliates, as applicable, such records are lost or destroyed prior to the end of the six-year period;

(l)(1) Except as provided below in paragraph (l)(2), and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to above in paragraph (k) are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department, the Internal Revenue Service, or the U.S. Securities and Exchange Commission; or

(B) Any fiduciary of any Plan, including any IRA owner, that engages in a Sale, or any duly authorized employee or representative of such fiduciary; or

(C) Any employer of participants and beneficiaries and any employee organization whose members are covered by a Plan that engages in the Unrelated Sale, or any authorized employee or representative of these entities;

(2) None of the persons described above in paragraph (l)(1)(B)–(C) shall be authorized to examine trade secrets of JPMorgan Chase, or commercial or financial information which is privileged or confidential; and

(3) Should JPMorgan Chase refuse to disclose information on the basis that such information is exempt from disclosure, JPMorgan Chase shall, by the close of the thirtieth (30th) day

[2] For purposes of this exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

[3] This exemption does not address tax issues. The Department has been informed by the Internal Revenue Service and the Department of the Treasury that they are considering providing limited relief from the requirements of sections 72(t)(4), 401(a)(9), and 4974 of the Code with respect to retirement plans that hold Auction Rate Securities. The Department has also been informed by the Internal Revenue Service that if Auction Rate Securities are purchased from a Plan in a transaction described in sections I and III at a price that exceeds the fair market value of those securities, then the excess value would be treated as a contribution for purposes of applying applicable contribution and deduction limits under sections 219, 404, 408, and 415 of the Code.

[4] The Department notes that the Act's general standards of fiduciary conduct also would apply to the transactions described herein. In this regard, section 404 of the Act requires, among other things, that a fiduciary discharge his duties respecting a plan solely in the interest of the plan's participants and beneficiaries and in a prudent manner. Accordingly, a plan fiduciary must act prudently with respect to, among other things, the decision to sell the Auction Rate Security to JPMorgan Chase for the par value of the Auction Rate Security, plus any accrued but unpaid interest or dividends. The Department further emphasizes that it expects Plan fiduciaries, prior to entering into any of the transactions, to fully understand the risks associated with this type of transaction following disclosure by JPMorgan Chase of all relevant information.

following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section III. Sales of Auction Rate Securities From Plans to JPMorgan Chase: Related to a Settlement Agreement

The restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), (D), and (E) of the Code, shall not apply, effective February 1, 2008, to the sale by a Plan of an Auction Rate Security to JPMorgan Chase, where such sale (a Settlement Sale) is related to, and made in connection with, a Settlement Agreement, provided that the conditions set forth in Section IV have been met.

Section IV. Conditions Applicable to Transactions Described in Section III

(a) The terms and delivery and timing of the Offer are consistent with the requirements set forth in the Settlement Agreement;

(b) The Offer or other documents available to the Plan specifically describe, among other things:

(1) How a Plan may determine: the Auction Rate Securities held by the Plan with JPMorgan Chase, the purchase dates for the Auction Rate Securities, and (if reliable information is available) the most recent rate information for the Auction Rate Securities;

(2) The number of shares and par value of the Auction Rate Securities available for purchase under the Offer;

(3) The background of the Offer;

(4) That participating in the Offer will not result in or constitute a waiver of any claim of the tendering Plan;

(5) The methods and timing by which Plans may accept the Offer;

(6) The purchase dates, or the manner of determining the purchase dates, for Auction Rate Securities tendered pursuant to the Offer;

(7) The timing for acceptance by JPMorgan Chase of tendered Auction Rate Securities;

(8) The timing of payment for Auction Rate Securities accepted by JPMorgan Chase for payment;

(9) The methods and timing by which a Plan may elect to withdraw tendered Auction Rate Securities from the Offer;

(10) The expiration date of the Offer;

(11) The fact that JPMorgan Chase may make purchases of Auction Rate Securities outside of the Offer and may otherwise buy, sell, hold or seek to restructure, redeem or otherwise dispose of the Auction Rate Securities;

(12) A description of the risk factors relating to the Offer as JPMorgan Chase deems appropriate;

(13) How to obtain additional information concerning the Offer; and

(14) The manner in which information concerning material amendments or changes to the Offer will be communicated to affected Plans;

(c) The terms of the Settlement Sale are consistent with the requirements set forth in the Settlement Agreement; and

(d) All of the conditions in Section II have been met with respect to the Settlement Sale.

Section V. Definitions

For purposes of this exemption:

(a) The term ''affiliate'' means: Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(b) The term ''control'' means: The power to exercise a controlling influence over the management or policies of a person other than an individual;

(c) The term ''Auction Rate Security'' means a security that:

(1) Is either a debt instrument (generally with a long-term nominal maturity) or preferred stock; and

(2) Has an interest rate or dividend that is reset at specific intervals through a Dutch auction process;

(d) A person is ''independent'' of JPMorgan Chase if the person is:

(1) Not JPMorgan Chase or an affiliate; and

(2) Not a relative (as defined in ERISA section 3(15)) of the party engaging in the transaction;

(e) The term ''Plan'' means: An individual retirement account or similar account described in section 4975(e)(1)(B) through (F) of the Code (an IRA); an employee benefit plan as defined in section 3(3) of ERISA; or an entity holding plan assets within the meaning of 29 CFR 2510.3–101, as modified by ERISA section 3(42); and

(f) The term ''Settlement Agreement'' means: A legal settlement involving JPMorgan Chase and a U.S. state or federal authority that provides for the purchase of an Auction Rate Security by JPMorgan Chase from a Plan.

Effective Date: This exemption is effective as of February 1, 2008.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published in the **Federal Register** on December 13, 2011 at 76 FR 77594.

FOR FURTHER INFORMATION CONTACT: Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

South Plains Financial, Inc. Employee Stock Ownership Plan (the Plan) Located in Lubbock, TX

[Prohibited Transaction Exemption 2012–15; Exemption Application No. D–11582].

Exemption

The restrictions of sections 406(a)(1)(A), (D) and (E), 406(a)(2), 406(b)(1) and (b)(2), 407(a)(1)(A) of the Act and the sanctions resulting from the application of section 4975 of the Code,[5] by reason of section 4975(c)(1)(A), (D) and (E) of the Code, shall not apply, (1) effective December 17, 2008, to the acquisition and holding by the Plan of certain interests (the LLC Interests) in SPFI Investment Group, LLC (the LLC), a former wholly owned subsidiary of the Plan sponsor, South Plains Financial, Inc. (SPF), which were distributed (the Distribution) as dividends to the Plan as a shareholder of SPF; and (2) the proposed redemption (the Redemption) by the LLC of the LLC Interests held by the Plan.

This exemption is subject to the following conditions:

(a) The Plan's acquisition and holding of the LLC Interests occurred in connection with the Distribution, wherein the Plan acquired the LLC Interests automatically and without any action on its part.

(b) The Plan's acquisition of the LLC Interests resulted from an independent act of SPF as a corporate entity for business reasons which did not involve the Plan. As such, all shareholders of SPF, including the Plan, were treated in the same manner.

(c) The Plan paid no fees or commissions in connection with the acquisition and holding of the LLC Interests.

(d) Within ninety (90) days after the date of publication of this notice in the **Federal Register**, the LLC redeems the LLC Interests held by the Plan for no less than the greater of $1,036,665 or the fair market value of the LLC Interests on the date that the Redemption occurs.

(e) The Redemption is a one-time sale of the LLC Interests for cash.

(f) The terms and conditions of the Redemption are at least as favorable to the Plan as those obtainable in an arm's length transaction with an unrelated party.

[5] For purposes of this exemption, references to section 406 of the Act should be read to refer as well to the corresponding provisions of section 4975 of the Code.

(g) The Plan pays no commissions, costs or other expenses in connection with the Redemption.

(h) An independent fiduciary has approved the Redemption and monitors such transaction on behalf of the Plan.

Effective Date: This exemption is effective as of December 17, 2008, with respect to the acquisition and holding by the Plan of the LLC Interests. In addition, this exemption is effective as of the date of this final exemption with respect to the LLC's Redemption of the LLC Interests held by the Plan.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published in the **Federal Register** on March 30, 2012, at 77 FR 19345.

FOR FURTHER INFORMATION CONTACT: Ms. Anna Mpras Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

Meridian Medical Associates, S.C. Employees' Retirement Plan and Trust (the Plan) Located in Joliet, Illinois

[Prohibited Transaction Exemption 2012–16; Exemption Application No. D–11649]

Exemption

I—Transactions

The restrictions of sections 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), 4975(c)(1)(D), and 4975(c)(1)(E) of the Code, will not apply to:

(a) The cash purchase (the Purchase) by the Plan (formerly, the Will County Medical Associates, S.C. Employees' Retirement Plan & Trust) of a 52 percent (52%) beneficial ownership interest in a parcel of improved real property (the Annex) located in Joliet, Illinois, from the JMG Property, LLC (the LLC), a party in interest with respect to the Plan;

(b) The entry by the Plan through a land trust (no. 6722), into a lease (the Annex Lease) with Meridian Medical Associates, S.C. (the Employer) (formerly, the Will County Medical Associates, S.C.), as lessee, of a 52 percent (52%) beneficial ownership interest in the Annex; and

(c) The personal guarantees, jointly and severally, by each of the shareholders of the Employer of the obligations of such Employer under the terms of the Annex Lease; provided that the conditions set forth, below, in Section II are satisfied.

II—Conditions

(a) With respect to the Purchase by the Plan of a 52 percent (52%) beneficial ownership interest in the Annex from the LLC:

(1) The Purchase is a one-time transaction for cash;

(2) The terms and conditions of the Purchase are no less favorable to the Plan than those obtainable by the Plan under similar circumstances when negotiated at arm's length with unrelated third parties;

(3) Prior to entering into the Purchase, an independent, qualified fiduciary (the I/F) determines that the Purchase is in the interest of, and protective of the Plan and of its participants and beneficiaries;

(4) The I/F negotiates, reviews, and approves the terms of the Purchase prior to the consummation of such Purchase;

(5) The acquisition price paid by the Plan for a 52 percent (52%) beneficial ownership interest in the Annex is not more than the fair market value of such interest, as determined by an independent, qualified appraiser, as of the date of the Purchase;

(6) An independent, qualified appraiser determines, as of the date of the Purchase, the fair market value of a parcel of improved real property (the Original Facility), which is adjacent to the Annex, and in which the Plan holds a 100 percent (100%) beneficial ownership interest through a land trust (no. 2024);

(7) Immediately following the Purchase, the combined fair market value of the Plan's 52 percent (52%) beneficial ownership interest in the Annex and the fair market value of the Plan's 100 percent (100%) beneficial ownership interest in the Original Facility when added together (the Combined Facility) does not exceed 20 percent (20%) of the fair market value of the total assets of the Plan;

(8) In the event of any actual or potential divergence of interests between the Plan and the LLC, that results as a consequence of their shared ownership interest in the Annex, the I/F takes appropriate steps to resolve such conflicts of interest and in all events acts prudently and solely in the interest of the Plan with respect to all decisions pertaining to the acquisition, holding, management, and disposition of the Plan's interest in the Annex. To the extent that a conflict occurs, the I/F has, by its written agreement, the sole authority acting on behalf of the Plan to determine the resolution of any conflict that arises from the shared beneficial ownership of the Annex by the Plan and the LLC; and that such determination shall be binding on the LLC; and

(9) The Plan does not incur any fees, costs, commissions, or other charges as a result of engaging in the Purchase, other than the necessary and reasonable fees payable to the I/F and to the independent, qualified appraiser, respectively.

(b) With respect to the Annex Lease:

(1) The terms and conditions of the Annex Lease are no less favorable to the Plan than those obtainable by the Plan under similar circumstances when negotiated at arm's length with unrelated third parties;

(2) Prior to entering into the Annex Lease, the I/F, acting on behalf of the Plan, negotiates, reviews, and approves the terms and conditions of the Annex Lease, and determines that the Annex Lease is in the interest of, and protective of the Plan and its participants and beneficiaries;

(3) The I/F monitors and enforces compliance with the conditions of this exemption and monitors and enforces compliance with all of the terms of the Annex Lease throughout the initial term of such lease and throughout the duration of each renewal of such lease, and is also responsible for legally enforcing the payment of rent and the proper performance of all other obligations of the Employer under the terms of such lease;

(4) The rent paid to the Plan by the Employer under the initial term of the Annex Lease, and the rent paid to the Plan by the Employer during each renewal of such lease, is based upon the fair market value of the Annex, as established by an independent, qualified appraiser at the time of such initial term and at the time of each renewal of such lease;

(5) The rent under the Annex Lease is adjusted at the commencement of the second year of the term of such lease and is adjusted every second year thereafter by the I/F, based on an appraisal of the fair market value of the Annex, as established by an independent, qualified appraiser at the time of each such adjustment of rent. If twelve percent (12%) of the fair market value of the Annex, established by such appraisal at the time of any such adjustment, is greater than the then current base rent under the Annex Lease, then the base rent is revised by the I/F to reflect the increase in fair market value of the Annex, as established by such appraisal. If twelve percent (12%) of the fair market value of the Annex, established by such appraisal at the time of any such adjustment, is less than or equal to the then current base rent, then the base rent remains unchanged by the I/F;

(6) The terms of the Annex Lease shall be triple net, such that the Employer, as lessee, is responsible for paying, in addition to monthly rent, all costs for maintenance, taxes, utilities, and insurance on the Annex;

(7) Prior to entering into any renewal of the Annex Lease, the I/F, acting on behalf of the Plan, approves such renewal beyond the initial term of such lease; and

(8) The Plan does not incur any fees, any costs, any commissions, and any other charges and expenses as a result of entering into the Annex Lease, other than the necessary and reasonable fees payable to the I/F and payable to the independent, qualified appraiser, respectively.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice of Proposed Exemption published on June 1, 2012, at 77 FR 32686.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693–8551. (This is not a toll-free number.)

TIB Financial Corp. Employee Stock Ownership Plan With 401(k) Provisions (the Plan) Located in Naples, Florida

[Prohibited Transaction Exemption 2012–17; Exemption Application No. D–11668]

Exemption

The restrictions of sections 406(a)(1)(A) and (E), 406(a)(2), 406(b)(1), 406(b)(2), and 407(a) of the Act and the sanctions resulting from the application of section 4975(c)(1)(A) and (E) of the Code,[6] shall not apply, effective December 17, 2010 through January 18, 2011, to: (1) the acquisition of certain stock rights (the Rights) by the Plan in connection with, and under the terms and conditions of, a Rights offering (the Offering) by TIB Financial Corp. (TIB or the Applicant), the Plan sponsor and a party in interest with respect to the Plan, and (2) the holding of the Rights by the Plan during the subscription period of the Offering; provided that the following conditions were met:

(a) The receipt of the Rights by the Plan occurred pursuant to Plan provisions for individually directed investments of such accounts, in connection with the Offering, and was made available by TIB on the same terms to all shareholders of record (the Shareholders) of TIB's common stock (Common Stock) as of 4:01 p.m., New York City time, on July 12, 2010 (the Record Date);

(b) The acquisition of the Rights by the Plan resulted from an independent act of TIB as a corporate entity, and all holders of the Rights, including the Plan, were treated in the same manner with respect to such acquisition;

(c) All Shareholders of Common Stock, including the Plan, received the same proportionate number of Rights based on the number of shares of Common Stock held by such Shareholders;

(d) All decisions regarding the Rights held by the Plan were made by the individual Plan participants (Participants) whose accounts in the Plan received the Rights pursuant to the Offering, in accordance with the provisions under the Plan for individually-directed investment of such account; and

(e) The Plan did not pay any fees or commissions in connection with the acquisition and or holding of the Rights.

Effective Date: This exemption is effective from December 17, 2010, through and including January 18, 2011.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption on or before May 21, 2012. During the comment period, the Department received one written comment from a Participant concerning the benefit of the Offering to the Plan and the provision of information to Participants concerning the terms of the Offering. The Participant's comment, as well as the Applicant's response to the issues raised therein, is described below. The Department received no hearing requests.

Participant's Comment

The Participant's comment concerned the Participant's belief that the Offering was conducted in a manner that was not in the benefit of the Participants in the Plan, and that TIB failed to provide information to Participants regarding their rights and obligations under the terms of the Offering. In this regard, the Participant states that a third party investment counselor whom the Participant solicited for advice suggested that the Offering benefited TIB, but did not necessarily benefit the Participants in the Plan. Furthermore, the Participant states that Participants had no choice except to deal with the terms of the Offering. Finally, the Participant states that Participants did not receive information regarding whom to contact or how to receive assistance concerning the terms of the Offering.

Applicant's Response

The Applicant reviewed the Participant's comment and disagreed with the Participant's characterization of the Offering and the Participant's opportunity to participate in the Offering. In response to the Participant's assertion that the Offering benefited TIB, but did not necessarily benefit the Participants in the Plan, the Applicant states that the Offering was intended as an opportunity for all shareholders of TIB Stock including those who held the TIB Stock in the Plan, to acquire additional shares of TIB Stock at a price below that available in the market at that time. In this regard, the Applicant notes that, as set forth in the proposed exemption, the subscription price was $15 per share of TIB Stock and the closing price per share of TIB Stock on the business day prior to the expiration of the Offering was $19.51 per share, an immediate gain of $4.51 per share for those shareholders of TIB Stock who exercised their Rights.

In response to the Participant's assertion that not enough information was provided to Participants concerning the terms of the Offering, the Applicant states that TIB provided Participants who held TIB Stock in their TIB Stock Fund with sufficient information and the opportunity to participate in the Offering. The Applicant states that all Plan Participants who held shares of TIB Stock in the TIB Stock Fund in the Plan were provided with the opportunity to participate in the Offering on the same terms as other shareholders of TIB Stock (except for the exercise process and the absence of fees and sales commissions for shares of TIB Stock held in the TIB Stock Fund), including any employees who held shares of Stock in accounts outside the Plan.

The Applicant notes that, in order to participate in the Offering with respect to shares of TIB Stock that were held in the Plan, Participants were mailed the ''Instructions for Participants in the TIB Financial Corp. Employee Stock Ownership Plan with 401(k) Provisions—Important information on the TIB Financial Corp. Rights Offering,'' that provided Participants with instructions on how to exercise the Rights that were allocated to a Participant's Plan account. In addition, the Applicant states that Participants were provided with a special election form to exercise their Rights and a prospectus that was provided to all shareholders of TIB Stock that described the Offering in more detail.

[6] For purposes of this exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

After giving full consideration to the entire record, including the written comment, the Department has decided to grant the exemption, as described above. The complete application file is made available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1513, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the proposed exemption published in the **Federal Register** on March 30, 2012 at 77 FR 19352.

FOR FURTHER INFORMATION CONTACT: Warren Blinder of the Department, telephone (202) 693–8553. (This is not a toll-free number.)

Ed Laur Defined Benefit Plan (the Plan) Located in Amarillo, TX

[Exemption Application No. D–11714 Prohibited Transaction Exemption 2012–18]

Exemption

The sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code,[7] shall not apply to the cash sale by the Plan to Ed Laur (Mr. Laur) of shares of stock (the Stock) of EnergyNet.com (EnergyNet); provided that:

(a) The sale of the Stock by the Plan to Mr. Laur is a one-time transaction in which the Plan receives cash;

(b) As the result of the sale, the Plan receives the fair market value of the Stock, as determined by the CFO of EnergyNet, as of the most recent valuation of such Stock;

(c) The Plan pays no commissions or fees in regard to the transaction; and

(d) The terms of the sale are no less favorable to the Plan than those the Plan would have received in similar circumstances when negotiated at arm's length with unrelated third parties.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption refer to the Notice of Proposed Exemption published on June 1, 2012, at 77 FR 32697.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena C. Le Blanc of the Department, telephone (202) 693–8551. (This is not a toll-free number.)

[7] Pursuant to 29 CFR 2510.3–3(b) of the Department's regulations, there is no jurisdiction with respect to the Plan under Title I of the Act. However, there is jurisdiction under Title II of the Act, pursuant to section 4975 of the Code.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Each exemption is supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of an exemption is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Lyssa E. Hall,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2012–18701 Filed 7–31–12; 8:45 am]

BILLING CODE 4510–29–P

OFFICE OF MANAGEMENT AND BUDGET

Audits of States, Local Governments, and Non-Profit Organizations; OMB Circular A–133 Compliance Supplement

AGENCY: Executive Office of the President, Office of Management and Budget.

ACTION: Notice of availability of the 2012 OMB Circular A–133 Compliance Supplement.

SUMMARY: This notice announces the availability of the 2012 OMB Circular A–133 Compliance Supplement (Supplement). The notice also offers interested parties an opportunity to comment on the 2012 Supplement. The 2012 Supplement adds seven new programs, including four programs added to existing clusters. It deletes eight programs and has also been updated for program changes and technical corrections. The eight deleted programs are:

- Catalog of Federal Domestic Assistance (CFDA) 15.518, Garrison Diversion Unit
- CFDA 15.520, Lewis and Clark Rural Water System
- CFDA 20.603, Federal Highway Safety Data Improvements Incentive
- CFDA 20.604, Safety Incentive Grants for Use of Seatbelts
- CFDA 20.605, Safety Incentives to Prevent Operation of Motor Vehicles by Intoxicated Persons
- CFDA 20.933, National Infrastructure Investments
- CFDA 93.713, ARRA—Child Care and Development Block Grant
- CFDA 97.004, State Domestic Preparedness Equipment Support Program (State Homeland Security Grant Program)

In total, the 2012 Supplement includes 243 individual programs. A list of changes to the 2012 Supplement can be found at APPENDIX V. APPENDIX VII provides an audit alert and lists compliance requirements regarding the grant programs funded under American Recovery and Reinvestment Act of 2009. Due to its length, the 2012 Supplement is not included in this Notice. See ''Addresses'' for information about how to obtain a copy either on line or through the Government Printing Office.

DATES: The 2012 Supplement supersedes the 2011 Supplement and will apply to audits of fiscal years beginning after June 30, 2011. All comments on the 2012 Supplement must be in writing and received by October 31, 2012. Late comments will be considered to the extent practicable. We received no comments on the 2011 Supplement.

Due to potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt. We cannot guarantee that comments mailed will be received before the comment closing date.

Electronic mail comments may be submitted to: *Hai_M._Tran@omb.eop.gov.* Please include ''A–133 Compliance Supplement—2012'' in the subject line and the full body of your comments in the text of the electronic message and as an attachment. Please include your

name, title, organization, postal address, telephone number, and email address in the text of the message. Comments may also be submitted via facsimile at 202–395–3952.

Comments may be mailed to Gilbert Tran, Office of Federal Financial Management, Office of Management and Budget, 725 17th Street NW., Room 6025, New Executive Office Building, Washington, DC 20503.

Comments may also be sent through *http://www.regulations.gov*—a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the **Federal Register** and that are open for comment. Simply type ''A–133 Compliance Supplement—2012'' (in quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments. Comments received through the Web site by the date specified above will be included as part of the official record.

ADDRESSES: The 2012 Supplement is available on-line on the OMB home page at *http://www.whitehouse.gov/omb/circulars/a133_compliance_supplement_2012.*

FOR FURTHER INFORMATION CONTACT: Recipients and auditors should contact their cognizant or oversight agency for audit, or Federal awarding agency, as appropriate under the circumstances. The Federal agency contacts are listed in Appendix III of the Supplement. Subrecipients should contact their pass-through entity. Federal agencies should contact Gilbert Tran, Office of Management and Budget, Office of Federal Financial Management, at (202) 395–3052.

Norman S. Dong,

Deputy Controller.

[FR Doc. 2012–18808 Filed 7–31–12; 8:45 am]

BILLING CODE P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice 12–061]

Notice of Intent To Grant Exclusive License

AGENCY: National Aeronautics and Space Administration.

ACTION: Notice of Intent to Grant Exclusive License.

SUMMARY: This notice is issued in accordance with 35 U.S.C. 209(e) and 37 CFR 404.7(a)(1)(i). NASA hereby gives notice of its intent to grant an exclusive license in the United States to practice the invention described and claimed in U.S. Patent Nos. 7,113,820 entitled, ''Real-Time, High Frequency QRS Electrocardiograph,'' 7,539,535 entitled, ''Real-Time, High Frequency QRS Electrocardiograph with Reduced Amplitude Zone Detection,'' and 7,386,340 entitled, ''System for Diagnosis and Monitoring of Coronary Artery Disease, Acute Coronary Artery Syndromes, Cardiomyopathy and Other Cardiac Conditions,'' to Medcare Holdings, LTD, having its principal place of business at P.O. Box 3483, Road Town, Tortola, British Virgin Islands. The patent rights in these inventions have been assigned to the United States of America as represented by the Administrator of the National Aeronautics and Space Administration. The prospective exclusive license will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7.

DATES: The prospective exclusive license may be granted unless, within fifteen (15) days from the date of this published notice, NASA receives written objections including evidence and argument that establish that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR 404.7. Competing applications completed and received by NASA within fifteen (15) days of the date of this published notice will also be treated as objections to the grant of the contemplated exclusive license.

Objections submitted in response to this notice will not be made available to the public for inspection and, to the extent permitted by law, will not be released under the Freedom of Information Act, 5 U.S.C. 552.

ADDRESSES: Objections relating to the prospective license may be submitted to Patent Counsel, Office of the Chief Counsel, NASA Johnson Space Center, 2101 NASA Parkway, Houston, TX 77058, Mail Code AL; Phone (281) 483–3021; Fax (281) 483–6936.

FOR FURTHER INFORMATION CONTACT: Ted Ro, Intellectual Property Attorney, Office of Chief Counsel, NASA Johnson Space Center, 2101 NASA Parkway, Houston, TX 77058, Mail Code AL; Phone (281) 244–7148; Fax (281) 483–6936. Information about other NASA inventions available for licensing can be found online at *http://technology.nasa.gov/.*

Sumara M. Thompson-King,

Acting Deputy General Counsel.

[FR Doc. 2012–18715 Filed 7–31–12; 8:45 am]

BILLING CODE 7510–13–P

NATIONAL LABOR RELATIONS BOARD

Further Amendment to Memorandum Describing Authority and Assigned Responsibilities of the General Counsel

AGENCY: National Labor Relations Board.

ACTION: Amendment of delegation of administrative authority to General Counsel under section 3(d) of National Labor Relations Act.

Authority: Sections 3, 4, 6, and 10 of the National Labor Relations Act, 29 U.S.C. Sec. 3, 4, 6, and 10.

SUMMARY: On July 23, 2012, the National Labor Relations Board amended the memorandum describing the authority and assigned responsibilities of the General Counsel of the National Labor Relations Board with respect to administrative functions to establish an Office of the Chief Financial Officer and to reestablish lines of authority within the administrative structure of the Agency. This amendment makes corrections in certain paragraph references required due to the renumbering of paragraphs in the July 23 amendment.

DATES: *Effective Date:* August 1, 2012.

ADDRESSES: National Labor Relations Board, 1099 14th Street NW., Room 11600, Washington, DC 20570.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570. Telephone: (202) 273–1067 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: Pursuant to the provisions of section 3(a) of the Administrative Procedure Act (Pub. L. 404, 79th Cong., 2d Sess.), the National Labor Relations Board hereby separately states and currently publishes in the **Federal Register** the following further amendment to Board memorandum describing the authority and assigned responsibilities of the General Counsel of the National Labor Relations Board.

The Board memorandum describing the authority and assigned responsibilities of the General Counsel of the National Labor Relations Board effective April 1, 1955, as amended September 8, 1958 (effective August 25, 1958), August 12, 1959 (effective August 3, 1959), April 28, 1961 (effective May 15, 1961), October 4, 2002 (effective October 1, 2002), and July 23, 2012 (effective July 23, 2012) (appearing at 20 FR 2175, 23 FR 6966, 24 FR 6666, 26 FR 3911, 67 FR 62992 and 77 FR 43127,

respectively), is hereby further amended as follows:

1. Strike the text of paragraphs 1 and 2 of section VII of the amendment dated October 4, 2002 (effective October 1, 2002), and substitute the following:

1. In order more fully to release the Board to the expeditious performance of its primary function and responsibility of deciding cases, the authority and responsibility for all administrative functions of the Agency shall be vested in the General Counsel, except as provided below. This authority shall be exercised subject to the limitations contained in paragraphs 2, 5 and 7, and shall be exercised in conformity with the requirements for joint determination as described in paragraph 4.

2. Subject to the limitations contained in paragraphs 5 and 7, the General Counsel shall exercise full and final authority on behalf of the Agency over the selection, retention, transfer, promotion, demotion, discipline, discharge, and in all other respects, of all personnel engaged in the field, except that personnel action with respect to Regional Directors and Officers-in Charge of Subregional offices will be conducted as hereinafter provided, and in the Washington Office (other than personnel in the Board Members' Offices, the Division of Judges, the Division of Information, the Security Office, the Office of the Solicitor, the Office of the Executive Secretary and the Office of Inspector General): provided, however, that the establishment, transfer or elimination of any Regional or Subregional Office shall require the approval of the Board. The appointment, transfer, demotion, or discharge of any Regional Director or of any Officer-in-Charge of a Subregional office shall be made by the General Counsel only upon the approval of the Board.

Dated: Washington, DC, July 27, 2012.

By direction of the Board.

Lester A. Heltzer,

Executive Secretary.

[FR Doc. 2012–18807 Filed 7–31–12; 8:45 am]

BILLING CODE 7545–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0149]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of pending U.S. Nuclear Regulatory Commission action to submit an information collection request to the Office of Management and Budget and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) invites public comment about our intention to request the Office of Management and Budget's (OMB) approval for renewal of an existing information collection that is summarized below. We are required to publish this notice in the **Federal Register** under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

Information pertaining to the requirement to be submitted:

1. *The title of the information collection:* Title 10 of the *Code of Federal Regulations* (10 CFR) Part 60, ''Disposal of High-Level Radioactive Wastes in Geologic Repositories.''

2. *Current OMB approval number:* 3150–0127.

3. *How often the collection is required:* The information need only be submitted one time.

4. *Who is required or asked to report:* State or Indian tribes, or their representatives, requesting consultation with the NRC staff regarding review of a potential high-level radioactive waste geologic repository site, or wishing to participate in a license application review for a potential geologic repository (other than a potential geologic repository site at Yucca Mountain, Nevada, which is regulated under 10 CFR part 63.

5. *The number of annual respondents:* 1; however, none are expected in the next 3 years.

6. *The number of hours needed annually to complete the requirement or request:* 1; however, none are expected in the next 3 years.

7. *Abstract:* Part 60 of 10 CFR requires States and Indian tribes to submit certain information to the NRC if they request consultation with the NRC staff concerning the review of a potential repository site, or wish to participate in a license application review for a potential repository (other than the Yucca Mountain, Nevada site, which is regulated under 10 CFR part 63). Representatives of States or Indian tribes must submit a statement of their authority to act in such a representative capacity. The information submitted by the States and Indian tribes is used by the Director of the Office of Nuclear Material Safety and Safeguards as a basis for decisions about the commitment of NRC staff resources to the consultation and participation efforts. The NRC anticipates conducting a public rulemaking to revise portions of 10 CFR part 60 in the near future (i.e., within the next 5 years). If, as part of this rulemaking, revisions are made affecting the information collection requirements, the NRC will follow OMB requirements for obtaining approval for any revised information collection requirements. [**Note:** All of the information collection requirements pertaining to Yucca Mountain were included in 10 CFR part 63, and were approved by OMB under control number 3150–0199. The Yucca Mountain site is regulated under 10 CFR part 63 (66 FR 55792, November 2, 2001).]

Submit, by October 1, 2012, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?

2. Is the burden estimate accurate?

3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?

4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

The public may examine and have copied, for a fee, publicly available documents, including the draft supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The OMB clearance requests are available on the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/.*

The document will be available on the NRC's Web site for 60 days after the signature date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because your comments will not be edited to remove any identifying or contact information, the NRC cautions you against including any information in your submission that you do not want to be publicly disclosed. Comments submitted should reference Docket No. NRC–2012–0149. You may submit your comments by any of the following methods. Electronic comments: Go to *http://www.regulations.gov* and search for Docket No. NRC–2012–0149. Mail comments to NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Questions about the information collection requirements may be directed to the NRC Clearance Officer, Tremaine Donnell (T–5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, by telephone at 301–

415–6258, or by email to *INFOCOLLECTS.Resource@NRC.GOV.*

Dated at Rockville, Maryland, this 26th day of July 2012.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Service.

[FR Doc. 2012–18778 Filed 7–31–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0036]

Agency Information Collection Activities: Submission for the Office of Management and Budget Review; Comment Request

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of the Office of Management and Budget review of information collection and solicitation of public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) has recently submitted to the Office of Management and Budget (OMB) for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The NRC published a **Federal Register** Notice with a 60-day comment period on this information collection on March 5, 2012.

1. *Type of submission, new, revision, or extension:* Extension.
2. *The title of the information collection:* Requests to Non-Agreement States for Information.
3. *Current OMB approval number:* 3150–0200.
4. *The form number if applicable:* N/A.
5. *How often the collection is required:* 8 times per year.
6. *Who will be required or asked to report:* The 15 Non-Agreement States (13 States, the District of Columbia and the Commonwealth of Puerto Rico that have not signed Section 274(b) Agreements with the NRC).
7. *An estimate of the number of annual responses:* 120.
8. *The estimated number of annual respondents:* 15.
9. *An estimate of the total number of hours needed annually to complete the requirement or request:* 1,089.
10. *Abstract:* Requests may be made of Non-Agreement States that are similar to those of Agreement States to provide a more complete overview of the national program for regulating radioactive materials. This information would be used in the decision-making of the Commission. With Agreement States and as part of the NRC's cooperative post-agreement program with the States pursuant to Section 274(b), information on licensing and inspection practices, and/or incidents, and other technical and statistical information are exchanged. Therefore, information requests sought may take the form of surveys, e.g., telephonic and electronic surveys/polls and facsimiles.

The public may examine and have copied for a fee, publicly available documents, including the final supporting statement, at the NRC's Public Document Room, Room O–1F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland. The OMB clearance requests are available on the NRC's Web site: *http://www.nrc.gov/public-involve/doc-comment/omb/.* The document will be available on the NRC's Web site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer listed below by August 31, 2012. Comments received after this date will be considered if it is practical to do so, but assurance of consideration cannot be given to comments received after this date.

Chad Whiteman, Desk Officer, Office of Information and Regulatory Affairs (3150–0200), NEOB–10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be emailed to *Chad_S_Whiteman@omb.eop.gov* or submitted by telephone at 202–395–4718.

The NRC Clearance Officer is Tremaine Donnell, 301–415–6258.

Dated at Rockville, Maryland, this 26th day of July 2012.

For the Nuclear Regulatory Commission.

Tremaine Donnell,

NRC Clearance Officer, Office of Information Services.

[FR Doc. 2012–18779 Filed 7–31–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee On Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee On Reliability and PRA; Notice of Meeting

The ACRS Subcommittee on Reliability and PRA will hold a meeting on August 15, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, August 15, 2012—8:30 a.m. Until 12 p.m.

The Subcommittee will be briefed on the draft SECY Paper on Economic Consequences/Land Contamination. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Derek Widmayer (Telephone 301–415–7366 or Email: *Derek.Widmayer@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by

contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: July 23, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–18766 Filed 7–31–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee on Fukushima; Notice of Meeting

The ACRS Subcommittee on Fukushima will hold a meeting on August 14, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, August 14, 2012—1 p.m. until 5 p.m.

The Subcommittee will hear an update on the staff's development of the interim staff guidance in support of the NTTF Report Recommendation 2.1 (seismic reevaluation). The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Derek Widmayer (Telephone 301–415–7366 or Email: *Derek.Widmayer@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North Building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: July 23, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–18757 Filed 7–31–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee On Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee On Economic Simplified Boiling Water Reactors (ESBWR); Notice of Meeting

The ACRS Subcommittee on ESBWR will hold a meeting on August 16, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The meeting will be open to public attendance with the exception of a portion that may be closed to protect information that is proprietary, pursuant to 5 U.S.C. 552b(c)(4).

The agenda for the subject meeting shall be as follows:

Thursday, August 16, 2012—8:30 a.m. until 5:00 p.m.

The Subcommittee will review the Fermi Reference Combined License Application (RCOLA) Chapters 2, 3, 10, and 14 of the Safety Evaluation Report (SER). The Subcommittee will hear presentations by and hold discussions with representatives from Detroit Edison, the NRC staff, and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Christopher Brown (Telephone 301–415–7111 or Email: *Christopher.Brown@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron

Brown (240–888–9835) to be escorted to the meeting room.

Dated: July 23, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–18759 Filed 7–31–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee On Reactor Safeguards (ACRS); Meeting of the ACRS Subcommittee On Fukushima; Notice of Meeting

The ACRS Subcommittee on Fukushima will hold a meeting on August 15, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, August 15, 2012—1 p.m. until 5 p.m.

The Subcommittee will discuss the staff's proposed path for addressing the Fukushima Near Term Task Force (NTTF) Recommendation 1: Enhanced Regulatory Framework. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Antonio Dias (Telephone 301–415–6805 or Email: *Antonio.Dias@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: July 16, 2012.

Cayetano Santos,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–18763 Filed 7–31–12; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67511; File No. SR–NASDAQ–2012–086]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fees for Access to BONO and ITTO Ports

July 26, 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 July 24, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to modify Chapter XV, Sec. 3 entitled ''NASDAQ Options Market—Access Services,'' related to fees assessed by NASDAQ for connectivity to the NASDAQ Options Market (''NOM''), NASDAQ's facility for executing and routing standardized equity and index options.

While fee changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on September 3, 2012.

The text of the proposed rule change is set forth below. Proposed new text is in italics and deleted text is in brackets.

* * * * *

Chapter XV Options Pricing

NASDAQ Options Market Participants may be subject to the Charges for Membership, Services and Equipment in the Rule 7000 Series as well as the fees in this Chapter XV.

* * * * *

Sec. 3 NASDAQ Options Market—Access Services

The following charges are assessed by Nasdaq for connectivity to the NASDAQ Options Market:

(a) TradeInfo

• Members not subscribing to the Nasdaq Workstation using TradeInfo will be charged a fee of $95 per user per month.

(b) Port Fees, per port per month, as follows:

Order Entry Port Fee—$500.00
CTI Port Fee—$500.00
OTTO Port Fee—$500.00
ITTO Port Fee [1]—$500.00
BONO Port Fee [1]—$500.00
Order Entry DROP Port Fee—$500.00
OTTO DROP Port Fee—$500.00
SQF Port Fee—$250.00

[1] *ITTO and BONO Port fees will be assessed to non-NOM Participants and NOM Participants.*

* * * * *

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.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. 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

NASDAQ is proposing to amend Chapter XV, Sec. 3(b) to assess fees for the Best of NASDAQ Options (''BONO℠'')[3] and NASDAQ ITCH to Trade Options (''ITTO'')[4] ports to non-NOM Participants and NOM Participants for purposes of receiving the BONO and ITTO data feeds.[5]

When the Exchange filed to adopt pricing for the BONO and ITTO data feeds, the Exchange noted in its filing that ''* * * NASDAQ has made a voluntary decision to make this market data available. NASDAQ is not required by the Exchange Act in the first instance to make the data available, unlike the best bid and offer which must be made available under the Act. NASDAQ has chosen to make the noted data available to improve market quality, to attract order flow, and to increase transparency; and will continue to make the data available until such time as NASDAQ changes its rule.'' Further, ''NASDAQ believes that its ITTO and BONO(℠) which includes the NOM NBBO and last sale information for trades executed on NOM in BONO,(℠) are precisely the sort of market data products that the Commission envisioned when it adopted Regulation NMS.''[6]

The Exchange currently assesses fees to NOM Participants for connectivity to various types of ports,[7] among them the BONO and ITTO ports. The fees for these ports are currently assessed only to NOM Participants.[8] The BONO and ITTO ports are necessary in order for subscribers to BONO and ITTO to receive those data feeds. Today, non-NOM Participants are not assessed fees for BONO and ITTO ports that they are utilizing to receive data.[9] The Exchange proposes to assess fees for BONO and ITTO ports to non-NOM Participants as well as NOM Participants.

Similar to the BONO and ITTO data feeds in Sec. 4 of Chapter XV, NASDAQ will issue an invoice to non-NOM Participants for BONO and ITTO ports fees on behalf of the NASDAQ OMX Global Data Products group.[10] The Exchange proposes to include a footnote within Sec. 3(b) of Chapter XV to specify that ITTO and BONO port fees will be assessed to non-NOM Participants and NOM Participants.

2. Statutory Basis

NASDAQ believes that its proposal to amend its pricing is consistent with Section 6(b) of the Act[11] in general, and furthers the objectives of Section 6(b)(4) of the Act[12] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using any facility or system which NASDAQ operates or controls.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. NASDAQ has made a voluntary decision to make the BONO and ITTO market data available. NASDAQ has chosen to make the noted data available to improve market quality, to attract order flow, and to increase transparency; and will continue to make the data available until such time as NASDAQ changes it rules. In order to obtain the data, all subscribers require a BONO and/or ITTO port.

The Exchange believes that assessing non-NOM Participants port fees for BONO and ITTO ports in addition to NOM Participants is reasonable, equitable and not unfairly discriminatory because all subscribers to the data would be assessed the same rate to obtain a port. Today, non-NOM Participants are not assessed BONO and ITTO port fees and NOM Participants pay a $500 per port per month fee. This proposal would uniformly assess all subscribers a $500 per port per month fee.

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a by-product of the execution service. The fees assessed by the Exchange must

[3] BONO℠ is a data feed that provides the NOM Best Bid and Offer (''NOM NBBO'') and last sale information for trades executed on NOM. The NOM NBBO and last sale information are identical to the information that NOM sends the Options Price Regulatory Authority (''OPRA'') and which OPRA disseminates via the consolidated data feed for options. BONO is the options equivalent of the NASDAQ Basic data feed offered for equities under NASDAQ Rule 7047. *See* Chapter VI, Section 1 at subsection (a)(3)(B).

[4] ITTO is a data feed that provides quotation information for individual orders on the NOM book, last sale information for trades executed on NOM, and Order Imbalance Information as set forth in NOM Rules Chapter VI, Section 8. ITTO is the options equivalent of the NASDAQ TotalView/ITCH data feed that NASDAQ offers under NASDAQ Rule 7023 with respect to equities traded on NASDAQ. As with TotalView, members use ITTO to ''build'' their view of the NOM book by adding individual orders that appear on the feed, and subtracting individual orders that are executed. *See* Chapter VI, Section 1 at subsection (a)(3)(A).

[5] The BONO and ITTO data feeds are described in Chapter XV, Section 4. The Exchange assesses monthly fees for firms that are distributors of BONO and ITTO market data. A ''distributor'' of NASDAQ options market data is any entity that receives a feed or data file of NASDAQ data directly from NASDAQ or indirectly through another entity and then distributes the data either internally (within that entity) or externally (outside that entity). The Exchange assesses fees for BONO and ITTO data on a per-user basis. These fees are separate from port fees. These fees vary based on whether they are for Professional users or Non-Professional users. The term ''Non-Professional'' shall have the same meaning as in NASDAQ Rule 7011(b)(2). Rule 7011(b)(2) defines a ''Non-Professional'' as a natural person who is neither: (A) Registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (B) engaged as an ''investment adviser'' as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (C) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Professional user is any user that is not a non-Professional. For BONO data, the per-user fee is $5 per Professional user; and $1 per non-Professional user. For ITTO data, the per-user fee is $10 per Professional user; and $1 per Non-Professional user.

[6] *See* Securities Exchange Act Release No. 64652 (June 13, 2011), 76 FR 35498 (June 17, 2011) (SR–NASDAQ–2011–075).

[7] The Exchange assesses fees for a CTI Port, OTTO Port, ITTO Port, BONO Port, Order Entry DROP Port, OTTO DROP Port and SQF Port in Section 3(b) of Chapter XV of the Options Rules. Non-NOM Participants only have access to the BONO and ITTO ports.

[8] NOM Participants are assessed a $500 per port per month fee to obtain a BONO or ITTO port.

[9] NOM Participants and non-NOM Participants are assessed fees today for the BONO and ITTO data. Only NOM Participants are assessed port fees today.

[10] Today, the BONO and ITTO market data distributor fees are invoiced by The NASDAQ Stock Market LLC. NOM will continue to invoice and collect fees for all ports specified in Sec. 3(b) of Chapter XV including BONO and ITTO ports for NOM Participants.

[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4).

remain competitive with fees assessed by other venues and therefore must continue to be reasonable and equitably allocated to those subscribers that desire to subscribe to services at the Exchange rather than competing venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[13] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2012–086 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–NASDAQ–2012–086. 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–NASDAQ–2012–086 and should be submitted on or before August 22, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18790 Filed 7–31–12; 8:45 am]

BILLING CODE 8011–01–P

[13] 15 U.S.C. 78s(b)(3)(A)(ii).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67506; File No. SR–OCC–2012–12]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change To Amend OCC's By-Laws To Allow the Corporation To Approve OCC's Form of Clearing Member Application and Form of Clearing Agreement

July 26, 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 July 16, 2012, The Options Clearing Corporation (''OCC'' or the ''Corporation'') 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 primarily by OCC. 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 proposed rule change would amend OCC's By-Laws to allow the Corporation to approve OCC's form of clearing member application and form of clearing agreement. The proposed rule change also amends the Agreement for OCC Services to reflect operational changes OCC made since OCC first created the agreement.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC 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

The purpose of this proposed rule change is to amend OCC's By-Laws to allow the Corporation to approve OCC's form of clearing member application and form of clearing agreement. Currently, OCC's Board of Directors must approve the form of these documents. OCC is also proposing general updates to its Agreement for OCC Services which has not been updated for several years.

OCC requires applicants for clearing membership at OCC to complete an application and, once an applicant becomes a clearing member, requires clearing members to enter into a clearing member agreement. Currently, OCC's By-Laws and Rules set forth the qualifications and requirements for clearing membership at OCC. The clearing member application is designed to elicit relevant information from an applicant for clearing membership in order for OCC to determine if the applicant meets OCC's qualifications for clearing membership. The clearing member agreement is a contract between OCC and a clearing member whereby the clearing member agrees to meet all of the requirements of clearing membership at OCC. The By-Laws require OCC's Board of Directors to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

approve both the form of clearing member application and the form of clearing member agreement.

In addition to the clearing member agreement, clearing members may also enter into an Agreement for OCC Services. The Agreement for OCC Services sets forth certain ancillary services OCC provides to its clearing members that are in addition to those services set forth in the By-Laws and Rules. The Agreement for OCC Services is set up as a master agreement. Clearing members may then choose the specific ancillary services they desire and then execute the appropriate ancillary services supplement. Such ancillary services may include, for example, access to OCC's Data Distribution Services, internet access to OCC information and data systems, and OCC's theoretical profit and loss values service.

Proposed By-Law and Rule Changes

OCC proposes to amend the applicable provisions of its By-Laws to state that both the form of clearing member application and the form of clearing member agreement be specified by OCC generally, rather than its Board of Directors. The requirement that the Board of Directors approve the form of such documents is overly ministerial given that OCC's By-Laws specify the substantive requirements of both the clearing member application and the clearing member agreement.

OCC also proposes to amend its Agreement for OCC Services (see Exhibit 5 to OCC's proposed rule filing) to reflect operational changes OCC made since OCC first created the agreement. These changes include broader references to ''clearing services'' provided by OCC and not only to ''options'' clearing services. Advanced notice of 90 days of fee changes would be eliminated because fee changes to the ancillary services program are filed as rule changes and are infrequent in nature. Language would be added to the Agreement for OCC Services such that the clearing member authorizes OCC to withdraw funds from the clearing member's firm account, on or after the fifth business day following the end of the calendar month. This language conforms to OCC Rules. In addition, a provision referring to the exclusivity of the warranties set forth in the Agreement for OCC Services would be eliminated because the agreement contains no warranty provisions. Any applicable warranty provisions would be contained within the ancillary supplements to the Agreement for OCC Services.

OCC believes that the proposed changes to its By-Laws and Agreement for OCC Services are consistent with the purposes and requirements of Section 17A of the Act because they are designed to remove impediments to, and perfect the mechanism of, a national system for the prompt and accurate clearance and settlement of securities transactions.[3] The proposed changes eliminate inefficient and burdensome administrative procedures which unnecessarily require OCC's Board approval for the form of clearing member application and agreement. The proposed rule change is not inconsistent with any rules of OCC, including those proposed to be amended.

B. Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would 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 were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

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:

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–OCC–2012–12 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–OCC–2012–12. 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 inspection and copying in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549–1090. Copies of such filing will also be available for inspection and copying at the principal office of OCC and on OCC's Web site at *http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_12_12.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–OCC–2012–12 and should be submitted on or before August 22, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[4]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18703 Filed 7–31–12; 8:45 am]

BILLING CODE 8011–01–P

[3] 15 U.S.C. 78q–1.

[4] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67508; File No. SR–Phlx–2012–98]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Terminate Revenue Sharing Agreement and Delete Associated Fee Schedule

July 26, 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 July 19, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') 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 proposes a rule change to terminate a revenue sharing program with Correlix, Inc. (''Correlix''), and delete the associated fees set forth in NASDAQ OMX PHLX Pricing Schedule, Section X(e). The text of the proposed rule change is available at *http://nasdaqomxphlx.cchwallstreet.com/nasdaqomxphlx/phlx/,* at Phlx's principal office, 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx proposes to eliminate its revenue-sharing program with Correlix, which was adopted to provide users of the Exchange real-time analytical tools to measure the latency of orders to and from its systems. In 2010, the Commission approved the revenue-sharing program, as well as a flexible free trial period for new users.[3] Under the program, the Exchange contracted with Correlix to receive 30% of the total monthly subscription fees received by Correlix from parties who contracted directly with Correlix to use its RaceTeam latency measurement service on the Exchange. The Exchange now proposes to terminate the revenue sharing relationship with Correlix due to the lack of customer interest in the measurement tools offered. It also proposes to delete from the rulebook the listing of fees for the service, so as to eliminate any confusion on the part of customers.[4]

2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act,[6] in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, Phlx believes ending the revenue sharing agreement and eliminating the fee for a product that customers have not chosen to utilize is responsive to market participants and eliminates confusion about offered products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, the Exchange believes that terminating the revenue sharing agreement and deleting the fee in the rulebook will not burden competition since the latency measurement tools are not currently being used by any customers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act[7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6)[9] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change to become operative upon filing to eliminate confusion on the part of potential customers regarding the availability of the Correlix RaceTeam offering. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Exchange represents that there are no customers currently using Correlix's RaceTeam latency

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See Exchange Act Release No. 63219 (November 1, 2010) 75 FR 68387 (November 5, 2010) (SR–Phlx–2010–152).

[4] The NASDAQ Stock Market recently filed a similar rule filing eliminating its revenue sharing relationship with Correlix and deleting from its rulebook the listing of fees for the service, due to lack of customer interest in the tools. See Exchange Act Release No. 67285 (June 27, 2012) 77 FR 39551 (July 3, 2012) (SR–NASDAQ–2012–74).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

measurement service. Therefore, the Commission designates the proposed rule change as operative upon filing with the Commission.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- *Send an email to rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–98 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2012–98. 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–Phlx–2012–98 and should be submitted on or before August 22, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18753 Filed 7–31–12; 8:45 am]

BILLING CODE 8011–01–P

[11] 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).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67509; File No. SR–BX–2012–054]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Terminate Revenue Sharing Agreement and Delete Associated Fees

July 26, 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 July 19, 2012, NASDAQ OMX BX, Inc. (''BX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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

BX proposes a rule change to terminate a revenue sharing program with Correlix, Inc. (''Correlix''), and delete the associated fees set forth in NASDAQ OMX BX Rule 7034(e). The text of the proposed rule change is available at *http://nasdaqomxbx.cchwallstreet.com/,* at BX's principal office, 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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

BX proposes to eliminate its revenue-sharing program with Correlix, which was adopted to provide users of the Exchange real-time analytical tools to measure the latency of orders to and from its systems. In 2010, the Commission approved the revenue-sharing program, as well as a flexible free trial period for new users.[3] Under the program, the Exchange contracted with Correlix to receive 30% of the total monthly subscription fees received by Correlix from parties who contracted directly with Correlix to use its RaceTeam latency measurement service on the Exchange. The Exchange now proposes to terminate the revenue sharing relationship with Correlix due to the lack of customer interest in the measurement tools offered. It also proposes to delete from the rulebook the listing of fees for the service, so as to eliminate any confusion on the part of customers.[4]

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[5] in general, and with Section 6(b)(5) of the Act,[6] in particular, in that the proposal is designed to prevent fraudulent and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] See Exchange Act Release No. 63220 (November 1, 2010) 75 FR 68389 (November 5, 2010) (SR–BX–2010–072).

[4] The NASDAQ Stock Market recently filed a similar rule filing eliminating its revenue sharing relationship with Correlix and deleting from its rulebook the listing of fees for the service, due to lack of customer interest in the tools. See Exchange Act Release No. 67285 (June 27, 2012) 77 FR 39551 (July 3, 2012) (SR–NASDAQ–2012–74).

[5] 15 U.S.C. 78f.

[6] 15 U.S.C. 78f(b)(5).

manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Specifically, BX believes ending the revenue sharing agreement and eliminating the associated fee for a product that customers have not chosen to utilize is responsive to market participants and eliminates confusion about offered products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, the Exchange believes that terminating the revenue sharing agreement and deleting the associated fee in the rulebook will not burden competition since the latency measurement tools are not currently being used by any customers.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) thereunder.[8]

A proposed rule change filed under Rule 19b–4(f)(6) [9] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[10] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change to become operative upon filing to eliminate confusion on the part of potential customers regarding the availability of the Correlix RaceTeam offering. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The Exchange represents that there are no customers currently using Correlix's RaceTeam latency measurement service. Therefore, the Commission designates the proposed rule change as operative upon filing with the Commission.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- *Send an email to rule-comments@sec.gov.* Please include File Number SR–BX–2012–054 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–BX–2012–054. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–BX–2012–054 and should be submitted on or before August 22, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18754 Filed 7–31–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6). Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[9] 17 CFR 240.19b–4(f)(6).

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] 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).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67507; File No. SR–NASDAQ–2012–090]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend Rule 4626—Limitation of Liability

July 26, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 23, 2012, The NASDAQ Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

rule change as described in Items I and II below, which Items have been prepared by the Exchange.[3] 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 Rule 4626. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com,* at NASDAQ's principal office, 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

I. Introduction

The Proposal

Nasdaq is seeking the SEC's approval of a voluntary accommodation policy for claims arising from system difficulties that Nasdaq experienced during the initial public offering (''IPO'') of Facebook, Inc. (''Facebook'' or ''FB'') on May 18, 2012. In the weeks since the Facebook IPO, Nasdaq has reviewed the events of May 18 with the goal of proposing a fair and equitable accommodation policy that is consistent with the Exchange Act and Nasdaq's self-regulatory obligations. This proposal reflects Nasdaq's effort (i) to identify the categories of investors and members that Nasdaq's system difficulties caused objective, discernible harm, and the type and scope of such harm, and (ii) to propose an objectively reasonable and regulatorily balanced plan for accommodating Exchange members and their investor customers for such harm. Nasdaq has undertaken this effort notwithstanding the liability protections afforded by its contractual limitations of liability, common law immunity, and Rule 4626—the rule that Nasdaq proposes to modify.[4]

Rule 4626 limits the liability of Nasdaq and its affiliates with respect to any losses, damages, or other claims arising out of the Nasdaq Market Center or its use and provides for limited accommodations under the conditions specified in the rule.[5] Subsection (b)(1) provides that for the aggregate of all claims made by market participants related to the use of the Nasdaq Market Center during a single calendar month, Nasdaq's payments under Rule 4626 shall not exceed the larger of $500,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy. Subsection (b)(2) states that for the aggregate of all claims made by market participants related to systems malfunctions or errors of the Nasdaq Market Center concerning locked/crossed compliance, trade through protection, market maker quoting, order protection, or firm quote compliance, during a single calendar month Nasdaq's payments under Rule 4626 shall not exceed the larger of $3,000,000 or the amount of the recovery obtained by Nasdaq under any applicable insurance policy.[6]

On May 18, 2012, Nasdaq experienced system difficulties during the Nasdaq Halt and Imbalance Cross Process (the ''Cross'') for the FB IPO. These difficulties delayed the completion of the Cross from 11:05 a.m. until 11:30 a.m. Based on its assessment of the information available at the time, Nasdaq concluded that the system issues would not have any effects beyond the delay itself. In an exercise of its regulatory authority, Nasdaq determined to proceed with the IPO at 11:30 a.m. rather than postpone it.

As a result of the system difficulties, however, certain orders for FB stock that were entered between 11:11:00 a.m. and 11:30:09 a.m. in the expectation of participating in the Cross—and that were not cancelled prior to 11:30:09—either did not execute or executed after 1:50 p.m. at prices other than the $42.00 price established by the Cross. (Other orders entered between 11:11:00 a.m. and 11:30:09 a.m., including cancellations, buy orders below $42.00, and sell orders above $42.00, were handled without incident.) System issues also delayed the dissemination of Cross transaction reports from 11:30 a.m. until 1:50 p.m. At 1:50 p.m., Nasdaq system difficulties were completely resolved. Nasdaq's analysis indicates that only a small percentage of the FB orders received by Nasdaq on May 18 were directly affected by Nasdaq system difficulties.

In the period between 11:30 a.m. and 1:50 p.m., although system issues had prevented Nasdaq from disseminating Cross transaction reports, Nasdaq determined not to halt trading in FB stock. Nasdaq believed that the system issues would be resolved promptly. Moreover, after 11:30 a.m. there was an orderly, liquid, and deep market in FB stock, with active trading on all markets. Halting trading on a market-wide basis in these circumstances would have been unprecedented, and, in Nasdaq's view, unjustified. In any event, in Nasdaq's regulatory judgment, the conditions after 11:30 a.m. did not warrant a halt of trading.

As a result of these unique circumstances, Nasdaq is proposing to accommodate members for losses attributable to the system difficulties on May 18, 2012 in an amount not to exceed $62 million. Nasdaq also proposes standards for orders to qualify for accommodation. For the reasons explained below, Nasdaq proposes to make accommodation payments in respect of:

1. SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. on May 18, 2012, that were priced at $42.00 or less, and that did not execute;

2. SELL Cross orders that were submitted between 11:11 a.m. and 11:30

[3] The Commission emphasizes that this notice was solely prepared by Nasdaq. As with all self-regulatory organization rule filings, the representations, views, and opinions contained in the notice are those of Nasdaq. The Commission is publishing the notice pursuant to the Exchange Act and the rules thereunder. The Commission neither makes any findings nor expresses any opinion with respect to Nasdaq's representations and interpretations contained in this notice.

[4] Rule 4626 was adopted on January 13, 2006 as part of Nasdaq's registration as a national securities exchange. Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131). The rule was amended in Securities Exchange Act Release Nos. 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR–NASDAQ–2006–001); 60794 (October 6, 2009), 74 FR 52522 (October 13, 2009) (SR–NASDAQ–2009–084); and 64365 (April 28, 2011), 76 FR 25384 (May 4, 2011) (SR–NASDAQ–2011–058).

[5] Rule 4626(a) provides that except as set forth in the accommodation portion of the rule, ''Nasdaq and its affiliates shall not be liable for any losses, damages, or other claims arising out of the Nasdaq Market Center or its use. Any losses, damages, or other claims, related to a failure of the Nasdaq Market Center to deliver, display, transmit, execute, compare, submit for clearance and settlement, adjust, retain priority for, or otherwise correctly process an order, Quote/Order, message, or other data entered into, or created by, the Nasdaq Market Center shall be absorbed by the member, or the member sponsoring the customer, that entered the order, Quote/Order, message, or other data into the Nasdaq Market Center.''

[6] Rule 4626 was amended in 2011 to the current version. *See* Securities Exchange Act Release No. 64365 (April 28, 2011), 76 FR 25384 (May 4, 2011) (SR–NASDAQ–2011–058) (notice of filing and immediate effectiveness).

a.m. on May 18, 2012, that were priced at $42.00 or less, and that executed at a price below $42.00;

3. BUY Cross orders priced at exactly $42.00 and that were executed in the Cross but not immediately confirmed; and

4. BUY Cross orders priced above $42.00 and that were executed in the Cross but not immediately confirmed, but only to the extent entered with respect to a customer [7] that was permitted by the member to cancel its order prior to 1:50 p.m. and for which a request to cancel the order was submitted to Nasdaq by the member, also prior to 1:50 p.m.[8]

The modifications proposed in this rule change are not intended to and do not affect the limitations of liability set forth in Nasdaq's agreements or SEC-sanctioned rules, or those limitations or immunities that bar claims for damages against Nasdaq as a matter of law. Rather, as noted above, they reflect Nasdaq's determination to adopt a fair and equitable accommodation policy that takes into account the impacts of Nasdaq's system issues on the investing public and members.

In the two sections that follow, Nasdaq provides: (i) Background information concerning Nasdaq's IPO process generally, the system difficulties Nasdaq experienced with the Facebook IPO process on May 18, 2012, and the impacts that those system difficulties had on certain orders; and (ii) Nasdaq's accommodation proposal, including the standards to be applied to claims for accommodation, the rationale for those standards, the proposed procedure for the submission and evaluation of claims, and the proposed payment process.

II. Background

The IPO Cross Process

The Nasdaq Cross, which is set forth in Nasdaq Rule 4753 (Nasdaq Halt and Imbalance Crosses), was developed in consultation with market participants and is designed to provide fair executions for investors to begin secondary market trading in IPO shares. The purposes of the Cross are set forth in the filings with the Commission that implemented Rule 4753.[9] In approving the Cross, the Commission found that the Cross process, as described in Nasdaq's filing seeking approval of the Cross, ''should provide useful information to market participants and increase transparency and order interaction at the opening,'' and ''should result in the public dissemination of information that more accurately reflects trading in a particular security.'' [10] The Commission additionally concluded that the Cross, as described in Nasdaq's filing, is consistent with the requirements of the Act and the rules and regulations thereunder generally, and particularly with the requirement that rules be designed to facilitate transactions in securities and to remove impediments to and perfect the mechanism of a free and open market.[11] The Commission also found that the Cross, as described in Nasdaq's filing, was ''based on the Nasdaq opening cross, which the Commission approved in a prior filing.'' [12]

The Cross is an open and transparent process that identifies a single price based on supply and demand as represented by orders submitted to the Cross process. The Cross process is integrated with the Nasdaq order book to provide a smooth transition for orders from the Cross to continuous trading.

In the Cross process, all members have the ability to enter orders and observe the evolution of the prospective auction price through Nasdaq's dissemination of auction imbalance information, and thereby to participate in the price discovery process. Cross-eligible shares determine the auction price as the price nearest to the offering price that will execute all market order shares, all limit order shares with superior prices to the auction price,[13] and as many limit order shares as possible with limit prices equal to the auction price.[14]

Nasdaq begins accepting Cross orders at the system start time of 7:00 a.m. During the interval between the system start time and the start of the Display-only period, orders can be entered or cancelled freely, and information on Cross orders is not publicly disseminated. The Display-only period begins 15 minutes prior to the scheduled release time of the IPO. Once the Display-only period begins, Nasdaq disseminates indicative information about the auction price and auction volume via Net Order Imbalance Indicator (''NOII'') messages on Nasdaq's public data feeds at five-second intervals.[15] Members may enter and cancel orders during the Display-only period. As the effects of order entry and cancellation are disseminated to the public, participants may respond with further order entry, modification, or cancellation instructions. Over the course of the Display-only period, market participants develop an understanding of the state of supply and demand, changes in the indicative price typically become smaller, and the indicative volume typically increases.

The Display-only period can be extended (up to six times) in five-minute increments. During the extension period, imbalance information continues to be disseminated and orders may be entered or canceled. It is relatively common for the Display-only period of an IPO to be extended.

Once there are no further five-minute extensions of the Display-only period, the IPO Cross executes, the Nasdaq official opening price is disseminated, a bulk trade execution is sent to the consolidated tape, and messages confirming individual executions for Cross-executed shares are sent to market participants. In accordance with market participants' instructions, orders not executed in the Cross are either canceled or populate the Nasdaq electronic order book.

Nasdaq believes that the benefits of the Cross include optimizing an opening price and allowing investors to cancel their orders at the last possible moment before a Cross is calculated. Moreover, as the Commission found when it approved the Cross, the Cross process, as described in Nasdaq's filing, was designed as described above to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the

[7] For purposes of the rule, unless stated otherwise, the term ''customer'' shall be construed to include any unaffiliated entity upon whose behalf an order is entered, including any unaffiliated broker or dealer.

[8] All claims allegedly attributable to system errors on May 18, 2012 not directly involving the FB IPO Cross will continue to be evaluated and adjudicated under Nasdaq Rule 4626(b)(1) using Nasdaq's existing processes and subject to Nasdaq's existing limitation of liability.

[9] *See* Securities Exchange Act Release Nos. 53488 (March 15, 2006), 71 FR 14272 (March 21, 2006) (SR–NASD–2006–015); 54248 (July 31, 2006), 71 FR 44738 (August 7, 2006) (SR–NASDAQ–2006–019).

[10] Securities Exchange Act Release No. 53687 (April 20, 2006), 71 FR 24878 (April 27, 2006) (SR–NASD–2006–015).

[11] *Id.*

[12] *Id.* (citing Securities Exchange Act Release 50405 (September 16, 2004), 69 FR 57118 (September 23, 2004) (SR–NASD–2004–071).

[13] An order with a superior price is, in the case of a buy order, an order with a limit higher than the auction price, and in the case of a sell order, an order with a limit lower than the auction price.

[14] The Cross algorithm sets the auction price by determining the price that will maximize the number of shares executed and, in the case of multiple prices providing the same maximum number of shares executed, selecting the price nearest to the offering price consistent with all superior priced orders executing. *See* Rule 4753(b)(2).

[15] *See* Rule 4753(b)(1).

public interest in various ways.[16] The Commission further noted that ''[i]n approving the proposed rule change, the Commission * * * considered its impact on efficiency, competition, and capital formation.'' [17]

The Facebook IPO Cross on May 18, 2012

At 10:45:00 a.m. on May 18, 2012 the Display-only period for Facebook began, with a scheduled release time of 11:00:00 a.m. The first NOII message disseminating indicative information about the upcoming IPO cross was distributed at 10:45:05 a.m. with an indicative price of $50.00 and indicative volume of 4,461,419 shares. At approximately 10:57:53 a.m., the initially scheduled release time of 11:00:00 a.m. was extended to 11:05:00 a.m. There were no further extensions.

The NOII messages continued at 5-second intervals until the last message at 11:05:05 a.m. From 11:00:30 a.m. onward, the NOII messages displayed an indicative price of $42.00. The last NOII message was distributed at 11:05:05 a.m. with an indicative price of $42.00 and indicative volume of 72,189,277 shares.

The Cross process in FB did not operate as expected. At approximately 11:05:10 a.m., Nasdaq attempted to conclude the quoting period, execute the Cross and print the opening trade to the tape. Initiating this procedure instructed the Cross application to run its final calculation to match buy and sell interest and then print the opening trade to the tape. As a protection to ensure the integrity of the IPO process, the system is designed to recalculate the IPO auction if the matching engine's view of the auction book has changed between the time of the final calculation and the printing of the opening trade. In other words, the system is designed to ensure that cancellations submitted while the Cross is calculating, and up until the last moment before the Cross is completed, are accounted for in the Cross.

After the initial calculation of the Cross was completed, but before the opening trade was printed, additional order modifications were received by the system, changing the auction order book. As designed, the system recalculated the Cross to factor in the new state of the book. Again, changes were received before the system could print the opening trade, which resulted in additional re-calculations. This condition persisted, resulting in further delay of the opening print.

Nasdaq continued to receive new order, cancel, and replace messages, and they were added to the Cross order book. New order, cancel, and replace messages received before approximately 11:11:00 a.m. were acknowledged and incorporated into the Cross order book in real time.

Upon concluding shortly before 11:30 a.m. that a system modification would resolve all system issues, Nasdaq, in an exercise of its market oversight obligations, determined to proceed with the IPO. At 11:30:09 a.m., Nasdaq completed the Cross, printed approximately 75.7 million shares at $42.00 to the tape, and opened continuous trading in Facebook.[18]

At the time Nasdaq implemented the system modification, its expectation was that substantially all Cross-eligible orders received prior to the Cross would participate in the Cross and that all Cross transaction confirmation messages would be disseminated immediately thereafter. This turned out not to be the case.

First, only orders received prior to 11:11:00 a.m. participated in the 11:30:09 a.m. Cross. Of the orders entered between 11:11:00 a.m. and 11:30:09 a.m., some were cancelled by members before the Cross.[19] Others were entered into the market at 11:30:09 a.m., and the remainder were either cancelled or released into the market at 1:50 p.m.[20]

Second, Cross transaction confirmation messages were not disseminated until 1:50 p.m. When Nasdaq became aware of the fact that confirmations were not being delivered, Nasdaq determined not to suspend trading in FB stock because at that time price discovery was occurring in an orderly fashion in the continuous market. Indeed, active, deep, and liquid trading was taking place in FB stock on Nasdaq and trading in FB stock was proceeding as well on ten other markets and in over-the-counter trading.[21] Nasdaq systems operated normally in handling all of the FB orders entered and executed after the Cross.

The circumstances described above affected market participants differently depending on the prices of their orders and whether they were buyers or sellers.

In spite of the absence of confirmation messages, Nasdaq believes that market participants—based on all of the information available at the time, their experience with Nasdaq crosses, and established trading priorities—would reasonably have had certain expectations for the execution or non-execution of their orders. Nasdaq printed approximately 75.7 million shares at $42.00 to the tape at 11:30 a.m. In addition, fair and orderly continuous trading on other markets opened in close proximity to the $42.00 established by the Cross, and the price of FB moved in an orderly manner above and below $42.00 throughout the trading day, with more than 500 million shares traded.[22] The following analysis reflects Nasdaq's assessments as to market participants' reasonable expectations and the nature of their potential losses.

Accordingly, any buy or sell order received up until 11:30:09 a.m. and priced at a level at which it could not be filled in a Cross with a publicly disseminated price of $42.00 (*i.e.,* a buy order below $42.00 and a sell order above $42.00) was not disadvantaged. Market participants who submitted such orders could not reasonably have expected such orders to be executed. Accordingly, those orders experienced no loss attributable to the Nasdaq system issues.[23]

[16] Securities Exchange Act Release No. 53687 (April 20, 2006), 71 FR 24878 (April 27, 2006) (SR–NASD–2006–015) (finding the Cross consistent with Section 15A of the Act, 15 U.S.C. 78o-3, in general, and Section 15A(b)(6) of the Act, 15 U.S.C. 78o-3(b)(6), in particular).

[17] *Id.* at n.5 (citing 15 U.S.C. 78c(f)).

[18] An initial calculation of the Cross was attempted at approximately 11:05:09 a.m. Had that calculation of the Cross completed, it still would have resulted in an opening price of $42.00.

[19] Cancellations received during that interval were processed in real time, resulting in Nasdaq assuming in its error account the cancelled buy and sell positions. Nasdaq's net error account position was a short position of 3,070,430 shares. Using the services of an unaffiliated third-party broker in accordance with Nasdaq's then-proposed, and since approved Rule 4758(d), Nasdaq thereafter sold this short position, resulting in an inadvertent gain of approximately $10.8 million. This gain will be returned in full to customers through the accommodation proposal set forth in this filing.

[20] Had all Cross-eligible orders, including those entered between 11:11:00 a.m. and 11:30:09 a.m., participated in the Cross, the Cross would still have taken place at $42.00.

[21] *See,* e.g., Securities Exchange Act Release No. 22554 (October 23, 1985), 50 FR 43825 (October 29, 1985) (SR–NYSE–85–38) (stating that when determining whether to halt trading, an exchange must weigh against a potential reason for a halt ''the need to provide investors with a liquid market within which to buy or sell securities whenever they choose,'' and that while decisions to halt or delay trading ''necessarily depend upon the circumstances of each particular situation,'' an ''Exchange will in all cases be guided by its intention to maintain a fair, orderly and continuous market in its listed securities, insofar as reasonably practicable under the circumstances'').

[22] As discussed herein, Nasdaq's subsequent analysis has confirmed that $42.00 was the appropriate opening price.

[23] Some orders inadvertently benefitted from Nasdaq system issues. For example, buy orders that were entered between 11:11 a.m. and 11:30 a.m. and priced at $42.00 and above were not filled in the Cross. Had these orders been executed in the Cross or returned to customers at 11:30 a.m. instead of being held until 1:50 p.m., they might have been filled at prices at or above $42.00 as the price of FB stock ran up to $45 immediately after 11:30 a.m.

Continued

Conversely, sellers who entered orders priced at $42.00 or less should reasonably have expected that their orders had been executed in the Cross. Nasdaq had continuously indicated through NOII messages the relative proportion of buy and sell interests, providing information as to the likelihood of a buy or sell order being executed. Such sellers whose orders were received by Nasdaq before 11:11 a.m. had their orders executed in the Cross, consistent with expectations and previous market practice. Therefore, they were not disadvantaged and experienced no loss attributable to Nasdaq system issues.

The analysis is different for market participants who entered such orders between 11:11 a.m. and 11:30 a.m. Buyers who entered orders priced higher than $42.00 during that interval did not receive messages that their orders had not executed in the Cross until 1:50 p.m. Yet, they were precluded from buying at their expected $42.00 price and instead bought at the lower open market prices then available, if their orders were executed at all. Accordingly, these buyers also experienced no loss attributable to the Nasdaq system issues.

Sellers who entered orders priced at $42.00 or less between 11:11 a.m. and 11:30 a.m. did not receive messages that their orders had not been executed in the Cross until 1:50 p.m. Such sell orders did not execute at their expected $42.00 price in the Cross, but instead sold at the lower continuous market prices available at or after 1:50, if they executed at all. Thus, these market participants experienced losses reasonably attributable to the Nasdaq system issues.

Market participants who entered Cross-only eligible buy orders priced exactly at $42.00 that executed in the Cross but that were not confirmed until 1:50 p.m. could not have been sure whether their orders had been executed because the number of buy and sell limit order shares priced at the clearing price and wishing to be matched in the Cross is never exactly equal. Consequently, in the interval between 11:30 a.m. and 1:50 p.m., these buyers may have purchased shares in the continuous market, and upon receiving Cross execution messages at 1:50 p.m., they may have experienced an unexpected long position. The sale of such an unexpected long position at a lower price would have occasioned a loss.

Buyers who entered orders priced higher than $42.00, which they did not subsequently cancel, should reasonably have expected that their orders had been executed in the Cross. As noted, Nasdaq had continuously indicated through NOII messages the relative proportion of buy and sell interests, providing information as to the likelihood of a buy or sell order being executed. Such buyers whose orders were received by Nasdaq before 11:11 a.m. had their orders executed in the Cross, consistent with expectations and previous market practice. Therefore, they were not disadvantaged and experienced no loss attributable to Nasdaq system issues.

Finally, there are market participants who entered eligible buy orders for customers that were priced above $42.00 and that were executed in the Cross but not confirmed until 1:50 p.m., but for which the customer requested and received an out from the member and for which the member submitted a request to cancel the order to Nasdaq prior to 1:50 p.m. When the member received confirmation of the execution of the customer's order at 1:50 p.m., the member held shares for which it no longer had a recipient. Nasdaq believes that members who took such actions were reasonably attempting to assist their own customers in responding to the delayed dissemination of Cross transaction reports, and that such members further attempted to communicate their actions to Nasdaq through the submission of cancellations. In this category, however, the outcome was affected not only by Nasdaq system issues, but also by the member's affirmative decision not to await the dissemination of confirmations. Accordingly, Nasdaq believes that a portion of the associated losses should be borne by the members. Thus, Nasdaq is proposing an accommodation equaling only 70% of the member's qualifying loss amount with respect to this category.

III. Accommodation Proposal

Accommodation Standards

Nasdaq's proposal is to provide accommodation within a framework that seeks to replicate what the expected execution prices of orders would have been had the Cross not experienced unexpected and unprecedented difficulties, limited by the expectation that members would exercise reasonable diligence to respond and mitigate losses once made aware that their Cross orders had not executed, or had executed at unexpected prices. Thus, Nasdaq proposes to make accommodation payments in respect of:

(i) SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. on May 18, 2012, that were priced at $42.00 or less, and that did not execute;

(ii) SELL Cross orders that were submitted between 11:11 a.m. and 11:30 a.m. on May 18, 2012, that were priced at $42.00 or less, and that executed at a price below $42.00;

(iii) BUY Cross orders priced at exactly $42.00 and that were executed in the Cross but not immediately confirmed; and

(iv) BUY Cross orders priced above $42.00 and that were executed in the Cross but not immediately confirmed, but only to the extent entered with respect to a customer that was permitted by the member to cancel its order prior to 1:50 p.m. and for which a request to cancel the order was submitted to Nasdaq by the member, also prior to 1:50 p.m.

These are the situations in which Nasdaq has concluded that its systems issues could have impacted market participants' reasonable expectations in an objectively discernible manner. In these situations, Nasdaq proposes to offer as an accommodation the loss differential for a qualified order—that is, the difference between the price that was reasonably expected and the subsequent execution price actually obtained, or the price available at the point when the market participant could have taken steps to mitigate its losses or otherwise adjust its position.

As described above, Nasdaq believes that it reasonably determined not to suspend the IPO or halt trading in FB stock, and Nasdaq's FB-related systems issues were fully resolved at 1:50 p.m., when Nasdaq disseminated all delayed Cross execution confirmation messages. At that point, Nasdaq believes that member firms were in possession of all the information needed to evaluate their positions and obligations to customers, and take steps accordingly.

Accordingly, for the orders described in (i), (iii), and (iv) above, Nasdaq proposes to establish a uniform benchmark price of $40.527, the price at which Nasdaq has concluded a reasonably diligent member could have obtained shares to mitigate any unexpected losses or to liquidate unanticipated positions coming out of the Cross. Nasdaq calculated this price using the volume-weighted average price of FB stock during the first 45 minutes of trading after execution reports were delivered to firms

The delay instead gave participants the opportunity either to cancel their orders after 11:30 a.m., as many did, or to execute at a lower price when the cancellations and remaining non-cancelled orders were released into the market at 1:50 p.m.

(*i.e.,* 1:50 p.m. to 2:35 p.m.).[24] Using $40.527 as the uniform benchmark price results in a maximum loss of $1.473 per share per order.

For the orders described in (ii) above, Nasdaq proposes to offer as an accommodation the difference between the price that was reasonably expected (*i.e.,* $42.00) and the execution price actually obtained, because the immediate execution of these orders precluded a member from taking reasonable actions to mitigate losses.

Nasdaq believes that this method provides a reasonable time period for firms to have taken actions to mitigate losses after receiving the Cross transaction reports, as well as a reasonable maximum loss price parameter for determining accommodation payments. Additional alleged losses incurred beyond that benchmark price, regardless of their cause, will remain the responsibility of the member. If a member suffered a lesser loss than that calculated based on the foregoing method, based on the difference between the expected execution price of the order in the Cross process establishing an opening print of $42.00 and the actual execution price received, the member shall not receive more than the lesser actual loss suffered. A member's direct trading losses, as calculated in accordance with these parameters, are referred to in the proposed rule as the ''Member's Share.''

Alleged losses from other causes shall not be considered eligible for accommodation payments under the proposed rule change. Thus, for example, Nasdaq does not propose to make accommodation payments in respect of alleged losses attributable to: orders received after the commencement of continuous regular trading in FB; individual member firm technology issues or system failures, or member firm operational issues or operational failures; affirmative trading actions taken by member firms on their own behalf or to accommodate their customers after the Cross, except as otherwise provided in the proposed rule; alleged or speculative lost trading opportunities or alleged or speculative lost business profits of any description; non-marketable Cross orders for which, based on their price, there was no reasonable expectation that orders had been executed; and a member firm's failure to adequately and appropriately mitigate losses or adjust trading positions. Nasdaq is not asking any firm to offset its claims under these criteria with any economic gains experienced because of the relevant system issues as outlined at footnote 23.

Examples of how the accommodation standards would apply are below.

Example 1: A member submitted an IPO Cross order to SELL 1000 shares priced at market (*i.e.,* willing to sell at any price or otherwise equivalent to $0.01) with a Time in Force (TIF) of Immediate or Cancel (IOC), entered at 11:15 a.m. Because the order was priced lower than the opening price, it should have been filled at $42.00 in the Cross, but failed to execute because it was entered after 11:11 a.m. Nasdaq transmitted the order confirmation of the failure to the member at 1:50 p.m., at which time the member covered its position (*i.e.,* sold the 1000 shares it had expected to sell in the Cross) at a price of $41.15. Because the member was able to sell its shares at a higher price than the benchmark price Nasdaq has established ($40.527), the member will be accommodated for the difference between the opening price and the covering execution's price. The amount of loss is 1000 × ($42.00-$41.15) = $850.00.

Example 2: A member submitted an IPO Cross order to SELL 1000 shares priced at market with a TIF of IOC, entered at 11:15 a.m. Because the order was priced lower than the opening price, it should have been filled at $42.00 in the Cross, but failed to execute because it was entered after 11:11 a.m. Nasdaq transmitted the order confirmation message noting the failure to execute to the member at 1:50 p.m., but the member did not cover its position until later in the day at an average price of $39.00. Because the member's covering execution price was lower than the benchmark price Nasdaq has established ($40.527), the member will be accommodated for the difference between the opening price and the benchmark price. The amount of loss is 1000 × ($42.00-$40.527) = $1,473.00.

Example 3: A member submitted an IPO Cross order to SELL 1000 shares priced at market with a TIF of DAY, entered at 11:15 a.m. Because the order was priced lower than the opening price, it should have been filled at $42.00 in the Cross, but failed to execute in the Cross because it was entered after 11:11 a.m. The order was entered into the continuous book at 1:50 p.m., at which time it executed at a price of $41.05. Nasdaq transmitted the order confirmation message to the member at 1:50 p.m. Because the order executed at an inferior price to the opening price, the member will be accommodated for the difference between the opening price and the actual execution price. The amount of loss is 1000 × ($42.00-$41.05) = $950.00.

Example 4: A member submitted an IPO Cross order to SELL 1000 shares priced at market with a TIF of DAY, entered at 11:15 a.m. Because the order was priced lower than the opening price, it should have been filled at $42.00 in the Cross, but failed to execute in the Cross because it was entered after 11:11 a.m. The order was entered into the continuous book at 1:50 p.m., at which time it executed at a price of $40.00. Nasdaq transmitted the order confirmation message to the member at 1:50 p.m. Because the order executed at an inferior price to the opening price, the member will be accommodated for the difference between the opening price and the actual execution price. The amount of loss is 1000 × ($42.00 − $40.00) = $2,000.00.

Example 5: A member submitted an IPO Cross order to SELL 1000 shares priced at market with a TIF of DAY, entered at 11:15 a.m. Because the order was priced lower than the opening price, it should have been filled at $42.00 in the Cross, but failed to execute in the Cross because it was entered after 11:11 a.m. The member cancelled the order at 12:30 p.m., after the Cross had taken place at 11:30:09 a.m. but before the order was delivered to the continuous book or a confirmation message was delivered. The order cancelled back to the member at 1:50 p.m. based on the request sent at 12:30 p.m. Because the member's order should have been executed in the Cross, the fact that the member cancelled the order at 12:30 p.m. is not relevant for purposes of determining that the order was directly disadvantaged, and the member will be accommodated for the difference between the opening price and the benchmark price. The amount of loss is 1000 × ($42.00 − $40.527) = $1,473.00.

Example 6: A member submitted an IPO Cross order to BUY 1000 shares priced at $42.00 with a TIF of DAY, entered at 11:00 a.m. The order was filled at $42.00, but because the order's price was exactly the opening price, the member could not have reasonably known that the order was filled until 1:50 p.m. As a result, the member acquired an unexpected long position of 1000 shares that resulted in a loss when the position was covered at a price of $40.15. Because the member's covering execution price was worse than the benchmark price Nasdaq has established ($40.527), the member will be accommodated for the difference between the opening price and the benchmark price. The amount of loss is 1000 × ($42.00 − $40.527) = $1,473.00.

Example 7: A member submitted an IPO Cross order to BUY 1000 shares at $42.00 with a TIF of IOC, entered at 11:15 a.m. The order was not filled at $42.00 because it was entered after 11:11 a.m., but because the order's price was exactly the opening price, the member could not have reasonably known that the order was not filled until 1:50 p.m. As a result, the member discovered it unexpectedly lacked 1000 shares at 1:50 p.m. At that time, the member could have purchased shares at prices lower than the opening price. Consequently, the member was not directly disadvantaged by Nasdaq's system error and there is no loss amount.

Example 8: A member submitted an IPO Cross order to BUY 1000 shares at $42.50 with a TIF of IOC, entered at 11:15 a.m. The order was not filled at $42.00 because it was entered after 11:11 a.m., but because the order's price was higher than the opening price, the member should have expected the order was filled until it received a confirmation to the contrary at 1:50 p.m. As a result, the member discovered it

[24] Trading firms typically process and determine actions on trading messages within seconds or less. Given the volume of messages at issue here and Nasdaq's delay in disseminating them, Nasdaq has concluded that 45 minutes would have been ample time for a reasonably diligent member to have identified any unexpected customer losses or unanticipated customer positions, and taken steps to mitigate or liquidate them.

unexpectedly lacked 1000 shares at 1:50 p.m. At that time, the member could have purchased shares at prices lower than the opening price. Consequently, the member was not directly disadvantaged by Nasdaq's system error and there is no loss amount.

Example 9: A member submitted an IPO Cross order for a customer to BUY 1000 shares at $42.50 with a TIF of IOC, entered at 11:05 a.m. and a cancel request was submitted by the member before 1:50 p.m. for the order. The order was filled at $42.00 as expected. Because it was priced higher than the opening price, the member should have expected that the order was filled, which was confirmed electronically at 1:50 p.m. In light of the confirmation delay, however, the member received a request to cancel the order from the customer prior to 1:50 p.m., accommodated that request by allowing the customer to cancel the order, and sent a cancellation request for the order to Nasdaq before 1:50 p.m. When confirmation of the customer's order execution in the Cross was received by the member at 1:50 p.m., the member held a long position of shares for which it no longer had a recipient. Although the decision to accommodate the customer's cancellation request was exclusively that of the member, Nasdaq has determined to provide a limited accommodation amount equaling 70% of the member's loss up to maximum loss amount of $0.70 \times 1000 \times (\$42.00 - \$40.527) = \$1,031.10$.

Example 10: A member submitted an IPO Cross order to BUY 1000 shares at $42.50 with a TIF of IOC, entered at 11:05 a.m. The order was filled at $42.00 as expected. Because it was priced higher than the opening price, the member should have expected that the order was filled, which was confirmed electronically at 1:50 p.m. As a result of the delay in confirmation, however, the member purchased additional shares before the confirmations arrived. This resulted in an unintended long position of 1000 shares. Although the member incurred a loss when covering the unintended position, Nasdaq correctly executed the member's order and the member should have expected the original IPO Cross order to be filled because of its price. Consequently, the member was not directly disadvantaged by Nasdaq's system error and there is no loss amount.

Example 11: A member submitted an IPO Cross order to BUY 1000 shares at $42.50 with a TIF of IOC, entered at 11:05 a.m. The order was filled at $42.00 as expected. Because it was priced higher than the opening price, the member should have expected that the order was filled, which was confirmed electronically at 1:50 p.m. Later in the day, the member sold the position at $40.00. The member claims that it would have been able to sell at a higher price if had received the confirmation sooner. Nasdaq correctly executed the member's order. The claim of loss is premised on an alleged or speculative lost trading opportunity rather than the actual failure by Nasdaq to process an order correctly. Consequently, the member was not directly disadvantaged by Nasdaq's system error and there is no loss amount.

Procedure for Submission and Evaluation of Claims

All members seeking accommodation under this proposal will be required to submit their claims to Nasdaq in writing not later than seven days after the approval of the proposed rule change by the Commission. Such notice of approval will be publicly posted by Nasdaq on its Nasdaq Trader Web site at *http://www.nasdaqtrader.com* and provided directly to all member firms via an Equity Trader Alert. All claims that have been timely submitted will be evaluated by the Financial Industry Regulatory Authority (''FINRA'') applying the accommodation standards set forth herein. FINRA may request such supplemental information as FINRA deems necessary to assist FINRA's evaluation of the claims. FINRA's role will be limited to measuring data against the benchmarks established by this filing to ascertain the eligibility and value of each member's claims under those benchmarks. FINRA staff assessing the claims will not be involved in providing regulatory services to any Nasdaq market and they will not have purchased Facebook stock during Nasdaq's IPO opening process or currently own Facebook stock. In addition, as discussed below, FINRA will prepare a report for Nasdaq on its analysis of the eligibility of claims that will be provided to the public members of FINRA's Audit Committee.

Once it has completed its review, FINRA shall provide to the Nasdaq Board of Directors and the Board of Directors of The NASDAQ OMX Group, Inc., an analysis of the total value of eligible claims submitted.[25] Thereafter, Nasdaq will file with the Commission a rule proposal setting forth the amount of eligible claims submitted and its intention to pay such claims up to $62 million. In no event shall Nasdaq make any payments on claims until the rule proposal setting forth the amount of eligible claims becomes effective and final.

Payment Process

Nasdaq's business and legal relationships are with its members, not its members' customers. Nasdaq has no contractual or other relationships with its members' customers, and generally does not possess information about interactions between a member and its customer that may underlie members' trading activity. Nevertheless, Nasdaq is mindful that member's customers have been impacted by the processing of member orders in the FB Cross. Thus, for example, to the extent that a member order reflected a customer order, and the member order was not executed in the manner expected, the customer order may not have been filled, or may have been filled at an unexpected price. Nasdaq is also aware of public reports that some members experienced their own system issues on May 18, 2012 that were unrelated to Nasdaq's system issues, and that those members' issues may have had an impact on the members' customers. To the extent that a member receiving accommodation hereunder had customers that incurred losses, Nasdaq believes that accommodation payments received by members from Nasdaq should be used for the benefit of such customers.

Accordingly, Nasdaq proposes that all accommodation payments proposed in this filing be contingent upon a member's submission to Nasdaq, not later than seven days after the effective date of the rule proposal described above detailing the amount of eligible claims, of an attestation detailing:

(i) The amount of compensation, accommodation, or other economic benefit provided or to be provided by the member to its customers (other than customers that were brokers or dealers trading for their own account) in respect of trading in Facebook Inc. on May 18, 2012 (''Customer Compensation''), and

(ii) The extent to which the losses reflected in the Member's Share[26] were incurred by the member trading for its own account or for the account of a customer that was a broker or dealer trading for its own account (''Covered Proprietary Losses'').

Failure to provide the required documentation within the specified time limit will void the member's eligibility to receive an accommodation under the modified rule. Each member shall be required to maintain books and records that detail the nature and amount Customer Compensation and Covered Proprietary Losses. Nasdaq, through FINRA, its regulatory services provider, would expect to examine the accuracy of member's attestation at a later date.

Accommodation payments under this subsection will be made in two tranches of priority, subject to the maximum total payout of $62 million:

(i) First, if the member has provided Customer Compensation, the member will receive an amount equal to the

[25] In accordance with the established policies of these Boards, any directors with a financial interest in the accommodation process will be expected to recuse themselves from consideration of the analysis.

[26] Defined specifically as a member's direct trading losses calculated in accordance with paragraphs (b)(3)(A) and (B) of the proposed rule.

lesser of the Member's Share or the amount of Customer Compensation. For example, if a Member's Share was $1 million, and the member had paid, or had committed to pay, compensation to its customers of at least $1 million, the member's expected accommodation would be $1 million. On the other hand, if the Member's Share was $1 million, but the member had paid, or committed to pay, only $500,000 in compensation to its customers, the member's expected accommodation in the first tranche would be only $500,000. This approach reflects Nasdaq's belief that accommodation with respect to members' trades on behalf of customers (other than broker-dealers trading on a proprietary basis) should be paid first, and should be paid only to the extent of the member's own compensation to customers.

(ii) Second, the member will receive an amount with respect to Covered Proprietary Losses; provided, however, that the sum of payments to a member under the rule shall not exceed the Member's Share. Although Nasdaq recognizes that firms engaging in proprietary trading may have incurred losses, it believes that payments to them should occur after payments with respect to losses on behalf of customers. If a member had both Covered Proprietary Losses and losses associated with customer business, it may receive distributions under both tranches. For example, if a Member's Share was $1 million, the member had $300,000 in Covered Proprietary Losses, and the member had provided $300,000 in Customer Compensation, the member's expected accommodation would be $600,000 in total. Alternatively, if the member had $300,000 in Covered Proprietary Losses and had provided $700,000 or more in Customer Compensation, the member's expected accommodation would be $1 million.

In the event that the amounts calculated under tranche (i) exceed $62 million, accommodation will be prorated among members eligible to receive accommodation under tranche (i) based on the size of the amounts payable under tranche (i). In the event that tranche (i) is paid in full and the amounts calculated under tranche (ii) exceed the funds remaining from the $62 million accommodation pool, such funds will be prorated among members eligible to receive accommodation under tranche (ii) based on the size of the amounts payable under tranche (ii). If a member's eligibility to receive funds is voided for any reason under this rule, and the funds payable to other members must be prorated, the funds available to pay other members will be increased accordingly.

Final payment of any accommodation payment also will be conditioned on the execution by the member firm of a formal release of claims against Nasdaq for losses associated with FB that are related in any way to the Cross or other errors, omissions, actions, or failures to act on the part of Nasdaq on May 18, 2012. The release will be required not later than fourteen days after the effective date of the rule proposal described above detailing the amount of eligible claims. The purposes of imposing the release requirement notwithstanding the limitations of liability and immunities, which apply in any event pursuant to Nasdaq's rules and agreements and/or otherwise as a matter of law, are to avoid the disruption and expense of unnecessary litigation in connection with the Cross and to ensure equal treatment of all claimants. Nasdaq further notes that the program proposed herein is a voluntary step taken by Nasdaq to provide a substantial and unprecedented accommodation to its members, and that participation in the program is likewise voluntary on the part of members. Nasdaq believes that it would be inequitable to approve Nasdaq's voluntary program without also allowing it to establish conditions that promote certainty and finality.[27]

IV. Solicitation of Comments

This proposed rule change is being published for public comment. Nasdaq will give due consideration to all comments submitted during the comment period, but notes that comments advocating different approaches should include a complete exposition of potentially relevant information, including any impacts that the following, among other things, may have had on alleged harms:

- Market participants' own trading decisions and strategies;
- Non-Nasdaq technology issues, which Nasdaq understands affected certain market participants on May 18, 2012;
- Obligations to customers or order delivery firms;
- Regulatory obligations; and
- Market data issues.

Failure to provide adequate detail will negatively impact Nasdaq's ability to respond to or otherwise evaluate a comment.

2. Statutory Basis

Nasdaq believes that the accommodation proposal is consistent with Section 6(b) of the Exchange Act[28] in general, and furthers the objectives of Section 6(b)(5) of the Act[29] in particular, because the proposal is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Nasdaq believes that the proposal to expand its accommodation policy in this unique set of circumstances will balance several important goals in keeping with the foregoing statutory objectives.

First, Nasdaq acknowledges that the system issues that first came to light during the FB IPO Cross had an impact on certain of its members during the period from 11:11 a.m. to 1:50 p.m. on May 18, 2012. As a result, Nasdaq believes that the public interest would be served by an accommodation policy that quantifies and provides compensation for customer losses that were directly attributable to those system issues in an objectively discernible manner. Specifically, Nasdaq believes that the public interest would be served by Nasdaq making accommodation payments in respect of the four specific categories of Cross orders, listed above, for which Nasdaq has concluded that its systems issues could have impacted market participants' reasonable expectations in an objectively discernible manner. Nasdaq further believes that the public interest would be served by Nasdaq providing as an accommodation the loss differential for a qualified order—that is, the difference between the price that was reasonably expected and the subsequent execution price actually obtained, or the price available at the point when the market participant could have taken steps to mitigate its losses or

[27] *Cf.* Section 405(c)(3)(B)(i) of the Air Transportation Safety and System Stabilization Act (requiring release by persons receiving compensation with respect to airline crashes on September 11, 2001).

[28] 15 U.S.C. 78f(b) (setting forth the prerequisites for registration as a national securities exchange).

[29] 15 U.S.C. 78f(b)(5) (requiring that an exchange's rules be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not [be] designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange'').

otherwise adjust its position (in situations when it was possible for the market participant to take such steps).

Second, Nasdaq believes that it is important to recognize the regulatory policy objectives underlying Rule 4626 and ensure that they are not compromised. Hundreds of billions of dollars of securities transactions are matched through the systems of Nasdaq and other exchanges every day. Through the operation of those systems, exchanges provide invaluable services in support of capital formation, price discovery, and investor protection. If exchanges could be called upon to bear all costs associated with system malfunctions and the varying reactions of market participants taken in their wake, the potential would exist for a single catastrophic event to bankrupt one or multiple exchanges, with attendant consequences for investor confidence and macroeconomic stability. Alternatively, the cost of providing exchange services would have to rise dramatically for all investors to cover this material and new risk.[30] In addition, exchanges would be less inclined to implement innovative systems [31] consistent with the goals of Section 6(b)(5) of the Act.[32] Accordingly, the Commission has recognized that it is consistent with the purposes of the act for a self-regulatory organization to limit its liability with respect to the use of such facilities by its members through rules such as Rule 4626.[33]

Moreover, if the potential for such catastrophic losses existed, as noted above, it would need to be reflected in the fees charged by exchanges to market participants in a manner that is not currently the case, making trading more expensive for all investors all the time. Rather, as the Commission has recognized, provisions such as Rule 4626 reflect the view that risks associated with system malfunctions should be allocated among all exchange members, rather than being borne solely by the exchange. Indeed, this view is consistently reflected in the limitation of liability rules common among United States exchanges.[34] And, this view is reflected in Nasdaq's proposal to condition any accommodation payment on the execution of a release of claims against Nasdaq for FB-related losses arising from the Cross, because this condition is aimed at avoiding unnecessary litigation and ensuring equal treatment of all claimants.

The level of accommodation being offered under this proposed rule change is unprecedented in its size. Although Nasdaq is voluntarily seeking in this instance to provide accommodation up to $62 million for losses associated with the FB IPO Cross that were the direct result of the system issues that came to light on May 18, 2012, Nasdaq does not believe that the purposes of the Act related to the operation of the national market system would be well served by allocating to exchanges responsibility for losses attributable to other factors, such as the failure of members to mitigate losses in a timely and reasonable manner, or by effecting a wholesale modification to the risk and loss allocations underlying Rule 4626 and the similar rules of other exchanges that reflect the exchanges' exercise of the regulatory authority and obligations delegated to exchanges by the Act.[35] In this regard, it bears noting that in light of those regulatory duties, exchanges are also immune from civil liability for claims for damages caused by actions taken in connection with the discharge of their regulatory duties.[36]

Nasdaq further believes that, consistent with Section 6(b)(5) of the Act,[37] its proposal will promote just and equitable principles of trade and protect investors and the public interest by establishing a fair process through which affected members may submit claims for losses covered by the modified accommodation policy. Nasdaq believes that by establishing the objective benchmarks set forth in this filing, and allowing FINRA to act as a neutral third party and measure data against those benchmarks to ascertain the value of each member's claims under those benchmarks, will enhance the transparency of the process and minimize the potential for conflicts of interest. Nasdaq further believes that its proposed process for distributing accommodation payments will benefit investors and promote the public interest by providing incentives for members to use accommodation funds for the benefit of investors. Specifically, Nasdaq believes that its proposal will benefit investors and promote the public interest by: (I) requiring a claimant to submit to Nasdaq an attestation detailing the compensation the member has Provided or will provide to its customers, and detailing the extent to which the member incurred the losses covered by the proposed accommodation payment when trading for its own account; and (ii) providing for accommodation payments to be made in tranches that prioritize payments based on the extent to which the claimant has compensated its customers.

[30] Trading costs in the United States are among the lowest in the world, and thus a contributor to economic growth. *See, e.g.,* Michael S. Pagano, *Which Factors Influence Trading Costs in Global Equity Markets?,* The J. of Trading, Winter 2009, at 7; Ian Domowitz *et al., Liquidity, Volatility, and Equity Trading Costs Across Countries and Over Time,* 4 Int'l Fin. 221 (Summer 2001); Asli Demirgüç-Kunt & Ross Levine, *Bank-based and Market-based Financial Systems: Cross-country Comparisons* 51 (The World Bank Working Paper No. 2143, July 1999).

[31] Securities Exchange Act Release No. 14777 (May 17, 1978) (SR–CBOE–78–14) (in proposing a limitation on liability, CBOE explained that an exchange ''cannot proceed with innovative systems and procedures for the execution, clearance, and settlement of Exchange transactions * * * unless it is protected against losses which might be incurred by members as a result of their use of such systems,'' and further that ''[t]o the extent [a limitation of liability rule] enables the Exchange to proceed with innovative systems, competition should be enhanced''); *see also* Securities Exchange Act Release No. 58137 (July 10, 2008), 73 FR 41145 (July 17, 2008) (SR–NYSE–2008–55) (explaining that exchange's limitation of liability rule encourages vendors to provide services to the exchange, which results in faster and more innovative products for order entry, execution, and dissemination of market information).

[32] 15 U.S.C. 78f(b)(5) (requiring that an exchange's rules be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not [be] designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this chapter matters not related to the purposes of this chapter or the administration of the exchange'').

[33] *See, e.g.,* BATS Exchange and BATS–Y Exchange Rules 11.16; C2 Options Exchange Rule 6.42; CBOE Options Exchange Rule 6.7; CME Rule 578; EDGA and EDGX Rules 11.12; ISE Rule 705; NASDAQ OMX PHLX Rule 3226; NASDAQ OMX BX Rule 4626; NYSE Rules 17 and 18; NYSE MKT Rule 905NY; NYSE Arca (Options) Rule 14.2; NYSE Arca (Equity) Rule 13.2; One Chicago Rule 421.

[34] *Id.*

[35] As reflected in the proposed rule change, however, Nasdaq does believe that the public interest and the purposes of the Act related to the operation of the national market system would be well served by: (i) Providing that the first 45 minutes of trading after confirmation reports were delivered to firms was a reasonable time period for firms to have taken actions to mitigate losses, and therefore is a reasonable period on which to base the maximum loss price parameter for determining accommodation payments; and (ii) providing an accommodation of 70% of the qualifying loss amount for the fourth category of orders for which Nasdaq proposes to make accommodation payments, given that the losses in that category were affected not only by Nasdaq's system issues but also by the members' affirmative decisions to take actions with respect to customer orders rather than await the dissemination of confirmation reports.

[36] *See, e.g., DL Capital Group, LLC* v. *Nasdaq Stock Market, Inc.,* 409 F.3d 93 (2d Cir. 2005); *Sparta Surgical Corp.* v. *NASD,* 159 F.3d 1209 (9th Cir. 1998).

[37] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

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 such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2012–090 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–NASDAQ–2012–090. 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–NASDAQ–2012–090 and should be submitted on or before August 22, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–18704 Filed 7–31–12; 8:45 am]

BILLING CODE 8011–01–P

[38] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket DOT–OST–2009–0116]

Application of Key Lime Air Corporation for Commuter Authority

AGENCY: Department of Transportation.

ACTION: Notice of Order To Show Cause (Order 2012–7–5); Docket DOT–OST–2009–0116.

SUMMARY: The Department of Transportation is directing all interested persons to show cause why it should not issue an order finding Key Lime Air Corporation fit, willing, and able, and awarding it a Commuter Air Carrier Authorization.

DATES: Persons wishing to file objections should do so no later than August 6, 2012.

ADDRESSES: Objections and answers to objections should be filed in Docket DOT–OST–2009–0116 and addressed to U.S. Department of Transportation, Docket Operations, (M–30, Room W12–140), 1200 New Jersey Avenue, SE., West Building Ground Floor, Washington, DC 20590, and should be served upon the parties listed in Attachment A to the order.

FOR FURTHER INFORMATION CONTACT: Vanessa R. Balgobin, Air Carrier Fitness Division (X–56, Room W86–487), U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 366–9721.

Dated: July 6, 2012.

Susan L. Kurland,

Assistant Secretary for Aviation and International Affairs.

[FR Doc. 2012–18741 Filed 7–31–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

Sunshine Act Meetings; Unified Carrier Registration Plan Board of Directors

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

TIME AND DATE: August 2, 2012, 12 noon to 3 p.m., Eastern Daylight Time.

PLACE: This meeting will take place telephonically. Any interested person may call 877.820.7831, passcode, 908048 to participate in this meeting.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED: The Unified Carrier Registration Plan Board of Directors (the Board) will continue its work in developing and implementing the Unified Carrier Registration Plan and Agreement and to that end, may consider matters properly before the Board.

FOR FURTHER INFORMATION CONTACT: Mr. Avelino Gutierrez, Chair, Unified Carrier Registration Board of Directors at (505) 827–4565.

Issued on: July 27, 2012.

Larry W. Minor,

Associate Administrator for Policy .

[FR Doc. 2012–18887 Filed 7–30–12; 4:15 pm]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2003–15754]

Notice of Public Hearing: Reading Blue Mountain and Northern Railroad

The Reading Blue Mountain and Northern Railroad (RBMN) has petitioned the Federal Railroad Administration (FRA) seeking the approval of the proposed

discontinuance and removal of Automatic Block System (ABS) signals between Milepost (MP) 119.3, Lehighton, and MP 130.6, Independence, on the Lehigh Line.

This proceeding is identified as FRA Block Signal Application Docket Number FRA–2003–15754. A copy of RBMN's full petition is available for review online at *www.regulations.gov* under the docket number identified above.

FRA has conducted a field investigation in this matter and has issued a public notice seeking comments from interested parties. *See* 77 FR 2774–2775 (January 19, 2012). After examining the carrier's proposal and the available facts, FRA has determined that a public hearing is necessary before a final decision is made on this proposal. Accordingly, FRA invites all interested persons to participate in a public hearing on August 22, 2012. The hearing will be conducted at the Tilden Township Municipal Building, 874 Hex Highway, Hamburg, PA 19526. The hearing will begin at 10:00 a.m. Interested parties are invited to present oral statements at the hearing. For information on facilities or services for persons with disabilities or to request special assistance at the hearing, contact FRA's Docket Clerk, Jerome Melis-Tull, by telephone, email, or in writing, at least 5 business days before the date of the hearing. Mr. Melis-Tull's contact information is: FRA, Office of Chief Counsel, Mail Stop 10, 1200 New Jersey Avenue SE., Washington, DC 20590; telephone: 202–493–6058; email: *Jerome.Melis-Tull@dot.gov*.

The hearing will be conducted in accordance with Rule 25 of the FRA Rules of Practice (Title 49 Code of Federal Regulations Section 211.25) by a representative designated by FRA. The hearing will be a non-adversarial proceeding; therefore, there will be no cross-examination of persons presenting statements. The FRA representative will make an opening statement outlining the scope of the hearing. After all initial statements have been completed, those persons wishing to make brief rebuttal statements will be given the opportunity to do so in the same order in which they made their initial statements. Additional procedures, if necessary for the conduct of the hearing, will be announced at the hearing.

Issued in Washington, DC, on July 26, 2012.

Ron Hynes,

Acting Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2012–18804 Filed 7–31–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0648]

Proposed Information Collection (Foreign Medical Program); Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to reimburse healthcare providers for medical services provided to veterans with service-connected disabilities living or traveling overseas.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 1, 2012.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *www.Regulations.gov;* or to Cynthia Harvey Pryor, Veterans Health Administration (10P7BFP), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email: *cynthia.harvey-pryor@va.gov.* Please refer to ''2900–0648'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor (202) 461–5870 or FAX (202) 273–9387.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Foreign Medical Program Registration Form, VA Form 10–7959f–1.

b. Claim Cover Sheet—Foreign Medical Program, VA Form 10–7959f–2.

OMB Control Number: 2900–0648.

Type of Review: Extension of a currently approved collection.

Abstracts:

a. Veterans with service connected disabilities living or traveling overseas complete VA Form 10–7959f–1 to enroll in the Foreign Medical Program.

b. Healthcare providers complete VA Form 10–7959f–2 to submit claims for payments or reimbursement of expenses relating to veterans living or traveling overseas (except for the Philippines) with service-connected disability. VA will accept provider's generated billing statement, Uniform Billing—Forms (UB) 04, and Medicare Health Insurance Claims Form, CMS 1500 for payments or reimbursements.

Affected Public: Individuals or households.

Estimated Total Annual Burden:

a. Foreign Medical Program, VA Form 10–7959f–1—111 hours.

b. Claim Cover Sheet, VA Form 10–7959f–2—3,652 hours.

Estimated Average Burden per Respondent:

a. Foreign Medical Program, VA Form 10–7959f–1—4 minutes.

b. Claim Cover Sheet, VA Form 10–7959f–2—11 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents:

a. Foreign Medical Program, VA Form 10–7959f–1—1,660.

b. Claim Cover Sheet, VA Form 10–7959f–2—19,920.

Dated: July 27, 2012.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–18727 Filed 7–31–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0427]

Proposed Information Collection (Former Prisoner of War Medical History); Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to assess the health care disability compensation or rehabilitation needs of Former Prisoners of War (FPOW) veterans.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 1, 2012.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *www.Regulations.gov;* or to Cynthia Harvey Pryor, Veterans Health Administration (10P7BFP), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email: *cynthia.harvey-pryor@va.gov.* Please refer to ''2900–0427'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor (202) 461–5870 or FAX (202) 273–9387.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Former Prisoner of War (FPOW) Medical History, VA Form 10–0048.

OMB Control Number: 2900–0427.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 10–0048 is completed by a VA physician during a medical examination of a Former Prisoner of War veteran. VA will use the data collected as a guide and reference for treatment planning for the FPOW veteran.

Affected Public: Individuals or households.

Estimated Total Annual Burden: 113 hours.

Estimated Average Burden per Respondent: 90 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 75.

Dated: July 27, 2012.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–18728 Filed 7–31–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0227]

Proposed Information Collection (Food Service and Nutritional Care Analysis) Activity; Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine patients' satisfaction with the quality of food and nutrition services.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 1, 2012.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov;* or to Cynthia Harvey-Pryor, Veterans Health Administration (10P7BFP), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420; or email: *cynthia.harvey-pryor@va.gov.* Please refer to ''OMB Control No. 2900–0227'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor (202) 461–5870 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Food Service and Nutritional Care Analysis, VA Form 10–5387.

OMB Control Number: 2900–0227.

Type of Review: Extension of a currently approved collection.

Abstract: VA will use the data collected to determine the level of patient satisfaction and quality of service resulting from advanced food preparation and advanced food delivery systems. All meals served are an integral

part of a patient's therapy. VA Form 10–5387 will be used to collect and evaluate information needed to determine whether improvements are needed to enhance patient's nutritional therapy.

Affected Public: Individuals and Households.

Estimated Annual Burden: 4,187 hours.

Estimated Average Burden per Respondent: 2 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 200.

Dated: July 27, 2012.

By direction of the Secretary:

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–18729 Filed 7–31–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0090]

Proposed Information Collection (Application for Voluntary Service); Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine an applicant's suitability and placement as a potential volunteer at VA.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 1, 2012.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov;* or to Cynthia Harvey-Pryor, Veterans Health Administration (10P7BFP), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420; or email: *cynthia.harvey-pryor@va.gov.* Please refer to ''OMB Control No. 2900–0090)'' in any correspondence. During the comment period, comments may be viewed online through the FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor at (202) 461–5870 or FAX (202) 273–9381.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from OMB for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Application for Voluntary Service, VA Form 10–7055.

OMB Control Number: 2900–0090.

Type of Review: Extension of a currently approved collection.

Abstract: Individuals expressing interest in volunteering at a VA medical center complete VA Form 10–7055 to request placement in the nationwide VA Voluntary Service Program. VA will use the data collected to place applicants in assignments most suitable to their special skills and abilities.

Affected Public: Individuals or Households.

Estimated Total Annual Burden: 8,000 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 32,000.

Dated: July 27, 2012.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–18730 Filed 7–31–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0681]

Proposed Information Collection (IL Assessment) Activity: Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to evaluate disabled veterans' independent living needs.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 1, 2012.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M35), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0681'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 632–8924 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of

information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Preliminary Independent Living (IL) Assessment, VA Form 28–0791.

OMB Control Number: 2900–0681.

Type of Review: Extension of a currently approved collection.

Abstract: VA case managers use VA Form 28–0791 while evaluating the independent living needs of veterans with severe disabilities. The data is used to determine the scope of the veteran's independent living needs under the Vocational Rehabilitation and Employment program.

Affected Public: Individuals or households.

Estimated Annual Burden: 2,500.

Estimated Average Burden per Respondent: 1 hour.

Frequency of Response: One-time.

Estimated Number of Respondents: 2,500.

Dated: July 27, 2012.

By direction of the Secretary:

Denise McLamb,

Program Analyst, Enterprise Records Service.

[FR Doc. 2012–18731 Filed 7–31–12; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0160]

Proposed Information Collection (Per Diem for Nursing Home Care of Veterans in State Homes; Per Diem for Adult Day Care of Veterans in State Homes): Comment Request

AGENCY: Veterans Health Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Health Administration (VHA) is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to ensure that nursing home and adult day health care facilities are providing high quality services to Veterans in State homes.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before October 1, 2012.

ADDRESSES: Submit written comments on the collection of information through the Federal Docket Management System (FDMS) at *www.Regulations.gov;* or to Cynthia Harvey-Pryor, Veterans Health Administration (10P7BFP), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420 or email: *cynthia.harvey-pryor@va.gov.* Please refer to ''2900–0160'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Cynthia Harvey-Pryor (202) 461–5870 or FAX (202) 273–9387.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Pub. L. 104–13; 44 U.S.C. 3501–3521), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to Section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VHA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VHA's functions, including whether the information will have practical utility; (2) the accuracy of VHA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Titles:

a. Title 38, CFR Parts 51 and 52, State Home Programs.

b. State Home Inspection—Staffing Profile, VA Form 10–3567.

c. State Home Report and Statement of Federal Aid Claimed, VA Form 10–5588.

d. State Home Program Application for Veteran Care—Medical Certification, VA Form 10–10SH.

e. Department of Veterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals, VA Form 10–0143.

f. Statement of Assurance of Compliance with Section 504 of the Rehabilitation Act of 1973, VA Form 10–0143a.

g. Certification Regarding Lobbying, VA Form 10–0144.

h. Statement of Assurance of Compliance with Equal Opportunity Laws, VA Form 10–0144a.

OMB Control Number: 2900–0160.

Type of Review: Extension of a currently approved collection.

Abstract: VA pays per diem to State homes providing nursing home and adult day health services care to Veterans. VA requires facilities providing nursing home and adult day health care to furnish an application for recognition based on certification; appeal information, application and justification for payment; records and reports which facility management must maintain regarding activities of residents or participants; information relating to whether the facility meets standards concerning residents' rights and responsibilities prior to admission or enrollment, during admission or enrollment, and upon discharge; the records and reports which facilities management and health care professionals must maintain regarding residents or participants and employees; documents pertain to the management of the facilities; food menu planning; pharmaceutical records; and life safety documentation. Without access to such information, VA would not be able to determine whether high quality care is being provided to Veterans.

Affected Public: State, Local or Tribal Government.

Estimated Total Annual Burden:

a. Title 38, CFR Parts 51 and 52, State Home Programs—3,738 hours.

b. State Home Inspection Staffing Profile, VA Form 10–3567—90 hours.

c. State Home Report and Statement of Federal Aid Claimed, VA Form 10–5588—1,080 hours.

d. State Home Program Application for Veteran Care—Medical Certification, VA Form 10–10SH—10,566 hours.

e. Department of Veterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals, VA Form 10–0143—15 hours.

f. Statement of Assurance of Compliance with Section 504 of the Rehabilitation Act of 1973, VA Form 10–1043a—15 hours.

g. Certification Regarding Lobbying, VA Form 10–0144—15 hours.

h. Statement of Assurance of Compliance with Equal Opportunity Laws, VA Form 10–0144a—15 hours.

Estimated Average Burden per Respondent:

a. Title 38, CFR Parts 51 and 52, State Home Programs—7 minutes.

b. State Home Inspection Staffing Profile, VA Form 10–3567—30 minutes.

c. State Home Report and Statement of Federal Aid Claimed, VA Form 10–5588—30 minutes.

d. State Home Program Application for Veteran Care—Medical Certification, VA Form 10–10SH—30 minutes.

e. Department of Veterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals, VA Form 10–0143—5 minutes.

f. Statement of Assurance of Compliance with Section 504 of the Rehabilitation Act of 1973, VA Form 10–1043a—5 minutes.

g. Certification Regarding Lobbying, VA Form 10–0144—5 minutes.

h. Statement of Assurance of Compliance with Equal Opportunity Laws, VA Form 10–0144a—5 minutes.

Frequency of Response: One-time.

Estimated Number of Respondents:

a. Title 38, CFR Parts 51 and 52, State Home Programs—22,926.

b. State Home Inspection Staffing Profile, VA Form 10–3567—180.

c. State Home Report and Statement of Federal Aid Claimed, VA Form 10–5588—180.

d. State Home Program Application for Veteran Care—Medical Certification, VA Form 10–10SH—21,132.

e. Department of Veterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals, VA Form 10–0143—180.

f. Statement of Assurance of Compliance with Section 504 of the Rehabilitation Act of 1973, VA Form 10–1043a—180.

g. Certification Regarding Lobbying, VA Form 10–0144—180.

h. Statement of Assurance of Compliance with Equal Opportunity Laws, VA Form 10–0144a—180.

Estimated Total Annual Responses:

a. Title 38, CFR Parts 51 and 52, State Home Programs—23,466.

b. State Home Inspection Staffing Profile, VA Form 10–3567—180.

c. State Home Report and State of Federal Aid Claimed, VA Form 10–5588—2,160.

d. State Home Program Application for Veteran Care—Medical Certification, VA Form 10–10SH—21,132.

e. Department of Veterans Affairs Certification Regarding Drug-Free Workplace Requirements for Grantees Other Than Individuals, VA Form 10–0143—180.

f. Statement of Assurance of Compliance with Section 504 of the Rehabilitation Act of 1973, VA Form 10–1043a—180.

g. Certification Regarding Lobbying, VA Form 10–0144—180.

h. Statement of Assurance of Compliance with Equal Opportunity Laws, VA Form 10–0144a—180.

Dated: July 27, 2012.

By direction of the Secretary.

Denise McLamb,

Program Analyst, Enterprise Records Service.

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Securities and Exchange Commission

17 CFR Part 242

Consolidated Audit Trail; Final Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 242

[Release No. 34–67457; File No. S7–11–10]

RIN 3235–AK51

Consolidated Audit Trail

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is adopting Rule 613 under the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'') to require national securities exchanges and national securities associations (''self-regulatory organizations'' or ''SROs'') to submit a national market system (''NMS'') plan to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail, with respect to the trading of NMS securities, that would capture customer and order event information for orders in NMS securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution.

DATES: *Effective Date:* October 1, 2012.

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I. Executive Summary

In today's high-speed electronic markets, trading is widely dispersed across a variety of market centers, including exchanges, Alternative Trading Systems (''ATSs''), such as dark pools and Electronic Communication Networks (''ECNs''), and over-the-counter broker-dealers acting as market makers or block positioners. In their capacity as SROs, the Financial Industry Regulatory Authority (''FINRA'') and some of the exchanges currently maintain their own separate audit trail systems for certain segments of this trading activity, which vary in scope, required data elements and format. In performing their market oversight responsibilities, SRO and Commission staffs today must rely heavily on data from these various SRO audit trails.

As discussed more fully in part II.A below, there are shortcomings in the completeness, accuracy, accessibility, and timeliness of these existing audit trail systems. Some of these shortcomings are a result of the disparate nature of the systems, which make it impractical, for example, to follow orders through their entire lifecycle as they may be routed, aggregated, re-routed, and disaggregated across multiple markets. The lack of key information in the audit trails that would be useful for regulatory oversight, such as the identity of the customers who originate orders, or even the fact that two sets of orders may have been originated by the same customer, is another shortcoming.

Though SRO and Commission staff also have access to sources of market activity data other than SRO audit trails, these systems each suffer their own drawbacks. For example, data obtained from the Electronic Blue Sheet (''EBS'') [1] system and equity cleared reports [2] comprise only trade executions, and not orders or quotes. In addition, like data from existing audit trails, data from these sources lacks key elements important to regulators, such as the time of execution, and, in the case of equity cleared reports, the identity of the customer. Furthermore, recent experience with implementing incremental improvements to the EBS system has illustrated some of the

[1] EBSs are trading records requested by the Commission and SROs from broker-dealers that are used in regulatory investigations to identify buyers and sellers of specific securities. *See* Securities Exchange Act Release No. 44494 (June 29, 2001), 66 FR 35836 (July 9, 2001) (File No. S7–12–00) (adopting Rule 17a–25). *See also* Securities Exchange Act Release Nos. 26235 (November 1, 1988), 53 FR 44688 (November 4, 1988) (approving the Chicago Board Options Exchange's (''CBOE'') rule for the electronic submission of transaction information); 26539 (February 13, 1989), 54 FR 7318 (February 17, 1989) (approving the National Association of Securities Dealers' (n/k/a FINRA) rule for the electronic submission of transaction information); and 27170 (August 23, 1989), 54 FR 37066 (September 6, 1989) (approving the Philadelphia Stock Exchange's (n/k/a NASDAQ OMX PHLX LLC) (''Phlx'') rule for the electronic submission of transaction information).

To partially address some of the current limitations of the EBS system, and to provide the Commission, in the short term, with more detailed and timely trade information for large traders, the Commission recently adopted new Rule 13h–1 concerning large trader reporting. *See* Securities Exchange Act Release No. 61908 (July 27, 2011), 76 FR 46960 (August 3, 2011) (''Large Trader Release''). Rule 13h–1 requires ''large traders'' to identify themselves to the Commission and make certain disclosures to the Commission on Form 13H. As adopted, Rule 13h–1 requires certain broker-dealers to capture and report through EBS the time of execution for any trade involving a large trader and a Commission-issued large trader identifier that identifies the large trader. *See also* Section II.A.3., *infra*.

On April 20, 2012, the Commission, among other things, extended the time by which registered broker-dealers were required to comply with Rule 13h–1 to allow broker-dealers additional time to develop, test, and implement enhancements to their recordkeeping and reporting systems as required under Rule 13h–1. *See* Securities Exchange Act Release No. 66839, 77 FR 25007 (April 26, 2012) (Order Temporarily Exempting Broker-Dealers From the Recordkeeping, Reporting, and Monitoring Requirements of Rule 13h–1 Under the Securities Exchange Act of 1934 and Granting an Exemption for Certain Securities Transactions) (''Large Trader Extension'').

[2] The Commission uses the National Securities Clearing Corporation's (''NSCC'') equity cleared report for initial regulatory inquiries. This report is generated on a daily basis by the SROs and is provided to the NSCC in a database accessible by the Commission, and shows the number of trades and daily volume of all equity securities in which transactions took place, sorted by clearing member. The information provided is end-of-day data and is searchable by security name and CUSIP number.

overall limitations of the current technologies and mechanisms used by the industry to collect, record, and make available market activity data for regulatory purposes.[3]

The Commission therefore believes that the regulatory data infrastructure on which the SROs and the Commission currently must rely generally is outdated and inadequate to effectively oversee a complex, dispersed, and highly automated national market system. In performing their oversight responsibilities, regulators today must attempt to cobble together disparate data from a variety of existing information systems lacking in completeness, accuracy, accessibility, and/or timeliness—a model that neither supports the efficient aggregation of data from multiple trading venues nor yields the type of complete and accurate market activity data needed for robust market oversight.

To address this problem and improve the ability of the SROs and the Commission to oversee the securities markets, on May 26, 2010, the Commission proposed Rule 613,[4] with the goal of creating a comprehensive consolidated audit trail[5] that allows regulators to efficiently and accurately track all activity in NMS securities throughout the U.S. markets. As proposed—and summarized in part II.B below—Rule 613 required SROs to jointly submit an NMS plan[6] that would govern the creation, implementation, and maintenance of a consolidated audit trail, including a central repository to receive and store consolidated audit trail data. In the proposed Rule, the Commission specified many requirements that the NMS plan, and by extension the consolidated audit trail, must meet, ranging from details of the data elements to be collected, to the timing of data transmissions, to specific standards for data formatting.

Among its various requirements, the proposed Rule mandated that the NMS plan developed by the SROs must in turn require each SRO and its members to capture and report specified trade, quote, and order activity in all NMS securities[7] to the central repository in real time, across all markets, from order inception through routing, cancellation, modification, and execution. The proposed Rule also mandated that the NMS plan require the creation of unique order identifiers to facilitate the ability of regulators to view cross-market activity, as well as unique customer identifiers to enhance the ability of regulators to reliably and efficiently identify the beneficial owner of the account originating an order or the person exercising investment discretion for the account originating the order, if different from the beneficial owner.

The Commission received 64 comment letters from 56 commenters in response to the proposed consolidated audit trail representing a wide range of viewpoints, as summarized in part II.C below.[8] The commenters included national securities exchanges, a national securities association, technology providers, academics, broker-dealers, organizations representing industry participants, individual investors, and members of Congress.[9] Of the comment letters received, 13 expressed support for the proposal;[10] 36 expressed support, but suggested modifications to certain provisions of the proposal;[11] five solely suggested modifications to the proposal;[12] two opposed the proposal;[13] and seven neither supported nor opposed the substance of the proposal.[14] Concerns raised in these comment letters included: (1) The appropriateness of real-time reporting of required data to the central repository;[15] (2) the scope of the required data elements, including the use of unique order identifiers and unique customer identifiers;[16] and (3) the burden and costs associated with the proposal.[17] In addition, a number of commenters offered alternative approaches and made suggestions regarding the creation, implementation, and maintenance of the consolidated audit trail.[18]

[3] *See* Large Trader Extension, *supra* note 1.

[4] *See* Securities Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32556 (June 8, 2010) (''Proposing Release''). The comment file is on the Commission's Web site at: *http://www.sec.gov/comments/s7-11-10/s71110.shtml.*

[5] In this release, ''consolidated audit trail'' means both a system capable of capturing a complete record of all transactions relating to an order, from origination to execution or cancellation, and the complete record for an order generated by such a system, as the context may require.

[6] NMS plan is defined in Rule 600(b)(43) to mean ''any joint self-regulatory organization plan in connection with: (i) [t]he planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or (ii) [t]he development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with any section of [Regulation NMS] * * *.'' 17 CFR 240.600(b)(43). Such NMS plan may be subject to modification prior to approval by the Commission pursuant to Rule 608 of Regulation NMS, as discussed in Section III.C.2.a.v., *infra.*

[7] ''NMS security'' is defined in Rule 600(a)(46) of Regulation NMS to mean ''any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.'' 17 CFR 242.600(a)(46). NMS stock is defined in Rule 600(47) to mean ''any NMS security other than an option.'' 17 CFR 242.600(a)(46). A listed option is defined in Rule 600(a)(35) of Regulation NMS to mean ''any option traded on a registered national securities exchange or automated facility of a national securities association.'' 17 CFR 242.600(a)(35).

[8] *See* Exhibit A for a citation key to the comment letters received by the Commission on the proposed rule. The Commission also received four comment letters that do not address the substance of the consolidated audit trail proposal. *See* Ericson Letter; Kondracki Letter; Grady Letter; Deep Liquidity Letter.

[9] The Commission notes that, in some cases, commenters fell into more than one such category.

[10] *See* Vannelli Letter; Beach Letter; Foothill Letter; Green Letter; Wealth Management Letter; McCrary Letter; Anastasopoulos Letter; Triage Letter; FTEN Letter; Middle Office Letter; Correlix Letter; Lettieri Letter; Bean Letter.

[11] *See* ICI Letter; Thomson Reuters Letter; Scottrade Letter; Liquidnet Letter; FINRA/NYSE Euronext Letter; BOX Letter; Nasdaq Letter I; Nasdaq Letter II; TIAA–CREF Letter; GETCO Letter; BATS Letter; SIFMA Letter; SIFMA February 2012 Letter; CBOE Letter; Direct Edge Letter; Angel Letter; IAG Letter; Managed Funds Association Letter; Mansfield Letter; Marketcore Letter; Kumaraguru Letter; Ameritrade Letter; FINRA Letter; Wells Fargo Letter; Noetic Partners Letters; Knight Letter; FIF Letter; FIF Letter II; Albany Letter; Endace Letter; Ross Letter; FINRA Proposal Letter; Schumer Letter; FIA Letter; STA Letter; Van Bokkelen Letter.

[12] *See* Belanger Letters; SIFMA Drop Copy Letter; Wachtel Letter; High Speed Letter (recommending next steps in the development of the consolidated audit trail).

[13] *See* BondMart Letter; Leuchtkafter Letter.

[14] *See* Broadridge Letter; FIX Letter; Know More Letter; Aditat Letter; iSys Letter; Kaufman Letter; Berkeley Letter.

[15] *See* Scottrade Letter, p. 1; ICI Letter, p. 4–6; FINRA/NYSE Euronext Letter, p. 4; GETCO Letter, p. 2; BATS Letter, p. 1–2; SIFMA Letter, p. 3–8; SIFMA February 2012 Letter, p. 1; CBOE Letter, p. 4–5; Direct Edge Letter, p. 3; FINRA Letter, p. 10–13; Wells Fargo Letter, p. 3; Knight Letter, p. 2–3; Leuchtkafer Letter; Broadridge Letter, p. 3; FIF Letter, p. 4; SIFMA Drop Copy Letter, p. 1; Ross Letter, p. 1; FINRA Proposal Letter, p. 3; FIA Letter, p. 1–2.

[16] *See* Ameritrade Letter, p. 3; Kumaraguru Letter, p. 1; FINRA Proposal Letter, p. 6–8, 13 and Appendix A.; Angel Letter, p. 2–3; Managed Funds Association Letter, p. 2; SIFMA Letter, p. 11–12, 14; SIFMA Drop Copy Letter, p. 2; Liquidnet Letter p. 6–7; FINRA Letter, p. 4, 7–9; CBOE Letter, p. 2; Knight Letter, p. 2; Scottrade Letter, p. 1; DirectEdge Letter, p. 3; FIF Letter, p. 2–3, 6–7; FIF Letter II, p. 2; BOX Letter, p. 2; Wells Fargo Letter, p. 3; Ross Letter, p. 1; ICI Letter, p. 3; Thomson Reuters Letter, p. 3; Endace Letter, p. 1–2; GETCO Letter, p. 4.

[17] *See* Thomson Reuters Letter, p. 2; Liquidnet Letter, p. 1; CBOE Letter, p. 2, 4–5; Nasdaq Letter I, p. 2; Angel Letter, p. 1–2; IAG Letter, p. 3.; Kaufman Letter, attachment p. 3; Wells Fargo Letter, p. 3–4; Noetic Partners Letter, p. 2; Leuchtkafer Letter, p. 1–5; Broadridge Letter, p. 3; FINRA Proposal Letter, p. 2–3.; High Speed Letter, p. 1; Belanger Letter, p. 7–8; Correlix Letter, p. 2.; FTEN Letter, p. 13; SIFMA Letter, p.1–8, 15–16; FINRA/NYSE Euronext Letter, p 4, 7; FINRA Letter, p. 3, 10–13; Scottrade Letter, p. 1; ICI Letter, p. 4–6; GETCO Letter, p. 2; BATS Letter, p. 1–2; Direct Edge Letter, p. 3; Knight Letter, p. 2–3; Leuchtkafer Letter; Broadridge Letter, p. 3; FIF Letter, p. 4; SIFMA Drop Copy Letter, p. 1; Ross Letter, p. 1; SIFMA February 2012 Letter; FIA Letter, p. 1–2; Noetic Partners Letter II, p. 2; High Speed Letter, p. 1.

[18] *See* FINRA Proposal Letter; Angel Letter, p. 3; BOX Letter, p. 2; BATS Letter, p. 2; CBOE Letter,

Continued

In consideration of the views expressed, suggestions for alternatives, and other information provided by those commenting on the proposed Rule, the Commission is adopting Rule 613 with significant modifications to the proposed requirements for the NMS plan submitted to the Commission for its consideration. In certain instances these modifications alter the data and collection requirements of the proposed Rule. In other instances, the adopted Rule has been altered to be less prescriptive, and hence less limiting, in the means SROs may use to meet certain requirements. Some of the more significant changes are as follows:

• *Replacing Real-Time Reporting with a Requirement to Report Data by 8 a.m. of the Next Trading Day.* The adopted Rule no longer requires that the NMS plan provide for the reporting of order event data [19] to the central repository in real time; rather, it provides that the NMS plan must require the reporting of order event data to the central repository by 8 a.m. Eastern Time on the trading day following the day such information has been recorded by the SRO or the member.[20] The NMS plan may accommodate voluntary submissions of order event data prior to 8 a.m. on the following trading day, but it may not mandate a reporting deadline prior to 8 a.m.

• *Providing More Flexibility to Determine the Format of Data Reported to the Central Repository.* The proposed Rule mandated that the NMS plan require the SROs and their members to collect and provide to the central repository the required order and event information in a uniform electronic format. The adopted Rule instead allows the SROs to determine the details of how market participants would transmit data to the central repository (which might include multiple electronic formats, rather than a uniform electronic format), subject to a more general requirement that data must be transmitted in a manner that ultimately allows the central repository to make this data available to regulators in a uniform electronic format.[21]

• *Eliminating the Requirement to Report Orders with a Unique Order Identifier.* The proposed Rule mandated that each order reported to the central repository be tagged with a unique identifier that is the same throughout the order's entire lifecycle. In the adopted Rule, this requirement is replaced with a more general requirement that once all order events are transmitted to the central repository, the repository must be able to efficiently and accurately link together all lifecycle events for the same order, and make available to regulators this linked order data.[22]

• *Extending the Compliance Period for Small Broker-Dealers.* Under the adopted Rule, the NMS plan may provide that small broker-dealers be allowed up to three years, rather than two years as proposed, from the effectiveness of the NMS plan to provide the required data to the consolidated audit trail.[23]

In addition to the above modifications, the Commission has also added a number of new requirements to the adopted Rule in response to general concerns expressed by commenters regarding the process for the development and implementation of the NMS plan. Some of the more significant of these additions are as follows:

• *Considering and Explaining Choices and Available Alternatives.* The adopted Rule requires that the NMS plan describe and discuss any reasonable alternative approaches to the creation of the consolidated audit trail that were considered by the SROs and why the approach set forth by the NMS plan was selected.[24]

• *Planning for Future System Efficiencies.* The adopted Rule requires that the NMS plan provide a plan to eliminate existing rules and systems (or components thereof) that are rendered duplicative by the consolidated audit trail, including identification of such rules and systems (or components thereof). Further, to the extent that any existing rules or systems related to monitoring quotes, orders, and executions provide information that is not rendered duplicative by the consolidated audit trail, such plan must also include an analysis of (1) whether the collection of such information remains appropriate, (2) if still appropriate, whether such information should continue to be separately collected or should instead be incorporated into the consolidated audit trail, and (3) if no longer appropriate, how the collection of such information could be efficiently terminated. Finally, such plan must also discuss the steps the plan sponsors propose to take to seek Commission approval for the elimination of such rules and systems (or components thereof); and a timetable for such elimination, including a description of how the plan sponsors propose to phase in the consolidated audit trail and phase out such existing rules and systems (or components thereof).[25]

• *Considering Input.* The adopted Rule requires the NMS plan to address the process by which the plan sponsors solicited views of their members and other appropriate parties regarding the creation, implementation, and maintenance of the consolidated audit trail, provide a summary of the views of such members and other parties, and describe how the plan sponsors took such views into account in preparing the NMS plan.[26] In addition, the adopted Rule also requires the NMS plan to provide for the establishment of an Advisory Committee whose function will be to advise the plan sponsors on the implementation, operation, and administration of the central repository.[27]

• *Periodic Reviews of the Consolidated Audit Trail.* To help assure the Commission that as financial markets evolve and new technologies emerge, the consolidated audit trail remains a useful regulatory tool, the adopted Rule mandates that the NMS plan must require the central repository's Chief Compliance Officer to regularly review the operations of the consolidated audit trail, and, in light of

p. 2–3; SIFMA Letter, p. 16–18; Wells Fargo Letter, p. 2; Knight Letter, p. 3; FIF Letter, p. 5–6; Schumer Letter, p. 1; FIF Letter, p. 1–3; FINRA Letter, p. 3, 6; FINRA/NYSE Euronext Letter, p. 8, 14; SIFMA Drop Copy Letter.

[19] As used herein, the term ''order event data'' is used to refer to the information reported pursuant to Rule 613(c)(3) and identified in Rule 613(c)(7)(i) through (v), generally including: (1) The Customer-ID(s) for each customer, including the person giving a modification or cancellation instruction; (2) the CAT-Order-ID; (3) the CAT-Reporter-ID of the broker-dealer, national securities exchange, or national securities association receiving, originating, routing, modifying, cancelling or executing an order, and to which an order is being routed; (4) the identity and nature of the department or desk to which an order is routed, if routed internally at the broker-dealer; (5) the date an order was received, originated, routed, modified, cancelled, or executed; (6) the time an order was received, originated, routed, modified, cancelled, or executed; (7) material terms of an order and any changes of such terms, if modified; (8) the price and remaining size of an order, if modified; (9) execution capacity (principal, agency, riskless principal); (10) execution price and size; and (11) whether the execution was reported pursuant to an effective transaction reporting plan or the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (''OPRA''). *See* Section III.B.1.d., *infra.* Information reported pursuant to Rule 613(c)(4) and identified in Rule 613(c)(7)(vi) through (viii) is referred to as ''supplemental data.''

[20] *See* Rule 613(c)(3); Sections II.A., III.B.1.e., *infra.*

[21] *See* Rule 613(c)(2); Sections III.B.1.f., III.B.2., *infra.*

[22] *See* Rule 613(j)(1); Section III.B.1.d.iv., *infra.*

[23] *See* Rule 613(a)(3)(vi); Section III.B.1.c., *infra.*

[24] *See* Rule 613(a)(1)(xii); Section III.C.2.a., *infra.*

[25] *See* Rule 613(a)(1)(ix); Section III.C.2.a., *infra.*

[26] *See* Rule 613(a)(1)(xi).

[27] *See* Rule 613(b)(7). For a further discussion of the composition of the Advisory Committee, *see* Section III.B.3.b., *infra.*

market and technological developments, make appropriate recommendations for enhancements to the consolidated audit trail.[28]

The Commission has also added certain requirements to the adopted Rule in response to specific concerns expressed by commenters with respect to the use of consolidated audit trail data. Some of the more significant of these additions are as follows:

• *Enhancing Security and Privacy Requirements.* Commenters have expressed concerns regarding the risk of failing to maintain appropriate controls over the privacy and security of consolidated audit trail data. Accordingly, the adopted Rule requires the NMS plan to include additional policies and procedures that are designed to ensure the rigorous protection of confidential information collected by the central repository.[29]

• *Addressing and Limiting Errors.* Commenters have also expressed concerns about the potential for errors in the consolidated audit trail; the adopted Rule requires the SROs to provide in their NMS plan detailed information regarding anticipated error rates as well as the plan's proposed error correction process.[30]

The Commission generally believes that the collective effect of the modifications and additions described above will be to significantly expand the set of solutions that could be considered by the SROs for creating, implementing, and maintaining a consolidated audit trail and to provide the SROs with increased flexibility in how they choose to meet the requirements of the adopted Rule, relative to the alternatives that would have been available under the requirements of the proposed Rule. The Commission further believes that these changes address or mitigate the principal concerns raised by commenters—including concerns regarding the extent and cost of the systems changes required by the SROs and their members—while continuing to enable the SROs and the Commission to achieve significant benefits from the consolidated audit trail.[31] Each of the modifications and additions noted above is described and explained in detail in part III below.

Given these changes and the wide array of commenters' views on how to best create, implement, and maintain a consolidated audit trail, the Commission expects that the SROs will seriously consider various options as they develop the NMS plan to be submitted to the Commission for its consideration.[32] Indeed, some commenters recognized that a consolidated audit trail could be created, implemented, and maintained in a number of ways, and thus recommended that the Commission replace the specific systems requirements of the proposed Rule with more general ''end-user'' requirements, perform an analysis of how existing audit trail systems do and do not meet the needs of regulators, and perhaps even engage in a formal request-for-proposal (''RFP'') process.[33]

In light of the expanded solution set that should be available under the changes described above and commenter views on the NMS plan development process, the adopted Rule now requires the SROs to provide much more information and analysis to the Commission as part of their NMS plan submission. These requirements have been incorporated into the adopted Rule as ''considerations'' that the SROs must address, and generally mandate that the NMS plan discuss: (1) The specific features and details of the NMS plan (*e.g.,* how data will be transmitted to the central repository, when linked data will be available to regulators); (2) the SROs' analysis of NMS plan costs and impact on competition, efficiency, and capital formation; (3) the process followed by the SROs in developing the NMS plan (*e.g.,* the requirement to solicit input from members of the SROs and other appropriate parties); and (4) information about the implementation plan and milestones for the creation of the consolidated audit trail.

These requirements are intended to ensure that the Commission and the public have sufficiently detailed information to carefully consider all aspects of the NMS plan ultimately submitted by the SROs, facilitating an analysis of how well the NMS plan would allow regulators to effectively and efficiently carry out their responsibilities. To help elicit the most appropriate information and analysis from the SROs in response to these requirements, the Commission is furnishing further details about how it envisions regulators would use, access, and analyze consolidated audit trail data through a number of ''use cases.'' These use cases and accompanying questions should help the SROs prepare an NMS plan that better addresses the requirements of the adopted Rule, as well as aid the Commission and the public in gauging how well the NMS plan will address the need for a consolidated audit trail.[34]

Because the Commission believes the adopted Rule permits a wider array of solutions to be considered by the SROs than the proposed Rule did and because the Commission and the public will be able to avail themselves of much more information and analysis in connection with the NMS plan submission, the Commission is also making significant modifications to the process by which it will consider the costs and benefits of the creation, implementation, and maintenance of a consolidated audit trail, as well as the potential impacts on efficiency, competition, and capital formation. In particular, the methodology that the Commission used in the Proposing Release to estimate the costs of creating, implementing, and maintaining a consolidated audit trail may be no longer suitable. As discussed in the Proposing Release, the approximately $4 billion cost estimate for the creation and implementation of a consolidated audit trail was primarily based on averages for the development from scratch of new, very large-scale market systems.[35] However, the Commission's rationale for this approach was predicated on some of the specific technical requirements of the proposed Rule, especially those related to the real-time collection and standard formatting of all data. As such, the approach assumed that the consolidated audit trail would not be able to build on existing trade, order, and audit trail systems. As noted above, these assumptions may no longer be valid since several of the specific technical requirements underlying the Proposing Release's approach have been substantially modified. The Commission believes these changes would now permit a wider array of solutions to be considered by the SROs, including solutions that could capitalize on existing systems and standards.[36]

In light of these changes, the Commission believes that the economic consequences of the consolidated audit trail now will become apparent only over the course of the multi-step process

[28] *See* Section III.B.2., *infra.*

[29] *See* Rule 613(e)(4).

[30] *See* Rule 613(e)(6); Section III.B.2., *infra.*

[31] *See* Section II.A., *infra,* for a discussion of the objectives of the consolidated audit trail.

[32] *See, e.g.,* FINRA Letter, p. 14 (advocating that SROs build off existing audit trails to develop a consolidated audit trail) and Nasdaq Letter I, p. 11–12 (arguing against building off existing audit trail systems and supporting the development of new system to establish a consolidated audit trail).

[33] *See* Nasdaq Letter I, p. 12; FIF Letter II, p. 2–3; STA Letter, p. 1–3; Direct Edge Letter, p. 2–3, 5.

[34] *See* Section III.C.2.b., *infra.*

[35] The methodology in the Proposing Release assumed that the scope of the required systems changes would be comparable to those made in connection with Regulation NMS. *See* Proposing Release, *supra* note 4, at 32597, n. 352.

[36] *See, e.g,* FINRA Letter, p. 14; SIFMA Letter, p. 16–18.

for developing and approving an NMS plan that will govern the creation, implementation, and maintenance of a consolidated audit trail. In particular, the Commission believes that the costs and benefits of creating a consolidated audit trail, and the consideration of specific costs as related to specific benefits, is more appropriately analyzed once the SROs narrow the expanded array of choices they have under the adopted Rule and develop a detailed NMS plan. The Commission therefore is focusing its economic analysis in this Release on the actions the SROs are required to take upon approval of the adopted Rule—specifically the requirement that the SROs develop an NMS plan, utilizing their own resources and undertaking their own research, that addresses the specific details, cost estimates, considerations, and other requirements of the Rule.[37] A robust economic analysis of the next step—the actual creation and implementation of a consolidated audit trail itself—requires information on the plan's detailed features (and their associated cost estimates) that will not be known until the SROs submit their NMS plan to the Commission for its consideration. Accordingly, the Commission is deferring this analysis until such time as it may approve any NMS plan—that is, after the NMS plan, together with its detailed information and analysis, has been submitted by the SROs and there has been an opportunity for public comment.

To that end, the adopted Rule requires that the SROs: (1) Provide an estimate of the costs associated with creating, implementing, and maintaining the consolidated audit trail under the terms of the NMS plan submitted to the Commission for its consideration; (2) discuss the costs, benefits, and rationale for the choices made in developing the NMS plan submitted; and (3) provide their own analysis of the submitted NMS plan's potential impact on competition, efficiency and capital formation. The Commission believes that these estimates and analyses will help inform public comment regarding the NMS plan and will help inform the Commission as it evaluates whether to approve the NMS plan. In this way, the Commission can develop estimates of the costs for the creation, implementation, and maintenance of the consolidated audit trail that benefit from cost data and information provided by the SROs.

The Commission notes that this approach is suited for the multi-step nature of the particular process for developing and approving an NMS plan that will govern the creation, implementation, and maintenance of a consolidated audit trail. Further, because the Commission is deferring its final analysis of the consolidated audit trail until after a detailed NMS plan has been submitted to the Commission for its consideration and the public has had an opportunity to comment, the adopted Rule has been modified to include a mandate that in determining whether to approve the NMS plan and whether the NMS plan is in the public interest, the Commission must consider the impact of the NMS plan on efficiency, competition, and capital formation of creating, implementing, and maintaining the NMS plan.[38] The Commission also will consider the costs and benefits of the creation, implementation, and maintenance of the consolidated audit trail pursuant to the details proposed in the NMS plan submitted to the Commission for its consideration.

As a result of the new requirements for SROs to provide additional information about costs and a number of other aspects of the NMS plan they submit, the Commission is extending the timeframe for the submission of the NMS plan from 90 days from the date of approval of Rule 613 to 270 days from the date of publication of the adopting release for Rule 613 (''Adopting Release'') in the **Federal Register**. The Commission also is altering the timeframe within which SROs must submit proposed rule changes to require their members to comply with the requirements of the Rule and the NMS plan approved by the Commission[39] and the deadline for submitting the document required by Rule 613(i) regarding the possible expansion of the scope of the NMS plan.[40]

II. Introduction

A. Need for, and Objectives of, a Consolidated Audit Trail

The Commission believes that the Rule adopted today is an appropriate step in the creation of a consolidated audit trail which, when implemented, should substantially enhance the ability of the SROs and the Commission to oversee today's securities markets and fulfill their responsibilities under the federal securities laws. Rule 613 requires the submission of an NMS plan to create, implement, and maintain the first comprehensive audit trail for the U.S. securities markets, which will allow for the prompt and accurate recording of material information about all orders in NMS securities, including the identity of customers, as these orders are generated and then routed throughout the U.S. markets until execution, cancellation, or modification. This information will be consolidated and made readily available to regulators in a uniform electronic format.

This section reviews the current status and limitations of existing, discrete audit trails and discusses how a consolidated audit trail could address those limitations and improve the ability of the SROs and the Commission to perform their regulatory functions. To perform this review, the Commission is, in part, drawing upon its own experiences in using existing audit trails to carry out its regulatory duties.[41] The Commission also is relying on information provided to the Commission from other regulators who use existing audit trail systems, broker-dealers and organizations representing industry participants, and those with expertise in data management and technology solutions that may be applicable to the adopted requirements.

1. Use and Limitations of Current Sources of Trading Data

It has become increasingly challenging for SROs and the Commission to oversee the U.S. securities markets across the multitude of trading venues, given the huge volume of orders and trades that are generated, routed, transformed, and then re-routed across dozens of venues every day. Among the challenges is the fact that there is no single, comprehensive audit trail available to regulators.[42] At present, the SROs and the Commission must use a variety of data sources, including EBS,[43] equity cleared reports,[44] and SRO audit trail data to help fulfill their regulatory obligations. As a result, among other issues, regulatory authorities face many challenges in obtaining, reconciling, and making effective use of even the limited

[37] *See* Rule 613(a)(1).

[38] *See* Rule 613(a)(5).

[39] The proposed Rule would have required SROs to submit such proposed rule changes on or before from 120 days from approval of the Rule. Because the adopted Rule permits the SROs up to 270 days from the date of publication of the Adopting Release in the **Federal Register** to submit NMS plans, the Commission believes that the more appropriate deadline for SROs to submit rule changes is 60 days from the date the Commission approves an NMS plan.

[40] Specifically, the adopted Rule provides SROs six months, instead of two months, after effectiveness of the NMS plan to submit this document to the Commission.

[41] *See* Proposing Release, *supra* note 4, at 32558–61.

[42] *See* FINRA/NYSE Euronext Letter, p. 1–3; Nasdaq Letter I, p. 1–5.

[43] *See* note 1, *supra;* Proposing Release, *supra* note 4, at 32557–58.

[44] *See* note 2, *supra.*

order and execution data that is available, thereby hindering the conduct of market surveillance, investigation and enforcement activities, and market reconstructions and analyses.[45]

The ultimate effectiveness of core SRO and Commission regulatory efforts depends on the following four qualities of trade and order (collectively ''market'') data:

- Accuracy. Is the data about a particular order or trade correct?
- Completeness. Does the data represent all market activity of interest, or just a subset? Is the data sufficiently detailed to provide the required information?
- Accessibility. How is the data stored? How practical is it to assemble, aggregate, reconcile, and process the data? Can all appropriate regulators acquire the data they need?
- Timeliness. When is the data available to regulators? How long will it take to process before it can be used for regulatory analyses?

SROs generally use market data in the form of audit trails to identify potential misconduct in the markets they oversee, including attempts to manipulate market quotations, inflate trading or order volume artificially, or profit from non-public information. When these surveillance efforts identify suspicious trading activity, SROs have a responsibility to open investigations in which they assemble and review additional market data to assess the nature and scope of the potential misconduct. When an SRO detects persistent problems in the market it oversees, it may write new rules for its members to address the problems. To inform these rulemaking efforts, SROs frequently gather and analyze significant amounts of market data. The effectiveness of such efforts is largely determined by the qualities of the data available.[46]

The qualities of such market data are also primary determinants of the Commission's ability to fulfill its statutory mission. The Commission uses market data in most of its investigations of potential securities law violations. In many of these investigations, market data analysis frames the issues for investigation and is a primary means of identifying relationships between individuals and entities whose activities may threaten the integrity of the securities markets or create substantial and unnecessary investor losses. The Commission also uses audit trails and other sources of market data to: (1) Inform its priorities for examinations of broker-dealers, investment advisers and SROs; (2) supplement the data and information it collects during those examinations; and (3) determine the nature and scope of any potential misconduct the examinations identify. The Commission also relies heavily on market data to identify patterns of trading and order activity that pose risks to the securities markets and to inform regulatory initiatives, as well as to perform market reconstructions. In addition, the Commission relies on market data to improve its understanding of how markets operate and evolve, including with respect to the development of new trading practices, the reconstruction of atypical or novel market events, and the implications of new markets or market rules. As is the case for the SROs, the effectiveness of such efforts by the Commission is largely determined by the qualities of the data available.[47]

As described in the following sections, each of the present sources of market data available to regulators suffers from deficiencies limiting its effective use.

a. The EBS System

The EBS system is currently the only available source of data that allows regulators to obtain the identity of customers of broker-dealers who have executed trades. The SROs and the Commission have depended on this system for decades to request trading records from broker-dealers. The EBS system, supplemented by the requirements of Rule 17a–25 under the Exchange Act,[48] is generally used by SRO and Commission staff to assist in the investigation of possible securities law violations, typically involving insider trading and market manipulations.[49] In its electronic format, the EBS system provides certain detailed execution information, upon request by SRO or Commission staff, for specific securities during specified timeframes. However, EBS data, which is currently sourced from the so-called back-office records of clearing brokers, are limited to executed trades and do not contain information on orders or quotes (and thus no information on routes, modifications, and cancellations). Also, in frequent cases where brokers utilize average-price accounts to execute and aggregate multiple trades for one or more customers, the details of each individual trade execution are typically lost when reported through the EBS system because it is only the average aggregate price and volume of a series of executed trades that are transmitted to the clearing systems for processing.[50]

Furthermore, the EBS data currently includes only the dates, but not the times, of each trade execution (regardless of whether or not the trade represents an average-price series of executions).[51] Since there could be many broker-dealers trading a given security on a given day of interest, to reconstruct trading on the market for one security on one day could involve many, perhaps hundreds, of EBS requests. Consequently, EBS data, alone, are not generally useful for price or short sale manipulations analysis, order flow analysis, depth-of-book analysis, or any large-scale market reconstructions in which the timing of events is required to build a useful picture of the market.[52]

In addition, though the EBS system provides the names associated with each account in which a trade has been

[45] The term ''market reconstruction'' is used to refer to the efforts by SRO and Commission staff to collect and process detailed trade and order data, often from multiple and varied data sources (*e.g.,* market participants, trading venues, and other SROs) to recreate the sequence of events and market conditions that existed over a given period of time. A recent example of this occurred following the ''Flash Crash'' of May 6, 2010, with the market reconstruction analysis undertaken by Commission and the Commodity Futures Trading Commission (''CFTC'') staff, which can be found in the ''Findings Regarding the Market Events of May 6, 2010: Report of the Staffs of the CFTC and the SEC to the Joint Advisory Commission Emerging Regulatory Issues.'' *See http://www.sec.gov/news/studies/2010/marketevents-report.pdf.*

[46] The Commission recognizes that the accuracy of the data available may also be subject to occasional errors, including errors caused by rare and unexpected events.

[47] The effectiveness of such efforts with respect to cross-market activities within the Commission's jurisdiction depends on the qualities of data from multiple sources, such as separate SRO audit trails used for equities and equity options. *See* Section II.A.1.c., *infra.* This dependency also exists with respect to market activities that involve other products outside the Commission's jurisdiction, such as futures and certain swaps. *See* note 239, *infra.*

[48] 17 CFR 240.17a–25. Rule 17a–25 codified the requirement that broker-dealers submit to the Commission, upon request, information on their customer and proprietary securities transactions in an electronic format. The rule requires submission of the same standard customer and proprietary transaction information that SROs request through the EBS system in connection with their market surveillance and enforcement inquiries.

[49] *See* Rule 17a–25; *supra* note 1, and accompanying text.

[50] *See* FIF Letter I, p. 3; SIFMA Letter, p. 18–19.

[51] As adopted, Rule 13h–1 requires certain broker-dealers to capture and report through EBS the time of execution for any trade involving a large trader and a Commission-issued large trader identifier that identifies the large trader. *See* Large Trader Release and Large Trader Extension, *supra* note 1.

[52] A 1990 Senate Report acknowledged the immense value of the EBS system, but noted that ''it is designed for use in more narrowly focused enforcement investigations that generally relate to trading in individual securities. It is not designed for use for multiple inquiries that are essential for trading reconstruction purposes.'' *See* S. Rep. No. 300, 101st Cong., 2d Sess. 2–5 (1990), at 48.

placed, these names are based on the separate records of each broker-dealer providing data to the EBS system, and the same party may be identified by a different name across multiple broker-dealers. Experience of staff at the Commission has shown [53] that it is difficult to perform cross-broker customer analysis of trading since the same customer may be known by different names depending on the account and broker-dealer through which it traded.

The EBS system also typically requires SRO and Commission staff needing EBS data to request the information from each broker-dealer, and complete responses from each broker-dealer may take days or weeks depending upon the scope of the request. As a result of these various limitations, the EBS system is generally only used by regulators in narrowly-focused enforcement investigations that generally involve trading in particular securities on particular dates or with specific broker-dealers.

b. Equity Cleared Reports

In addition to the EBS system and Rule 17a–25, the SROs and the Commission also rely upon the NSCC [54] equity cleared report for initial regulatory inquiries.[55] This report is generated on a daily basis by the SROs, is provided to the NSCC, and shows the number of trades and daily volume of all equity securities in which transactions took place, sorted by clearing member. The information provided is end-of-day data and is searchable by security name and CUSIP number.[56] This information is also provided to the Commission upon request. Since the information made available on the report is limited to the date, the clearing firm, and the number of transactions cleared by each clearing firm, its use for regulatory purposes is quite limited—equity cleared reports basically serve as a starting point for certain types of investigations, providing a tool the Commission can use to narrow down the clearing firms to contact concerning transactions in a certain security.

c. SRO Audit Trails

In addition to EBS data and equity cleared reports, the SROs and the Commission rely on data collected through individual SRO audit trails. Most SROs maintain their own specific audit trails applicable to their members. For example, the National Association of Securities Dealers (''NASD'') [57] established its Order Audit Trail System (''OATS'') [58] in 1996, which required NASD (n/k/a FINRA) members to report certain trade and order data on Nasdaq-listed equity securities. OATS was later expanded to include OTC equity securities. Similarly, the NYSE implemented its Order Tracking System (''OTS'') [59] in 1999 under which its members were required to report certain trade and order data on NYSE-listed securities. Beginning in 2000, several of the current options exchanges implemented the Consolidated Options Audit Trail System (''COATS'').[60] In addition, many of the exchanges have created their own audit trails to assist in surveillance activities.

Recently, FINRA expanded its OATS requirements from covering only Nasdaq-listed and OTC equity securities to covering all NMS stocks.[61] To avoid duplicative reporting requirements, the NYSE, NYSE Amex LLC (n/k/a ''NYSE MKT LLC'') (''NYSE Amex''), and NYSE ARCA, Inc. (''NYSE Arca'') subsequently replaced their OTS audit trail requirements for members who are also members of either FINRA or Nasdaq (and therefore subject to OATS requirements) with rules that allow these members to satisfy their reporting obligations by meeting the new OATS requirements.[62]

Although these developments with respect to the scope of FINRA's OATS rules reduce the number of audit trails with disparate requirements, they still do not result in a comprehensive audit trail that provides regulators with accurate, complete, accessible, and timely data on the overall markets for which regulators have oversight responsibilities. In particular, data collected by FINRA pursuant to FINRA's Rule 7400 series (''OATS data'') does not provide a complete picture of the market because though OATS collects data from FINRA members with respect to orders and trades involving NMS stocks, OATS does not include trade or order activity that occurs on exchanges, or at broker-dealers that are not FINRA or Nasdaq members. Nor does OATS include exchange quotes, principal orders submitted by FINRA members registered as market makers, or options data.[63] In

[53] *See, generally,* Sections II.A.1. and II.A.2., *infra.*

[54] *See* note 2, *supra,* and accompanying text.

[55] The Commission also uses the Options Cleared Report, with data supplied by the Options Clearing Corporation (''OCC''), for analysis of trading in listed options. The OCC is an equity derivatives clearing organization that is registered as a clearing agency under Section 17A, 15 U.S.C. 78q–1, of the Exchange Act, and operates under the jurisdiction of both the Commission and the CFTC.

[56] A CUSIP number is a unique alphanumeric identifier assigned to a security and is used to facilitate the clearance and settlement of trades in the security.

[57] In 2007, NASD and the member-related functions of NYSE Regulation, Inc., the regulatory subsidiary of New York Stock Exchange LLC (''NYSE''), were consolidated. As part of this regulatory consolidation, the NASD changed its name to FINRA. *See* Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (August 1, 2007). FINRA and the National Futures Association (''NFA'') are currently the only national securities associations registered with the Commission; however, the NFA has a limited purpose registration with the Commission under Section 15A(k) of the Exchange Act, 15 U.S.C. 78o–3(k). *See also* Securities Exchange Act Release No. 44823 (September 20, 2001), 66 FR 49439 (September 27, 2001).

[58] *See In the Matter of National Association of Securities Dealers, Inc.,* Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, Exchange Act Release No. 37538 (August 8, 1996), Administrative Proceeding File No. 3–9056 and Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and The Nasdaq Stock Market LLC (''Nasdaq''). *See also* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (order approving proposed rules comprising OATS) (''OATS Approval Order'').

[59] *See* Securities Exchange Act Release No. 47689 (April 17, 2003), 68 FR 20200 (April 24, 2003) (order approving proposed rule change by NYSE relating to order tracking) (''OTS Approval Order'').

[60] *See* In the Matter of Certain Activities of Options Exchanges, Administrative Proceeding File No. 3–10282, Securities Exchange Act Release No. 43268 (September 11, 2000) (Order Instituting Public Administrative Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions) (''Options Settlement Order''). *See, e.g.,* Securities Exchange Act Release No. 50996 (January 7, 2005), 70 FR 2436 (order approving proposed rule change by CBOE relating to Phase V of COATS).

[61] *See* Securities Exchange Act Release No. 63311 (November 12, 2010), 75 FR 70757 (November 18, 2010) (SR–FINRA–2010–044) (order approving proposed rule change by FINRA relating to the expansion of OATS to all NMS stocks).

[62] *See* Securities Exchange Act Release Nos. 65523 (October 7, 2011), 76 FR 64154 (October 17, 2011) (SR–NYSE–2011–49); 65524 (October 7, 2011), 76 FR 64151 (October 17, 2011) (SR–NYSEAmex–2011–74); 65544 (October 12, 2011), 76 FR 64406 (October 18, 2011) (SR–NYSEArca–2011–69).

[63] *See* FINRA Rule 7410(j) (defining *''Order''* for purposes of OATS, to mean ''any oral, written, or electronic instruction to effect a transaction in an NMS stock or an OTC equity security that is received by a member from another person for handling or execution, or that is originated by a department of a member for execution by the same or another member, other than any such instruction to effect a proprietary transaction originated by a trading desk in the ordinary course of a member's market making activities.'' Additionally, Nasdaq, Nasdaq OMX BX, Inc. (''BX'') and Phlx equities (''PSX'') members that are registered as market makers in a certain security are similarly exempted from recording OATS audit trail data for the security in which they are registered to make a market. *See* Nasdaq and BX Rules 6951(i); PSX Rule 3401(i).

The Commission notes that members of Nasdaq, BX and PSX, that are not also members of FINRA, are required by those exchanges to record the audit trail data required by OATS; however, they are only required to report that data through OATS upon request by their respective exchanges. See Nasdaq

performing its own regulatory oversight of the markets, FINRA has chosen to create an internal process in which it augments the data it collects via OATS with trade execution data from other exchanges with which it has a regulatory services agreement. This process provides FINRA with a wider view of the markets than that provided by OATS alone, but linking data in this fashion does not yield fully accurate results.[64] For these reasons, the Commission believes that the augmented OATS data currently falls short of providing an efficient source of data for analyzing cross-market activities, or tracking an order through its entire cycle from generation through routing to execution, modification or cancellation.

OATS data also suffers from a lack of timeliness, partly as a result of the problems with the accuracy of the data as collected, and partly because of its lack of completeness. When FINRA receives an end-of-day OATS file from a member, it takes an hour for FINRA to acknowledge receipt of the report and approximately another 24 hours to determine if there is a syntax error[65] in the report.[66] During this time, FINRA performs over 152 validation checks on each order event reported to OATS. Thus, FINRA performs over 40 billion separate checks each day to ensure OATS data conforms to all applicable specifications.[67] Each of these checks can result in OATS data submissions being rejected and generating an error message.[68] As a result of these validation checks, almost 425,000 reports per day, on average, are rejected and must be corrected.[69] In addition to the 24 hours needed to identify errors within a report, it takes another two business days to determine whether a file that is syntactically correct nevertheless contains errors in content related to internally-inconsistent information about processing, linking, and routing orders. Once a member is advised of such errors, the member has up to five business days to re-submit a corrected file. However, error corrections are limited to only those that are required to remedy internal inconsistencies within a given member's submission. Cross-firm inconsistencies in which, for example, one member reports routing an order to a second member, but the second member does not report receiving or processing such an order, are identified as unmatched or unlinkable data records, but neither firm corrects these types of reporting errors. The net result yields a historical data record of market activity that contains a small but permanent number of incorrect or irreconcilable trade and order events.[70]

Given the time it takes to process each OATS file, and the nature of the process in which errors are detected, reported back to members, and then corrected, inter-firm surveillance by FINRA typically does not begin until 5 business days after receipt of OATS data. In addition, the final product of the FINRA process is available to FINRA, but is not stored in a market-wide database or a central repository that is readily accessible to other regulators. This is because SROs do not typically have access to the internal systems of another SRO, though they may share some sources of underlying data.[71]

Because the Commission does not have direct access to OATS data and other SRO audit trails and because each SRO only has direct access to its own audit trails, requests must be made to the Intermarket Surveillance Group (''ISG'')[72] or SROs to conduct an analysis on order data. It can take days or weeks, depending on the scope of the information requested, to receive responses to requests. Once the responses to its requests for information are received, the Commission, or any SRO undertaking the same task, must commit a significant amount of time and resources to process and cross-link the data from the various formats used by different SROs before it can be analyzed and used for regulatory purposes. Whether or not this process is successful depends on the accuracy, completeness, and format of the data received, as well as how readily data from different SROs can be reliably linked. For example, staff at the Commission working on the analysis of the May 6, 2010 ''Flash-Crash'' found it was not possible to use the data from existing audit trails to accurately or comprehensively reconstruct exchange

and BX Rules 6955(b); PSX Rule 3405(b). Additionally, as of October 17, 2011, members of NYSE and NYSE Amex, who are not also FINRA members, are required to record their trade and order activity. These non-FINRA members are not required to report this data through OATS unless requested. *See* NYSE and NYSE Amex Equities Rules 7450(b); *see, e.g.,* Securities Exchange Act Release Nos. 65523 (October 7, 2011), 76 FR 64154 (October 17, 2011); 65524 (October 7, 2011), 76 FR 64151 (October 17, 2011); 65544 (October 12, 2011), 76 FR 64406 (October 18, 2011) (notice of immediate effectiveness of proposed rule change to adopt the FINRA Rule 7400 series, the OATS rules, and making certain conforming changes to the NYSE and NYSE Amex Equities rules). Members of NYSE Arca, who are not also FINRA members, were required to record their trade and order activity as of March 31, 2012. *See* NYSE Arca Equities Rule 7450(b); see Securities Exchange Act Release No. 65544 (October 12, 2011), 76 FR 64406 (October 18, 2011) (notice of immediate effectiveness of proposed rule change to adopt the FINRA Rule 7400 series, the OATS rules, and making certain conforming changes to the NYSE Arca Equities rules). *See also* Securities Exchange Act 66094 (January 4, 2012), 77 FR 1545 (January 10, 2012) (notice of immediate effectiveness to extend the implementation date of the NYSE Arca Equities Rule 7400 Series, the OATS rules, for Equity Trading Permit Holders that are not FINRA members from January 31, 2012 to March 31, 2012).

[64] FINRA has represented to Commission staff that, as part of its own surveillance activities, FINRA acquires some of this order handling system data from non-FINRA members to supplement the data it receives from its members via OATS, but that matching data across the audit trails yields varying levels of success and accuracy due to the disparate methods used by the different order handling systems to collect and store data. FINRA represented that, during the period from November 28, 2011 to February 24, 2012, approximately 2% of reportable OATS data related to exchange orders could not be linked with matching exchange data. *See* Commission Staff Memorandum to File No. S7–11–10 regarding telephone conversations with FINRA, dated April 17, 2012 (''Commission Staff Memorandum''). Also, since this process only involves acquiring trade and order data from select sources, it still does not produce a complete record of all market activity. The Commission notes that, when considering data covering a time period of approximately 26 months, the percentage of reportable OATS data related to exchange orders that could not be linked with matching exchange data remained at approximately 2%. *Id.*

[65] Common reasons given by FINRA for syntax rejections include: Missing mandatory fields, invalid fields, and invalid field combinations (*e.g.,* a Limit Price without a Time in Force Code). OATS will reject records as duplicates if more than one record is submitted with the same Order Receiving Firm Market Participant Identifier, Order Received Date, and Order Identifier or if more than one record contains all of the same information. *http://www.finra.org/Industry/Compliance/MarketTransparency/OATS/FAQ/P085542* (last viewed on May 23, 2012).

[66] *See* Commission Staff Memorandum, *supra* note 64. FINRA estimates that, from the period November 28, 2011 to February 24, 2012 approximately 0.10% of the intra-firm data reported daily by broker-dealers were rejected for errors. *Id.* The Commission notes that, when considering data covering a time period of approximately 26 months, the percentage of the intra-firm data reported daily by broker-dealers rejected for errors was more than double this amount. *Id.*

[67] *See* FINRA Letter, p. 11. FINRA represented to Commission staff that many of the validation errors result from problems encountered in translating order information from broker-dealer formats into OATS format. *See* Commission Staff Memorandum, *supra* note 64.

[68] *Id.*

[69] *Id.*

[70] FINRA estimates that during the period from November 28, 2011 to February 24, 2012 approximately 0.5% of each day's reportable events remained unmatched (*i.e.,* multi-firm events, such as routes, that cannot be reconciled). *See* Commission Staff Memorandum, *supra* note 64. When considering data covering a time period of approximately 26 months, the percentage of each day's reportable events remaining unmatched was more than double this amount. *Id.*

[71] For example, FINRA has been given access to order audit trail information from certain SROs pursuant to Regulatory Services Agreements.

[72] ISG is an international group of exchanges, market centers, and regulators that perform market surveillance in their respective jurisdictions. The organization provides a forum for its members to share information and coordinate regulatory efforts to address potential intermarket manipulation and trading abuses.

and ATS equity limit order books for NMS securities as required to fully analyze the events of that day.[73]

A further difficulty in using existing audit trails to conduct cross-market surveillance is the lack of consistency in both format and content among the various audit trails. Not all SROs collect data using the OATS format. In addition, each options exchange maintains its own COATS audit trail in a different format and includes different supplemental data items in its audit trail. These differences make it difficult and labor intensive for regulators to view options trading activity across multiple markets, and the lack of any combined equity and options audit trail is a significant impediment to regulators performing cross-product investigations and analyses.

An additional shortcoming of existing SRO audit trails is the lack of customer identifiers. In general, existing SRO audit trails only identify the broker-dealer handling the order and not the account holder or the person exercising investment discretion for the account holder, if different. This limitation makes the process of identifying the customers involved in unusual trading patterns or market events very difficult. Even determining whether or not an unusual trading pattern exists is challenging if the data does not identify trades by a single customer at multiple broker-dealers. Requests therefore must be made to one or more broker-dealers to obtain information about the customer or customers behind an order. Multiple requests may be necessary before the information is obtained. EBS data may have to be requested as a supplement. A further challenge arises in any type of customer-based cross-market analysis because there is no standard convention for how customers are identified at different broker-dealers—the same party directing trades across multiple venues, or through different broker-dealers, can be known by many different names.

Not having customer information at the early stage of surveillance can also impair the accuracy, and thus efficacy, of certain surveillances. The patterns that emerge when trade and order activity is aggregated across all customers of a broker-dealer often exhibit characteristics that can be quite different from the (initially) unobservable patterns of trade and order activity of each individual customer at that broker-dealer. This could result in what are known as ''false positive signals,'' in which market activities that initially are flagged as being potentially manipulative by a surveillance system are later found not to be potentially manipulative once more detailed customer data from the broker-dealer is requested and analyzed. In contrast, potentially manipulative activities may be missed by a surveillance system that cannot identify the customers behind each order or trade if those activities are otherwise obscured by non-manipulative activities of other customers of the same broker-dealer such that the aggregate patterns of trading do not appear potentially manipulative.

Given the various limitations described above, the Commission does not believe that existing audit trails, with their current features, provide regulators with an efficient or adequate method of monitoring and surveilling the market for NMS securities. The Commission notes, for example, that FINRA summarizes the current cross-market systems as follows: ''The current systems in place to achieve effective cross-market surveillance, such as the ISG, are incomplete. For example, the ISG audit trail data has numerous shortcomings, including: (1) It does not capture quote/orders away from a market's inside market (i.e., those quotes/orders below the best bid or above the best offer); (2) it currently identifies participants of a trade only to the clearing broker, not down to the executing broker level; (3) data submitted by participants is not validated; (4) certain data fields are not mandatory; and (5) there are no service level agreements to ensure that participants submit timely and accurate information.'' [74]

2. Regulatory Improvements With a Consolidated Audit Trail

The NMS plan required by the Rule, if approved by the Commission, will improve the quality of audit trail data by, among other things: (1) Identifying with a unique ''Customer-ID'' the account holder(s) with respect to an account at a registered broker-dealer and, if different, any person authorized to give the broker-dealer trading instructions for such account; (2) identifying the time of each key event in the life of an order according to synchronized business clocks; (3) requiring the reporting of comprehensive order lifecycle data; and (4) including all NMS securities in one audit trail. As discussed below, the Commission believes that these improvements should have the potential to result in the following: (1) Improved market surveillance and investigations; (2) improved analysis and reconstruction of broad-based market events; and (3) improved market analysis. In addition, a consolidated audit trail has the potential to result in a reduction in disparate reporting requirements and data requests.

a. Improved Market Surveillance and Investigations

A consolidated audit trail will expand the data available for regulators to perform surveillance and investigations for illegal activities such as insider trading, wash sales, or manipulative practices. In particular, a consolidated audit trail will help surveillance and investigations by facilitating risk-based examinations, allowing more accurate and faster surveillance for manipulation, improving the process for evaluating tips, complaints, and referrals (''TCRs''), and promoting innovation in cross-market and principal order surveillance.

i. Risk-Based Examinations

A consolidated audit trail will facilitate risk-based examinations. Risk-based examinations require access to accurate and timely data so that the scope of the examination can be properly set to cover the areas of identified risks. Regulators currently may request audit trail data directly from the broker-dealer, work with the broker-dealer to understand the format and definitions in the data, validate that information with a third party, and analyze the data to determine whether the initial assumptions concerning risk were valid. This effort requires significant resources from both the regulator and the broker-dealer, all of which may be wasted if the resulting analysis shows that the assumptions of risk justifying the examination of a particular subject were not founded. Thus, this resource-intensive process does not necessarily reveal the subjects most worthy of examination, and does not permit an effective pre-examination review of a subject's trading practices.

In contrast, a consolidated audit trail would permit regulators, for example, to identify risks and appropriate subjects for examinations relating to certain types of trading by creating and comparing metrics based on the complete (and possibly cross-market) activities of a broker-dealer or customer. Signals based on such metrics could, for example, identify outlier patterns in the ratio of order activity to execution, which may be an indication of potentially manipulative practices. Currently, this method is impractical because, as described above, it requires the consolidation of many audit trails

[73] *See* Section II.A.2.b., *infra.*

[74] *See* FINRA/NYSE Euronext Letter, p. 3.

that store data in non-uniform formats, participant information in SRO audit trails often does not consistently identify the executing broker-dealer, and there is no uniform method of identifying customers.

In sum, consolidated audit trail data that meets the minimum requirements for the NMS plan specified in the Rule would allow regulators to create a process that focuses much more of their resources on those firms for which specific activities over specific time periods warrant follow up. The subsequent examinations would thus be more precise, resulting in more efficient use of regulatory resources, potentially reducing the need for multiple document requests, and ultimately reducing the sometimes significant compliance burden on a broker-dealer or other subject.

ii. Market Manipulation

In addition to helping regulators focus their resources and better identify areas in which potentially manipulative trading activity may be occurring, a consolidated audit trail will greatly aid the analysis of the potential manipulation itself. The current methodology to analyze order and trade data requires a tremendous amount of time and resources to construct an accurate picture of when trades are actually executed. Typically, this includes: (1) Broker-dealers and other registrants responding to multiple requests from the Commission and SROs; (2) SROs devoting regulatory resources to obtaining, analyzing, and reporting data requested by the Commission; and (3) Commission staff reconciling inconsistent order data provided by different SROs with respect to different markets.

In addition, while SRO audit trail data identifies the dates and times of trades by a particular broker-dealer, SRO audit trail data does not reveal the identities of the customers initiating the trades executed by the broker-dealers. Accordingly, to identify customers placing trades through a broker-dealer, regulatory staff must obtain EBS data and integrate such data with SRO audit trail data. This is a cumbersome process because there is no automated process to link the two data sources. To determine the exact execution time for trades by a particular customer, regulatory staff must obtain a third set of data from the broker-dealer's trading and order handling system. These processes can take many months. In some cases, the laborious process of assembling the data delays other critical investigative or analytical steps. In other cases, investigators or analysts forego the process of determining when trades occurred, limiting their analysis to more accessible information. As a result, SRO and Commission staffs may fail to ascertain the full scope of misconduct under investigation or the causes of unusual market events at issue.

Even more critically, the absence of reliable information about who initiated which orders makes detection of schemes that involve repeat instances of activity through accounts at multiple broker-dealers difficult. Schemes of this sort may be among the most harmful and difficult to police, but without a customer identifier that consistently and uniquely identifies responsibility for orders across all broker-dealers, no amount of technical sophistication and securities market insight can produce a data query or analysis to detect them.[75]

With the data provided by the consolidated audit trail, regulatory staff would be able to conduct such analyses in a much shorter period of time. In addition, the process of analysis with a consolidated audit trail would be inherently more reliable than the manual reconstruction process currently available, reducing the risk of inaccuracies. Furthermore, the ability to process and meaningfully analyze audit trail data more quickly would allow regulatory staff to employ proactive methods of identifying potentially manipulative activities. The Commission therefore believes a consolidated audit trail would make the overall process of identifying and analyzing potentially manipulative trading practices much more focused, accurate, and efficient.[76]

The timely availability of data to regulators also impacts the efficacy of detecting (and possibly mitigating the effects of) some types of market manipulation. For example, some pernicious trading schemes are designed to generate large ''quick-hit'' profits in which participants attempt to transfer the proceeds from the activity to accounts outside of the reach of domestic law enforcement as soon as the offending transactions have settled in the brokerage account (typically three days after execution). If the SROs detect such schemes and promptly report them to the Commission, the Commission potentially could seek asset freezes that limit the transfer of funds until charges against the account holder are resolved. The Commission believes that a consolidated audit trail in which uniform data about market activities are efficiently collected and processed soon after such activities occur, and in which data are available to regulators in a timely manner, would more frequently and effectively allow regulators to use this approach.

iii. Tips and Complaints

A consolidated audit trail also would significantly improve the processes used by the SROs and the Commission for evaluating tips and complaints about trading activity.[77] It is not uncommon for market participants or those with experience in market data to sometimes note atypical trading or quoting patterns in publicly-available market data. A consolidated audit trail would allow regulatory staff to quickly determine whether a particular instance of an atypical activity (regardless of how it was originally identified), such as an abnormally high level of quote traffic, is worthy of further investigation.

Today, such an analysis of TCRs is difficult and cumbersome. Even a preliminary review requires analysis by each exchange or ATS to identify the activity in question and to determine its scope. Regulators then must consolidate the analyses from each such market center to determine the identities of those responsible for the atypical

[75] Examples of schemes that typically rely on orders from accounts at multiple brokers include: (1) ''Network'' insider trading schemes in which the participants cultivate multiple sources of non-public information and trade on the information they receive over an extended period of time and through accounts at a large number of broker-dealers; (2) wash trading; and (3) order layering. Unlike insider trading, for example, which is neither defined nor expressly prohibited in the Act, wash trading is specifically prohibited in the statute. The entering of matched orders for the purpose of creating the illusion of market activity or to artificially affect the price is one of the oldest and most difficult to detect manipulative practices. Technology that permits the routing of thousands of orders to different venues in micro seconds has made cross market surveillance for this activity extremely difficult. ''Order layering'' is similar to wash trading. In this practice, a market participant can enter numerous non-bona fide market moving orders, often in substantial size relative to a security's legitimate volume to create the false impression of buy or sell side pressure. When such orders induce others to execute against profitable limit orders, the market participants immediately cancel the pending orders that manipulated the price. As with wash sales, multiple traders can enter orders on different venues, impacting the NBBO and making the activity difficult to detect.

[76] For example, implementation of a consolidated audit trail also will help regulators monitor reliance on the use of the safe harbor provision for issuer repurchases in Rule 10b–18 under the Exchange Act. 17 CFR 240.10b–18. Rule 10b–18 under the Exchange Act provides issuers with a safe harbor from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b–5 under the Exchange Act, when they repurchase their common stock in the market in accordance with the Rule's manner, timing, price, and volume conditions. The data required to be included in the consolidated audit trail will assist regulators in monitoring issuer repurchases that rely on Rule 10b–18's safe harbor protections to ensure that they comply with all required criteria.

[77] The Commission receives an average of over 200 market-related TCRs each month.

activity in question. To the extent that the activity originates from several market participants, regulators must conduct additional analysis on each of those participants, and possibly other participants, to discover information that could identify the customer(s) originating the orders that created the atypical activity. Without a unique customer identifier included in the order and trade data, this may not be possible. The consolidated audit trail would significantly improve the multi-stage process, enabling regulatory staff to make efficient queries on orders and more quickly determine whether the TCR can be ''closed'' or if further analysis and investigation are warranted.

iv. Cross-Market and Principal Order Surveillance

Investigations of cross-market activity may be more efficient with a consolidated audit trail as such an audit trail may provide regulators with data not currently consolidated across markets and/or data not currently available to regulators such as broker-dealer principal orders, including market maker quotes. For example, in an attempt to manipulate the market, a broker-dealer could use numerous principal sell orders across multiple venues to give the misleading appearance of broad sell-side pressure, and then send a buy principal order at a favorable price to take advantage of the market momentum created by the misleading sell orders. This type of activity would be difficult to readily identify with current audit trails, but it could be the target of a routine surveillance of a consolidated audit trail. The Commission notes, for example, the statement of FINRA and NYSE Euronext that, ''[p]articularly since the implementation of Regulation NMS in 2007, there has been a significant increase in market linkages, the result of which is that trading activity on one market can have a profound effect on other markets. This, in turn, has led to the realization that market manipulation, by its very nature, is facilitated cross-market where, for example, trading on one market is used to affect a security's price while trading on another market is used to take advantage of that price change.'' [78]

In addition, the consolidation of order data with direct access for all relevant regulators may create opportunities for regulators to develop entirely new methods of surveillance, and to keep existing forms of surveillance up to date as new market practices and new market technologies continue to rapidly evolve. In fact, as described more fully below, SROs are required by the Rule to incorporate the expanded audit trail data into their surveillance systems.[79]

b. Improved Analysis and Reconstruction of Broad-Based Market Events

A consolidated audit trail will significantly improve the ability of regulators to reconstruct broad-based market events so that they and the public may be informed by an accurate and timely accounting of what happened, and possibly why. The sooner a reconstruction can be completed, the sooner regulators can begin reviewing an event to determine what, if any, regulatory responses might be required to address the event in an effective manner.

For example, on the afternoon of May 6, 2010, the U.S. equity and equity futures markets experienced a sudden breakdown of orderly trading, when broad-based indices, such as the Dow Jones Industrial Average Index and the S&P 500 Index, fell about 5% in just five minutes, only to rebound soon after (the ''Flash Crash''). Many individual equities suffered even worse declines, with prices in over 300 stocks and exchange-traded funds falling more than 60%. In many of these cases, trades were executed at a penny or less in stocks that were trading at prices of $30 or more only moments earlier before prices recovered to their pre-Flash Crash levels.[80]

The Commission immediately formed an interdisciplinary team from across the Commission to analyze the events of May 6, 2010, identify possible causes, inform the public of what happened, and aid in formation of regulatory responses. The CFTC took similar steps. Within a few weeks, staff at the Commission and the CFTC released a joint preliminary report that described the event and, in general terms, the market conditions prior to and during the rapid decline.[81] However, at that time the staffs were unable to definitively identify the specific conditions or circumstances that could have caused, contributed to, or exacerbated the event. Though the SROs and the Commission quickly implemented a single-stock circuit breaker pilot program as an initial response, a more complete regulatory response required a full and robust analysis of additional data.

From the start of the investigation, many market participants had suggested that the sudden withdrawal of liquidity in the equity markets may have resulted in the rapid decline of prices as orders to immediately sell (many from retail investors) found no interest on the buy side (from market professionals).[82] To fully understand how such conditions could occur, Commission economists needed to analyze the order books for thousands of equities. Commission staff requested order book data from several exchanges that sell such data or could readily put such data together, but this data did not represent the whole market. Commission staff attempted to use order data from OATS and several SRO audit trails to reconstruct order books for thousands of equities traded on exchanges that do not maintain or could not provide order book data. Although it was possible to link the data from different sources to show trading activity for a particular stock over a specific period of time, the accuracy, completeness, and content of the combined data sets were not sufficient to allow for an accurate reconstruction of the order books. This hindered staff in determining what happened to liquidity before, during, and after the Flash Crash. Two major problems were the inability to identify and eliminate duplicate orders from the data and the inability to accurately sequence events across the multiple data sources.

As described in the final joint report issued by the staffs of the CFTC and the Commission on September 30, 2010, Commission staff were only able to create a comprehensive view of the order books by acquiring, processing, and aggregating four distinct data sets that each contained a subset of order book information from each of the four exchanges that could provide such information: Nasdaq ModelView, NYSE Openbook Ultra, NYSE ARCABook, and BATS Exchange.[83] Given the enormous volume of data that needed to be processed (more than 5.3 billion records), even small changes to the integration and aggregation process took

[78] *See* FINRA/NYSE Euronext Letter, p. 2.

[79] *See* Rule 613(f).

[80] *See* note 45, *supra.*

[81] *See* ''Preliminary Findings Regarding the Market Events of May 6, 2010: Report of the Staffs of the CFTC and the SEC to the Joint Advisory Commission Emerging Regulatory Issues.'' (May 18, 2010). *See http://www.sec.gov/sec-cftc-prelimreport.pdf.*

[82] For detailed discussions and chronologies of the investigation into the events of May 6, 2010, *see* SEC (*http://www.sec.gov/spotlight/sec-cftcjointcommittee.shtml*) and CFTC (*http://www.cftc.gov/PressRoom/Events/AdvisoryCommitteeMeetings/index.htm*) webcasts and minutes of public meetings held with the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues on May 24, 2010, June 22, 2010, August 11, 2010, November 5, 2010, and February 18, 2011.

[83] *See* note 45, *supra,* at p. 11.

significant computer time to test and implement.

By early July 2010, staff at the CFTC had completed a very detailed analysis of the full order book of the S&P 500 E-Mini futures contract and were able to show how liquidity in that contract had been eroding for most of the day. The CFTC's detailed second-by-second analysis of trading during the Flash Crash itself revealed how buy-side depth in the S&P 500 E-Mini futures virtually evaporated as broad market indices rapidly fell 5%.[84] However, until a similar analysis could be completed in the equity markets, neither regulators nor the public would know whether an evaporation of liquidity was also present in the equity markets, and whether the timing of such an event preceded or followed the liquidity event in the futures market. Ultimately, it took Commission staff nearly five months to complete an accurate representation of the order books of the equity markets for May 6, 2010. Even then, the reconstruction was not fully complete and only contained an estimated 90% of trade and order activity for that day.[85] However, it was sufficiently comprehensive to allow staff to perform a robust analysis of the equity markets revealing how ''the decline in full-depth buy-side liquidity for the E-Mini precede[d] that of the SPY and [the stocks composing] the S&P 500,'' and how ''drops in [stock] prices [became] increasingly more severe with ever-larger drops in liquidity.'' [86]

Had there been a consolidated audit trail in place on May 6, 2010, regulators would likely have been able to much more quickly and efficiently perform these types of detailed analyses. This in turn could have dramatically shortened the time during which regulators, as well as the public, remained uncertain about what actually happened during the Flash Crash.

c. Improved Market Analysis

In addition to the surveillance and reconstruction benefits described above, a consolidated audit trail would also significantly improve the ability of regulators to monitor overall market structure, so that both the Commission and the SROs can be better informed in their rulemakings. In January 2010 the Commission published a concept release on equity market structure that discusses how the markets have rapidly evolved from trading by floor-based specialists to trading by high-speed computers. The concept release poses a number of questions about the role and impact of high-frequency trading strategies and the movement of trading volume from the public national securities exchanges to dark pools.[87]

Over the past two years there has been considerable discussion about these topics by regulators, market participants, the media, and the general public. Nevertheless, numerous open questions remain because of a lack of consolidated market data, making certain types of market-wide analysis impractical. For example, existing research on high frequency trading cannot precisely identify high frequency traders. As a result, studies of high frequency trading have been limited in their ability to thoroughly examine such strategies and their impact on the market, leaving many open questions. Having more precise data on who is trading (and from which general patterns of order submission could be inferred) would help regulators better understand the impact of high frequency trading on markets. Similar analyses also could be performed for other aspects of general market structure, such as those discussed in the concept release related to dark pools and internalization. In addition, having access to a consolidated audit trail will provide the Commission and SROs with better data to conduct retrospective analyses of rules and pilots. Informed analysis of these topics requires consolidating audit trails so that quotes and trades across multiple exchanges can be linked (either by customer type or by specific customer) with order flow and trades from the many dozens of over-the-counter venues.

d. Potential Reduction in Disparate Reporting Requirements and Data Requests

The Commission believes that a consolidated audit trail will reduce the burdens on SROs and broker-dealers associated with producing regulatory data. In particular, the consolidated audit trail may reduce burdens from ad hoc data requests.

The Commission believes that the creation of a consolidated audit trail may reduce the number and types of ad hoc requests made by regulators to market participants for data concerning their trading activities. In particular, regulators could use direct access to data in the consolidated audit trail for investigations or analyzing trends or broad market activities instead of requesting data from market participants. In addition, regulators could use this direct access to analyze the activities of a single trader across multiple markets, which today requires requests for data from multiple market participants. Regulators would therefore likely make fewer ad hoc requests. The Commission, however, does not believe that all ad hoc requests for data from market participants will be replaced by obtaining data from the consolidated audit trail. A detailed investigation of a particular firm may require types of data from that firm that are not stored in the consolidated audit trail, or that relate to periods prior to the implementation of the consolidated audit trail. In addition, in cases in which there are discrepancies, or even suspected discrepancies, between a firm's actual trading activities and what is stored in the consolidated audit trail's central repository, regulators are likely to request data directly from market participants for verification and investigative purposes.

3. Large Trader Reporting System Rule

The Commission believes that a consolidated audit trail will be able to build upon various aspects of the large trader reporting system that was recently adopted by the Commission.[88] Rule 13h–1, which establishes the large trader reporting system, requires large traders to identify themselves to the Commission and make certain disclosures to the Commission on Form 13H. Upon receipt of Form 13H, the Commission issues a unique identification number to the large trader, which the large trader then will be required to provide to those broker-dealers through which the large trader trades. Registered broker-dealers will be required to maintain specified transaction records for each large trader and to report that information to the Commission upon request. The Large Trader Rule requirements are designed to enable the Commission to promptly and efficiently identify significant market participants and collect data on their trading activity so that Commission staff can reconstruct market events, conduct investigations and bring enforcement actions as appropriate.

Several commenters noted that portions of the requirements of Rule 13h–1 overlapped with certain provisions of proposed Rule 613 and requested that the Commission harmonize the rules.[89] One commenter

[84] *Id.*

[85] *Id.*

[86] *Id.* at p. 18, 80.

[87] *See* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (''Concept Release on Equity Market Structure'').

[88] *See* note 1, *supra.*

[89] *See* ICI Letter, p. 6–7; Liquidnet Letter, p. 4–5; SIFMA Letter, p. 18–19; CBOE Letter, p. 6

Continued

stated that the Commission should consider implementing only those portions of Rule 13h–1 that would not be affected by, or be redundant to, the implementation of the consolidated audit trail proposal.[90] Another commenter suggested that the Commission mandate compliance only with those aspects of Rule 13h–1 that would operate as part of the consolidated audit trail—the large trader identifier in particular—so they could be leveraged in the creation of the consolidated audit trail.[91] Yet another commenter believed that, upon implementation of the consolidated audit trail, it would not be necessary for large traders to identify themselves to their broker-dealers pursuant to Rule 13h–1, because the consolidated audit trail already would require broker-dealers to include a customer identifier for every order.[92] The commenter explained that, if customer information is collected as part of the consolidated audit trail, the Commission and SROs could run queries to identify customers with significant trading volume.[93]

The Commission believes that both Rules are necessary to enhance regulatory oversight of the markets and its members. Key aspects of Rule 13h–1 define the types of entities that are large traders, and who must register with the Commission and file and keep current certain background information on Form 13H. These aspects of Rule 13h–1 are not addressed by Rule 613 and would not be superseded by it. Rather, the information collected by the registration of large traders would further complement the data collected for a consolidated audit trail. To this end, Rule 613 requires that large trader identifiers also be reported to the central repository as part of any large trader's customer account information.[94]

The Commission does note, however, that other aspects of Rule 13h–1 may be superseded by Rule 613. Specifically, the trade reporting requirements of Rule 13h–1 are built upon the existing EBS system. To the extent that, as described in Section II.A.2.iv.d., data reported to the central repository under Rule 613 obviates the need for the EBS system, the Commission expects that the separate reporting requirements of Rule 13h–1 related to the EBS system would be eliminated.[95]

B. Summary of Proposed Rule 613

Proposed Rule 613 would have required that the SROs propose an NMS plan that included provisions regarding: (1) The operation and administration of the NMS plan; (2) the creation, operation and oversight of a central repository; (3) the data required to be provided by SROs and their members[96] to the central repository; (4) clock synchronization; (5) compliance by national securities exchanges, FINRA, and their members with Rule 613 and the NMS plan; and (6) a plan for the possible expansion of the NMS plan to products other than NMS securities.

Specifically, proposed Rule 613 would have required the SROs to jointly file an NMS plan with the Commission to govern the creation, implementation, and maintenance of a consolidated audit trail and a central repository.[97] The NMS plan would have been required to provide for an accurate, time-sequenced record of an order's life, from receipt or origination, through cancellation or execution. In particular, the proposed Rule would have required the NMS plan to require that the SROs and their respective members collect and provide to the central repository data for each ''reportable event,'' defined to include the receipt, origination, modification, cancellation, routing, and execution (in whole or in part) of an order, with respect to any NMS security. This data would have been required to be collected and provided to the central repository in a uniform electronic format on a real-time basis.

Under the proposed Rule, the data collected upon the receipt or origination of an order would have included: a unique order identifier; a unique customer identifier;[98] a unique identifier for the broker-dealer receiving or originating the order; the date and time of receipt or origination of the order; and the ''material terms of the order.''[99] For orders that are modified or cancelled, the data collected in real time would have included: The date and time the modification or cancellation was received or originated; the price and remaining size of the order; changes in the material terms of the order (if the order is modified); and the identity of the person giving the modification or cancellation.

For orders that are routed, data collected in real time would have included: The unique order identifier, the date and time the order was routed; The unique identifier of the broker-dealer or national securities exchange routing the order; the unique identifier of the broker-dealer or national securities exchange receiving the order; if routed internally at a broker-dealer, the identity and nature of the department and desk to which the order was routed; and the material terms of the order.

For orders received that were routed, data collected in real time would have included all the information for orders that are routed, except the identity and nature of the department and desk to which the order was routed, if routed internally at a broker-dealer; however,

(questioning the need for a large trader reporting system if a consolidated audit trail is implemented).

[90] *See* FINRA/NYSE Euronext letter, p. 7.

[91] *See* SIFMA Letter, p. 18.

[92] *See* Liquidnet Letter, p. 5.

[93] *Id.*

[94] *See* Rule 613(j)(4).

[95] Though certain reporting requirements of Rule 13h–1 may eventually be unnecessary due to Rule 613, the Commission notes that Rule 13h–1 will be implemented much more expeditiously compared to the consolidated audit trail, and therefore will address the Commission's near-term need for access to more information about large traders and their activities.

[96] Section 3(a)(3)(A) of the Exchange Act defines the term ''member'' to mean: ''(i) Any natural person permitted to effect transactions on the floor of the exchange without the services of another person acting as broker; (ii) any registered broker or dealer with which such a natural person is associated; (iii) any registered broker or dealer permitted to designate as a representative such a natural person; and (iv) any other registered broker or dealer which agrees to be regulated by such exchange and with respect to which the exchange undertakes to enforce compliance with the provisions of the [Exchange Act], the rules and regulations thereunder, and its own rules.'' Section 3(a)(3)(A) further provides that, ''[f]or purposes of Sections 6(b)(1), 6(b)(4), 6(b)(6), 6(b)(7), 6(d), 17(d), 19(d), 19(e), 19(g), 19(h), and 21 of [the Exchange Act], the term 'member' when used with respect to a national securities exchange also means, to the extent of the rules of the exchange specified by the Commission, any person required by the Commission to comply with such rules pursuant to Section 6(f) of this title.'' Finally, Section 3(a)(3)(B) provides that ''[t]he term 'member' when used with respect to a registered securities association means any broker or dealer who agrees to be regulated by such association and with respect to whom the association undertakes to enforce compliance with the provisions of [the Exchange Act].'' *See* 15 U.S.C. 78c(a)(3)(A) and 15 U.S.C. 78c(a)(3)(B).

[97] The proposed Rule would have explicitly required each national securities exchange and national securities association to be a sponsor of the NMS plan submitted pursuant to the Rule and approved by the Commission. *See* proposed Rule 613(a)(4). ''Sponsor,'' when used with respect to an NMS plan, is defined in Rule 600(a)(70) of Regulation NMS to mean any self-regulatory organization which is a signatory to such plan and has agreed to act in accordance with the terms of the plan. *See* 17 CFR 242.600(a)(70).

[98] Proposed Rule 613(j)(1) would have defined the term ''customer'' to mean the beneficial owner(s) of the account originating the order and the person exercising investment discretion for the account originating the order, if different from the beneficial owner(s).

[99] The proposed Rule would have defined ''material terms of the order'' to include, but not be limited to: The NMS security symbol; security type; price (if applicable); size (displayed and non-displayed); side (buy/sell); order type; if a sell order, whether the order is long, short, or short exempt; if a short sale, the locate identifier, open/close indicator, time in force (if applicable), whether the order is solicited or unsolicited, and whether the account has a prior position in the security; if the order is for a listed option, option type (put/call), option symbol or root symbol, underlying symbol, strike price, expiration date, and open/close; and any special handling instructions. *See* proposed Rule 613(j)(3).

the date and time the order was routed would be replaced by the date and time the order was received.

For the execution of an order, data collected in real time would have included: the unique order identifier; the date and time of execution; the execution size and price; the unique identifier of the SRO or broker-dealer executing the order; the capacity of the broker-dealer executing the order (*i.e.,* principal, agency, riskless principal); and whether the execution was reported pursuant to an effective transaction reporting plan or the OPRA Plan.[100]

Because certain information may not be readily available at the time of the reportable event, the proposed Rule would have required the NMS plan to require each SRO and its members to collect and provide to the central repository certain information, in a uniform electronic format, promptly after receipt of such information, but in no instance later than midnight of the day that the reportable event occurred or when the SRO or its member receives such information. Under the proposed Rule, this data would have included: The account number for any subaccounts to which the execution is allocated (in whole or part); the unique identifier of the clearing broker or prime broker, if applicable; the unique order identifier of any contra-side order; special settlement terms, if applicable; short sale borrow information and identifier; the amount of a commission, if any, paid by the customer, and the unique identifier of the broker-dealer(s) to whom the commission is paid; and, if the execution is cancelled, a cancelled trade indicator.

The proposed Rule would have required that the SROs jointly file an NMS plan with the Commission within 90 days after approval of the Rule. In addition, the SROs would have been required to select a plan processor within two months of the effectiveness of the NMS plan, as well as provide the Commission a document outlining how the SROs would propose to expand the audit trail to include non-NMS securities and additional transactions. The proposed Rule also would have required the SROs to file proposed rule changes to require their members to comply with the requirements of the proposed Rule and the NMS plan within 120 days of the effectiveness of the NMS plan. The SROs would have been required to begin reporting data to the central repository within one year after the effectiveness of the NMS plan, and their members would have been required to begin reporting data to the central repository within two years after the effectiveness of the NMS plan.

As proposed, the NMS plan would have been required to include specific plan provisions, detailing: The plan governance structure, the processes of admission and withdrawal of plan sponsors, the percentage of votes required to effectuate amendments to the plan, the allocation of central repository costs among the plan sponsors, and the appointment of a Chief Compliance Officer (''CCO'') of the central repository. The proposed Rule would have required all plan sponsors to develop and implement a surveillance system, or enhance existing surveillance systems, reasonably designed to make use of the information contained in the consolidated audit trail. This information would be available to the Commission and the SROs for regulatory and oversight purposes only. The proposed Rule also would have required the NMS plan to require information be collected in a convenient and usable standard electronic data format, directly available and searchable electronically without any manual intervention for a period of not less than five years. This information would have been required to be available immediately, or, if immediate availability was not reasonably and practically achieved, any search query would have to begin operating on the data not later than one hour after the search query was made. Additionally, the proposed Rule would have required the NMS plan to include policies and procedures, including standards, to be utilized by the plan processor to ensure the security and confidentiality of all information submitted to the central repository, and all SROs and their employees, as well as all employees of the central repository, would have been required to agree to use appropriate safeguards to ensure the confidentiality of such data. The proposed Rule also would have required SROs and their members to synchronize their business clocks that are used for the purposes of recording the date and time of any event that must be reported under the proposed Rule consistent with industry standards. Further, the proposed Rule would have required the central repository to collect and retain, on a current and continuing basis, and in a format compatible with the other information collected pursuant to the proposed Rule, the national best bid and national best offer (''NBBO'') information for each NMS security. Transaction reports reported pursuant to an effective transaction reporting plan filed with the Commission pursuant to, and meeting the requirements of, Rule 601 of Regulation NMS under the Exchange Act,[101] and last sale reports reported pursuant to the OPRA Plan filed with the Commission pursuant to, and meeting the requirements of, Rule 608 of Regulation NMS under the Exchange Act also would have been required to be collected and retained.

C. Summary of General Comments on the Proposed Rule

The Commission requested comments on all aspects of the proposed Rule, including the potential costs and benefits.[102] In particular, the Commission encouraged commenters to identify, discuss, analyze, and supply relevant data regarding any such costs or benefits.[103] In response, commenters provided views and opinions regarding the regulatory usefulness of a consolidated audit trail; the overall costs of the proposed Rule, focusing on those requirements that commenters believed would be the most costly or burdensome to implement;[104] the process for creating and implementing a consolidated audit trail; and alternatives to the proposed Rule's approach to creating, implementing, and maintaining a consolidated audit trail. These comments are discussed below.

1. Industry Support for a Consolidated Audit Trail

Commenters provided a wide range of opinions, and shared their concerns, regarding specific aspects of the proposed Rule.[105] However, many of the

[100] ''The OPRA Plan'' is the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information filed with the Commission pursuant to, and meeting the requirements of, Rule 608 of Regulation NMS. The OPRA Plan governs the dissemination of trade and quotation information for listed options. In this capacity, it provides real-time quotation and transaction information to market participants. *See* 17638 (March 18, 1981), 22 SEC Docket 484 (March 31, 1981) (order approving the OPRA Plan).

[101] The effective transaction reporting plans include the Consolidated Tape Association Plan (''CTA Plan'') and the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (''UTP Plan'').

[102] *See* Proposing Release, *supra* note 4, at 32586 and 32594.

[103] *Id.*

[104] For comments on general costs of the proposed Rule, *see, e.g.,* Thomson Reuters Letter, p. 2; Liquidnet Letter, p. 1; CBOE Letter, p. 2; Nasdaq Letter I, p. 2; Angel Letter, p. 1–2; IAG Letter, p. 3.; Kaufman Letter, attachment p. 3; Wells Fargo Letter, p. 4; Noetic Partners Letter, p. 2; Leuchtkafer Letter, p. 1–5; Broadridge Letter, p. 3; SIFMA Letter, p. 1–2, FINRA Letter, p. 3; FINRA Proposal Letter, p. 2.; High Speed Letter, p. 1; Belanger Letter, p. 7–8.

[105] *See* Section II.C., *infra,* for a discussion of specific concerns raised by commenters.

commenters and their representatives who are involved with regulating and operating securities markets—as well as many of the commenters who otherwise populate data for, or make use of, existing audit trail systems (such as broker-dealers)—expressed support for the creation of a single consolidated audit trail.

FINRA and NYSE Euronext, filed a joint letter, ''vigorously support[ing] the establishment of a consolidated audit trail,'' and stating, among other things, that ''the evolution of the U.S. equity markets and the technological advancements that have recently taken place have created an environment where a consolidated audit trail is now essential to ensuring the proper surveillance of the securities markets and maintaining the confidence of investors in those markets.'' [106]

The NASDAQ OMX Group, Inc. similarly states that ''[m]arket developments and fragmentation of market centers with varying market structures and levels of transparency have created inefficiencies and potential gaps in cross-market regulation,'' and that ''[c]omplete transparency is the only way to ensure fair and orderly markets.'' [107]

Other commenters also stated their general support for the creation of a consolidated audit trail. According to Direct Edge Holdings, LLC (''Direct Edge''), ''[t]he proposed consolidated audit trail ('CAT') system would significantly enhance the capabilities of regulators to police trading across asset classes; replace existing audit trails and consolidate trading and execution data for the asset classes under the Commission's jurisdiction * * * enable regulators to create a more complete timeline of an order's lifecycle; and facilitate large-scale market reconstructions * * * .'' [108]

Although CBOE expressed some concerns in its comment letter about the ''breadth, expense, and timetable of the Proposal'' [109] (concerns that were shared by other commenters),[110] it ''recognizes there are potential benefits to be obtained from CAT, and agrees that a central repository with uniform data submitted by all markets could enhance SRO and SEC oversight of the markets.'' [111] CBOE further stated that, ''[i]n particular, a CAT that contains a customer identifier on an order by order basis would enhance significantly the audit trails of the markets.'' [112]

BATS Exchange, Inc. (''BATS'') expressed general support for the Commission's proposal, stating, ''[o]ver the last several years, liquidity has dispersed across multiple interconnected venues, such that no one market center can claim a majority share of equity securities transactions. However, regulatory tools have not evolved to keep pace with these changes, and the limited existing processes and data available to analyze inter-market trading are inadequate. As a consequence, regulators rely on inefficient processes to reconstruct inter-market trading activity, including ad hoc requests to members for trading data when a potential problem is identified.'' [113]

Liquidnet, Inc. (''Liquidnet''), an ATS, generally stated that, ''[i]n the long run, a properly-designed system that provides for centralized reporting of data should be more cost-efficient than the current patchwork system for collecting audit trail data.'' [114] Liquidnet outlined seven specific benefits of a consolidated audit trail, ranging from ''[reducing] the time that regulatory personnel must expend to request and collect data from market participants on a case-by-case basis,'' to ''[reducing] the cost of reconstructing, analyzing, and reporting on significant market events such as those that occurred on May 6, 2010.'' [115]

The Securities Industry and Financial Markets Association (''SIFMA''), an industry group that represents, among other entities, hundreds of securities firms that could be impacted by the creation of a consolidated audit trail, ''believes that a centralized and comprehensive audit trail would enable the SEC and securities self-regulatory organizations ('SROs') to perform their monitoring, enforcement, and regulatory activities more effectively.'' [116] SIFMA further states that, ''[i]n the current era of electronic trading, regulators need efficient access to order and execution data from both broker-dealers and exchanges. Indeed, a consolidated audit trail is a much-needed improvement over today's fragmented audit trail platforms.'' [117] As did a number of other commenters,[118] SIFMA also expressed concerns about, and suggested alternatives to, some specific aspects of the proposed Rule, which will be further discussed below.

Finally, the Commission notes that members of the Financial Information Forum, whose participants include ''trading and back office service bureaus, broker-dealers, market data vendors and exchanges,'' agree that ''an enhanced audit trail system could increase the effectiveness of cross-market surveillance through better data availability and integration.'' [119]

When the perspectives of these commenters are combined with the Commission's own experiences (as described above in Section II.A.1.c.), a common theme emerges: There is substantial room for improvement in the collection of and access to trading data beyond what is available today from existing audit trails and other sources. The Commission agrees with many of the commenters that one of the main benefits of a consolidated audit trail will be to improve the efficiency and adequacy of a regulatory process of collecting and accessing audit trail data that directly affects and impacts a significant number, and wide variety, of market participants.

2. Commenters' Views on the Overall Costs of the Proposed Rule and the Resulting Framework of the Adopted Rule

With respect to general costs for the proposal, commenters expressed differing views. As discussed below, some commenters thought that the Commission overestimated the burdens of creating, implementing, and maintaining a consolidated audit trail, while others argued that the Commission had underestimated such burdens.

Nasdaq was among those commenters that stated that the Commission had overestimated the burdens. Specifically, Nasdaq stated that ''innovative technology exists to meet many of the Commission's goals at significantly

[106] *See* FINRA/NYSE Euronext Letter, p. 1. NYSE Euronext is the publicly traded parent of a number of subsidiaries, including three SROs, NYSE, NYSE Amex, and NYSE Arca.

[107] *See* Nasdaq Letter I, p. 2. The NASDAQ OMX Group, Inc. is the publicly traded parent of a number of subsidiaries, including three SROs, Nasdaq, Phlx, and BX.

[108] *See* Direct Edge Letter, p. 1. Direct Edge is the parent of two SROs, EDGA Exchange, Inc. and EDGX Exchange, Inc.

[109] *See* CBOE Letter, p. 2.

[110] *See, e.g.,* Scottrade Letter, p. 1; ICI Letter, p. 4–6; FINRA/NYSE Euronext Letter, p. 4; GETCO Letter, p. 2; BATS Letter, p. 1–2; SIFMA Letter, p. 3–8; Direct Edge Letter, p. 3; FINRA Letter, p. 10–13; Wells Fargo Letter, p. 3; Knight Letter, p. 2–3; Leuchtkafer Letter; Broadridge Letter, p. 3; SIFMA Proposal Letter, p. 1; FINRA Proposal Letter, p. 3.; Liquidnet Letter, p. 3 & p. 5–6; Ameritrade Letter, p. 2–3

[111] *Id.*

[112] *Id.*

[113] *See* BATS Letter, p. 1.

[114] *See* Liquidnet Letter, p. 1.

[115] *Id.* at p. 1–2.

[116] *See* SIFMA Letter, p. 1–2.

[117] *Id.* at p. 2.

[118] *See, e.g.,* FINRA/NYSE Euronext Letter, p. 7, FINRA Letter, p. 3, FINRA Proposal Letter, p. 1–16, FTEN Letter, p. 1, 4–5, Correlix Letter, p. 2–3; BOX Letter, p. 2; BATS Letter, p. 2.; CBOE Letter, p. 2; Angel Letter, p. 2; Wells Fargo Letter, p. 2; Knight Letter, p. 3; FIF Letter, p. 5–6; Schumer Letter, p. 1.

[119] *See* FIF Letter, p. 1.

lower costs than estimated in the Proposing Release,'' and that SROs should be able to weigh the costs and benefits of various designs.[120] Other commenters also expressed similar opinions stating that a consolidated audit trail accomplishing the Commission's goals could be implemented for less than the preliminary estimates.[121] Two firms with experience in processing and analyzing market data, FTEN and Thomson Reuters, each noted that current technology could convert data from disparate systems into a uniform format, resulting in a less costly implementation of the consolidated audit trail.[122] FTEN stated that ''currently available commercial systems are capable of immediately accomplishing CAT goals of real-time cross-market transparency, accountability and control with no implementation risk and for far less than the estimated multi-billion dollar price tag.'' [123] It further suggested that ''[t]he SEC should leverage already deployed and commercially available solutions that are in production use today by major market participants * * *.'' and an ''iterative approach [that] would leverage existing systems to capture order and execution data in real-time from liquidity destinations (exchanges, ECNs, ATSs and dark pools) and 'map' the data back to original trade submissions by market participants without requiring integration with, or changes to, market participants systems or to liquidity destination systems and without modifying existing order flow.'' [124] Similarly, another commenter recommended a technology solution that could handle the required data in milliseconds and that ''significantly reduces disk space required, which can potentially save millions of dollars when dealing with multiple terabytes of data.'' [125] One commenter suggested an entirely different approach through the use of an ''adaptive graph indexing-based architecture'' as the basis for the consolidated audit trail platform, instead of using a central repository, and explained that this technology would keep trading data within each SRO.[126]

On the other hand, numerous commenters expressed general concerns about the costs of implementing a consolidated audit trail relative to the benefits to be gained. For example, one commenter stated that ''there can be no doubt whether market regulators need a consolidated audit trail;'' however, the commenter questioned whether a system as costly as the consolidated audit trail was necessary to detect violations such as frontrunning, spoofing, and layering, which are violations the Commission has rarely pursued in the recent past.[127]

As discussed above, many commenters expressed general support for the creation of a consolidated audit trail, but believed that, as proposed, the implementation would be too costly and that the Rule should be modified.[128] Concern about the proposed real-time requirements for reporting data to the central repository was a common theme expressed by these commenters,[129] including those who maintained that a requirement to provide data on a real-time basis would be too burdensome due to the extensive systems changes that would be needed to comply with such a requirement.[130] Some of these commenters argued that a real-time reporting requirement would require many industry participants to build entirely new systems or undertake significant technological upgrades.[131] SIFMA, in particular, estimated that the cost per broker-dealer to implement real-time reporting could be millions of dollars and that the cost of capturing options quotes in real time alone could exceed the Commission's $2.1 billion estimate for the annualized cost of the audit trail.[132] SIFMA further argued that broker-dealers would incur costs associated not only with establishing and maintaining the infrastructure to support real-time reporting, but also due to regulatory risk if they are not able to achieve 100 percent compliance with the proposed Rule.[133] While SIFMA opposed a real-time reporting requirement, and encouraged the Commission to adopt a next day or later reporting requirement,[134] SIFMA also stated that ''if the SEC determines to require reporting of certain data elements in real-time or near real-time, we believe such data should be limited to reporting of 'key business events.' '' [135] SIFMA further stated that, ''if the definition of real-time allowed for reporting within minutes (*e.g.* 10–15 minutes) of the events, it would be substantially less intrusive on order management systems and may allow for greater flexibility in designing reporting systems architecture and more standardized content for events such as order modifications * * *.'' [136] SIFMA described how a reporting system using ''drop copies'' [137] could be ''achievable in the relative near term,'' although it noted that its proposed process would not, among other things, include a unique Customer ID or a unique order identifier.[138]

Commenters also expressed general concerns regarding the costs of other aspects of the Proposed Rule. For example, Global Electronic Trading Company (''GETCO''), a market maker in equities and equity options, urged the Commission to consider whether quotation information already

[120] *See* Nasdaq Letter I, p. 2.

[121] *See* Thomson Reuters Letter, p. 2; Noetic Partners Letter, p. 2; FTEN Letter, p. 1; Ross Letter; Correlix Letter, p. 2.; FINRA Proposal Letter, p. 2.; High Speed Letter, p. 1; Belanger Letter, p. 7–8; Aditat Letter, p. 2 (stating that FIX protocol is already used in the industry today, making it cheaper to create systems to handle consolidated audit trail data as the data already exists in a ''suitable format'').

[122] *See* FTEN Letter, p. 13; Thomson Reuters Letter, p. 2–3.

[123] *See* FTEN Letter, p. 1.

[124] *Id.* at p. 3.

[125] *See* Know More Software Letter, p. 1.

[126] *See* Belanger Letter, p. 4.

[127] *See* Leuchtkafer Letter, p. 4. *See also* IAG Letter, p. 3.

[128] *See, e.g.,* SIFMA Letter, p. 2, 15–16; FINRA/NYSE Euronext Letter, p. 7; FINRA Letter, p. 3; Angel Letter, p. 2; CBOE Letter, p. 2–6 (suggesting several ways that the costs of the proposal could be reduced, including: Leveraging existing SRO experience with audit trail systems and imposing uniformity across markets in those systems; requiring the submission of audit trail information through a batch process after the close of the trading day; deleting the requirement that all market maker quotes be submitted to the proposed consolidated audit trail; making clear that broker-dealers have no obligation to report order information that has already been reported to an exchange; and revisiting the need for a large trader reporting system if that proposed rule is adopted.).

[129] *See* Scottrade Letter, p. 1; ICI Letter, p. 4–6; FINRA/NYSE Euronext Letter, p. 4; GETCO Letter, p. 2; BATS Letter, p. 1–2; SIFMA Letter, p. 3–8; CBOE Letter, p. 4–5; Direct Edge Letter, p. 3; FINRA Letter, p. 10–13; Wells Fargo Letter, p. 3; Knight Letter, p. 2–3; Leuchtkafer Letter; Broadridge Letter, p. 3; FIF Letter, p. 4; SIFMA Drop Copy Letter, p. 1; Ross Letter, p. 1; FINRA Proposal Letter, p. 3; SIFMA February 2012 Letter; FIA Letter, p. 1–2.

[130] *See* Section III.F.2., *infra; see also, e.g.,* BATS Letter, p. 1–2; Broadridge Letter, p. 3; FIF Letter, p. 4–5; FINRA/NYSE Euronext Letter, p. 7; FINRA Letter, p. 3; ICI Letter, p. 4–5; Knight Letter, p. 2; Scottrade Letter, p. 1–2; SIFMA Letter, p. 3–6; SIFMA February 2012 Letter. Some commenters also questioned whether the costs to provide data on a real-time basis would outweigh the benefits. *See* Scottrade Letter, p. 1–2; FINRA/NYSE Euronext Letter, p. 4; GETCO Letter, p. 2; BATS Letter, p. 2; SIFMA Letter, p. 3–8; CBOE Letter, p. 4; FINRA Letter, p. 11–13; Wells Fargo Letter, p. 3; ICI Letter, p. 4–6; GETCO Letter, p. 2; Direct Edge Letter, p. 3; Leuchtkafer Letter; SIFMA Drop Copy Letter, p. 1; Ross Letter, p. 1; FINRA Proposal Letter, p. 3; SIFMA February 2012 Letter; FIA Letter, p. 2.

[131] *See* Scottrade Letter, p. 1–2; ICI Letter, p. 4–5; SIFMA Letter, p. 4; Knight Letter, p. 2. *See also* Broadridge Letter, p. 3; FIF Letter, p. 4; FIA Letter, p. 2.

[132] *See* SIFMA Letter, p. 4–6.

[133] *Id.* at p. 5.

[134] *See* SIFMA Letter, p. 3–4.

[135] *See* SIFMA Drop Copy Letter.

[136] *Id.*

[137] A ''drop copy'' is an electronic copy of a message automatically generated by the existing order management and execution systems used by broker-dealers and SROs.

[138] *See* SIFMA Drop Copy Letter.

disseminated by SROs could be reported instead of requiring the SROs and their members to report all quotation information to reduce costs for the industry.[139] Another commenter, Wells Fargo Advisors, argued that the inclusion of a unique customer identifier would add ''tremendous incremental cost to the [consolidated audit trail].'' [140]

Many commenters provided suggestions and views on how the costs of creating and implementing a consolidated audit trail might be lowered. For example, financial technology firm, Correlix, Inc. (''Correlix''), stated that relying on existing infrastructure, where possible, could bring down the cost and amount of time it would take to implement the consolidated audit trail.[141] Correlix further stated that existing technology already is able to provide ''a complete end-to-end history of message and order data from the market participant to the execution venue's matching engine and back to the originator,'' and that allows clients to run customized queries and reports on the data.[142]

A variety of commenters, including SROs and broker-dealers, also believed it would be more cost efficient to use the existing OATS infrastructure specifically as a basis for a consolidated audit trail, rather than to purchase or create an entirely new system.[143] Commenters further argued that existing audit trails could be expanded economically and quickly.[144]

In contrast, other commenters expressed the view that costs could be reduced not by using existing audit trail infrastructures, but rather by using new, innovative technology to create the consolidated audit trail.[145] Noetic Partners, a financial technology firm, explained that technologies are currently available to build a system that would capture ''full-depth'' data with ''compression and near-line storage'' in a system that would enable fast retrieval and analysis of data, and opined that, based on existing technology, a consolidated audit trail could be implemented for substantially less than the Commission's preliminary estimates.[146] This commenter stated that, based on available technology, a fully functional consolidated audit trail could be implemented in months, rather than years, at an initial cost of less than $100 million.[147]

An aggregate analysis of the many specific opinions described above suggests that commenters' views regarding the costs of creating, implementing, and maintaining a consolidated audit trail fall into one of two general categories. One set of commenters expressed the view that many, if not all, of the requirements of the proposed Rule could be met in a cost-effective fashion if current audit trail systems were replaced with new technologies and systems. However, another set of commenters expressed the view that a number of the requirements of the proposed Rule would be very costly to implement, and, instead, suggested that the most cost-effective method of creating a consolidated audit trail would be to relax some of the proposed requirements and build upon the infrastructure of existing audit trail systems.

Therefore, as discussed above and in detail below,[148] in response to these comments, and specific comments discussed throughout this Release,[149] the Commission is adopting Rule 613 with substantive changes to some of the specific collection, reporting, and data requirements of the Rule.[150] The Commission believes that these changes significantly expand the solutions that could be considered by the SROs for creating, implementing, and maintaining a consolidated audit trail and provide the SROs with increased flexibility in how they choose to meet the requirements of the Rule compared with the requirements of the proposed Rule. For example, the Rule no longer requires real-time reporting [151] or only one unique order identifier; [152] thus, the Rule would accommodate an NMS plan based on the types of solutions proposed by SIFMA and FINRA. However, to guide the SROs in their development of the NMS plan, the Rule includes several specific considerations [153] that the Commission intends to use to evaluate the submitted NMS plan and consider its costs and benefits.

The changes from the Proposing Release provide the SROs with the flexibility to submit an NMS plan that provides creative solutions that harness innovative technology or that build on existing audit trail systems.

3. Comments on the Process for Creating a Consolidated Audit Trail

The Commission received comments regarding the process through which a consolidated audit trail should be created. As proposed, the Rule required that the SROs submit an NMS plan setting forth the details for the creation, implementation, and maintenance of a consolidated audit trail within 90 days of approval of the Rule. A few commenters suggested that more time be allotted for the planning and design of the NMS plan.[154] FIF and the Security Traders Association (''STA'') recommended extensive, ''up-front business analysis,'' [155] explaining that if conducted ''during the CAT plan development process, [they] are confident that issues would emerge earlier in the process, leading to more efficient and cost-effective solutions.'' [156] These commenters believed that the business analysis would require many discussions involving the Commission, the SROs and teams comprising members of the securities industry.[157]

In this regard, several commenters suggested that the Commission undergo a RFP or request for information (''RFI'') process to create and implement a consolidated audit trail.[158] Specifically, FIF urged the Commission to perform a RFP process ''to determine the best technical solution for developing a

[139] *See* GETCO Letter, p. 3–4.

[140] *See* Wells Fargo Letter, p. 3.

[141] *See* Correlix Letter, p. 2–3.

[142] *Id.*

[143] As discussed in Section II.C.4, *infra,* both SIFMA and FINRA submitted several comment letters with increasing levels of detail on the extent to which existing infrastructures could be used to achieve different forms of the various reporting requirements of the proposed Rule. In one of its later comment letters, FINRA submitted a detailed blueprint describing how it would build a consolidated audit trail that it believed would meet the primary objectives of the proposed Rule in a relatively short timeframe and with minimum costs to the industry. *See* FINRA Proposal Letter; SIFMA Letter, p. 16–18. *See also* BOX Letter, p. 2; BATS Letter, p. 2.; CBOE Letter, p. 2–3; Angel Letter, p. 2–3; Wells Fargo Letter, p. 2; Knight Letter, p. 3; FIF Letter, p. 5–6; Schumer Letter, p. 1; FIA Letter, p. 3.

[144] *See, e.g.,* FINRA/NYSE Euronext Letter; FINRA Letter; Schumer Letter, p. 1.

[145] *See* Noetic Partners Letter II, p. 2; High Speed Letter, p. 1 (opining that estimated costs could be reduced if data were stored in an off-the-shelf cloud-based storage system or if a petabyte storage facility was built to store data and also estimating that ''an integrated analysis system combining bespoke software for first-cut filtering of data from the repository, along with [commercial off-the-shelf software] for detailed analysis, could be developed for less than $10M''). *See also* Know More Software Letter, p. 1; Belanger Letter, p. 4; FTEN Letter, p. 1, 13.

[146] *See* Noetic Partners Letter II, p. 2.

[147] *Id.*

[148] *See* Section I., *supra.*

[149] *See, generally,* Section III., *infra.*

[150] *See* Section I., *supra,* for a summary of the changes to proposed Rule 613.

[151] *See* Rule 613(c)(3); Section I., *supra;* Section III.B.1.e., *infra.*

[152] *See* Rule 613(j)(1); Section I., *supra;* Section III.B.1.d.iv., *infra.*

[153] *See* Rule 613(a)(1)(i) through (xii); Section I., *supra;* Section III.C.2.a., *infra.*

[154] *See* FIF Letter II, p. 2–3; STA Letter, p. 2; Nasdaq Letter I, p. 6–7.

[155] *See* FIF Letter II, p. 1, 3; STA Letter, p. 1, 3.

[156] *See* FIF Letter II, p. 2; STA Letter, p. 1.

[157] *See* FIF Letter II, p. 1; STA Letter, p. 1–2.

[158] *See* FIF Letter, p. 1, 9; FIF Letter II, p. 1–2; STA Letter, p. 2; Direct Edge Letter, p. 2–3, 5.

consolidated audit trail.'' [159] FIF suggested that the Commission ''should outline a set of goals and guiding principles they are striving to achieve as part of the adopted CAT filing and leave the determination of data elements and other technical requirements to [an] industry working group.'' [160] Similarly, Direct Edge suggested that Commission staff should form and engage in a working group to develop an RFP for publication by the Commission.[161] DirectEdge explained that an RFP process would facilitate the identification of the costs and benefits of the audit trail, as well as the consideration of a wider range of technological solutions.[162] Further, commenters, including Broadridge Financial Solutions, Inc., a technology provider,[163] also requested more specific information about the audit trail system to better assess the Commission's initial cost estimates and to determine the best approach to the consolidated audit trail.[164]

To gather the necessary information, commenters argued that the timeframe for submitting an NMS plan should be extended. FIF and STA opined that the time needed to perform the analysis to produce a ''detailed blueprint for CAT'' [165] would be closer to six months,[166] rather than the proposed 90 days.[167] As a basis for their suggestions, FIF provided a breakdown of the time and the types of work needed for FINRA's expansion of OATS to all NMS securities.[168] FIF noted that over one-third of the time required for the project was spent on conducting business analysis, and that one-third of the time was spent on project development.[169]

In response to these comments, the Rule requires the SROs to provide more information and analysis to the Commission as part of their NMS plan submission than would have been required under the proposed Rule. As discussed in more detail below, these requirements have been incorporated into the Rule as ''considerations'' that the SROs must address, and they generally mandate that the NMS plan submitted to the Commission for its consideration discuss certain important features and details of the NMS plan, such as how data will be transmitted to the central repository, as well as an analysis of NMS plan costs and impact on efficiency, competition, and capital formation, the process followed by the SROs in developing the NMS plan, and information about the implementation plan and milestones for the creation of the consolidated audit trail.[170] These requirements are intended to ensure that the NMS plan is the result of a thorough and well-developed plan for creating, implementing, and maintaining the consolidated audit trail, and the Proposing Release highlighted the importance of these types of considerations. In Section III.C. below, the Commission also provides details about how it envisions regulators would use, access, and analyze consolidated audit trail data through a number of ''use cases'' to help the SROs prepare a sufficiently detailed NMS plan that addresses the requirements of the adopted Rule.[171]

Because of the additional information and analysis required to be included in the NMS plan, the Commission is extending the amount of time allowed for the SROs to submit the NMS plan. Rule 613(a)(1) provides that ''[e]ach national securities exchange and national securities association shall jointly file on or before 270 days from the date of publication of the Adopting Release in the **Federal Register** a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository as required by this section.'' The Commission will publish the NMS plan submitted in accordance with Rule 608 of Regulation NMS under the Exchange Act [172] for public comment and will approve the NMS plan if the Commission determines it is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.[173] The Commission also will consider whether the NMS plan submitted for its consideration would achieve the objectives of the Rule.

4. Comments on Alternatives to the Proposed Consolidated Audit Trail

Several commenters, many of whom generally supported the concept of a consolidated audit trail, recommended alternatives for how a consolidated audit trail should be created, implemented, and maintained. In particular, the Commission received comments suggesting various ways that the OATS system could be modified to serve as the central repository for the consolidated audit trail. FINRA submitted a blueprint for a modified version of OATS that listed certain changes to address the Commission's proposed requirements for the creation, implementation, and maintenance of the consolidated audit trail.[174] The proposed modifications included, for example, the addition of data elements capturing whether an order was solicited, customer account type, a large trader identifier,[175] and a unique identifier for branch office and registered representative to the data reported to OATS; [176] using OATS to capture order and quote data from all national securities exchanges and eventually OPRA; the inclusion of options, fixed income securities, security-based swaps, principal orders and orders originating in firm-controlled accounts for purposes of working a customer order in OATS; the use of CRD numbers to identify broker-dealers; an exchange data processing gateway for OATS to validate submissions from exchanges; full access to regulators of queryable consolidated audit trail data through the FINRA web portal; [177] and OATS' acceptance of limited drop-copy report information from broker-dealers on a 15-minute reporting basis.[178]

[159] *See* FIF Letter, p. 1.

[160] *See* FIF Letter II, p. 2.

[161] *See* Direct Edge Letter, p. 2–3, 5. *See also* STA Letter, p. 1–3 (recommending the use of working groups comprising the Commission, FINRA, exchanges, broker-dealers, investors, vendors, and institutional asset managers to conduct business analysis and requisite discussions with the industry in planning a consolidated audit trail that meets the Commission's goals).

[162] *Id.* at p. 3.

[163] *See* Broadridge Letter, p. 2.

[164] *See* Broadridge Letter, p. 2; FIF Letter, p. 8. *See also* Ross Letter, p. 1 (discussing examples of information security details to consider); Nasdaq Letter I, p. 6 (stating that the proposed Rule provided ''incomplete technical information on which design and features make the most sense'').

[165] *See* FIF Letter II, p. 1–2; STA Letter, p. 2.

[166] *See* FIF Letter II, p. 2; STA Letter, p. 2–3; *see also* Nasdaq Letter I, p. 7 (arguing for ''scheduling flexibility at the initial stage'' of designing the consolidated audit trail).

[167] *See* proposed Rule 613(a)(1).

[168] *See* FIF Letter II, p. 3. The commenter also provided the cost to the industry for the expansion of OATS to all NMS stocks—$48 million. The Commission notes that this is the cost for the project as a whole, not solely for the planning phase, and therefore is not entirely applicable to the cost of the creating and filing the NMS plan required by Rule 613.

[169] The time remaining was spent on ''testing and other activities.'' *See* FIF Letter II, p. 3.

[170] *See* Section III.C.2.a., *infra.*

[171] *See* Section III.C.2.b., *infra.*

[172] 17 CFR 242.608.

[173] 17 CFR 242.608(b)(2).

[174] *See* FINRA Proposal Letter.

[175] *See* FINRA Proposal Letter, p. 4, 6 (arguing against requiring the name and address of the beneficial owner of an account, as well as of the individual making the investment decision, and against requiring tax identification or social security numbers for individual investors).

[176] *Id.* at p. 7 and Appendix B.

[177] *Id.*

[178] *Id.* at p. 3–4 (noting that this information would be available for query by regulators within one hour of receipt, would include a unique order

Continued

However, FINRA's blueprint provided that the large trader identifier should be used initially to identify market participants, as the complexities of tracking retail accounts, the infrequent amount of trading by retail investors, and the large number of such investors make requiring a unique customer identifier difficult.[179]

Another commenter from the academic field believed that a modified version of OATS (including fields incorporating ultimate customer account information, a reduction in the time stamp standard to milliseconds or even microseconds, and standardized clock synchronization requirements), coupled with a requirement that exchanges must report to OATS, would allow OATS to fulfill the needs of the consolidated audit trail in a less costly manner than originally proposed.[180] This commenter stated that the Commission's needs could be met by ''a few tweaks to the existing trade reports and by extending OATS to cover all NMS stocks and executions at exchanges.'' [181]

Several commenters, including SROs and broker-dealers, generally believed that it would be more cost and time efficient to use a form of OATS as a basis for the consolidated audit trail than to purchase or create a new system.[182] For example, FINRA/NYSE Euronext stated that modifying existing systems would reduce both the time and cost to develop a consolidated audit trail, explaining that ''the programming changes needed to comply with an entirely new system are substantially greater than expanding existing protocols,'' [183] while BATS suggested that significant cost savings may be realized by building a consolidated audit trail that ''leverages elements of OATS.'' [184] FINRA/NYSE Euronext also argued that existing audit trails could be expanded ''economically and quickly,'' [185] noting that use of such systems, such as FINRA's OATS, could make the central repository unnecessary.[186] Similarly, FINRA believed that using OATS as a foundation of the consolidated audit trail would make the consolidated audit trail easier to implement,[187] as opposed to building a new system, which could take years to establish and would likely result in ''negative unintended consequences'' during development.[188] FIF suggested leveraging FINRA's Trade Reporting and Compliance Engine as a basis for the coverage of debt securities.[189]

Two SROs, BOX and CBOE, recommended the joint use of both OATS and COATS.[190] BOX suggested an expansion of OATS and COATS to include customer information,[191] and CBOE stated that it believed that certain aspects of OATS and COATS could be combined, with the addition of customer and routing broker information, and new formats.[192] The Commission also received an alternative proposal from a commenter that was not based on OATS, but on a combination of automatically-generated drop-copies and the Financial Information eXchange (''FIX'') protocol.[193] SIFMA urged reporting on a T+1 basis as it believed real-time reporting would require significant changes to existing order management and trading systems.[194] If T+1 reporting were not adopted, however, SIFMA's proposal suggested that certain data be provided to the central repository in near real time, such as data pertaining to ''key business events'' such as order receipt and origination, order transmittal, execution, modification, and cancellation. SIFMA's proposal listed the specific data elements to be reported for each event, but, to achieve quick implementation, did not include unique customer or order identifiers, or an identifier for algorithmic orders.[195]

The Commission has considered the comments on alternative proposals, including those based on OATS, and has made significant modifications to the proposed Rule in light of such comments. Each of these modifications is discussed in detail in Section III. below. But the Commission notes more generally that, as adopted, Rule 613 does not prescribe a specific audit trail collection system or a particular method of data collection to be used for the central repository. In addition, the Commission believes that certain modifications to Rule 613, such as

identifier and MPID, and would be added on T+1 to the ''order lifecycle'' using OATS and TRF data).

[179] *Id.* at p. 4.

[180] *See* Angel Letter, p. 3 (also noting, ''While the OATS data are extremely useful for understanding market behavior and for searching for various violations, these data are not really needed for real time surveillance. Real time surveillance is generally focused on the question of whether or not some change needs to take place immediately * * *. The extensive OATS data regarding the handling of individual orders are more useful for economic analysis and enforcement activities and do not need to be reported in real time.'')

[181] *Id.*

[182] *See* FINRA Proposal Letter; BOX Letter, p. 2; BATS Letter, p. 2.; CBOE Letter, p. 2–3; Angel Letter, p. 2–3; SIFMA Letter, p. 16–18; Wells Fargo Letter, p. 2; Knight Letter, p. 3; FIF Letter, p. 5–6; Schumer Letter, p. 1; FIA Letter, p. 1–3.

[183] *See* FINRA/NYSE Euronext Letter, p. 7. *See also* FINRA Letter, p. 3 (stating that ''the necessary components to an effective, comprehensive, and efficient consolidated audit trail are: (1) Uniform data (both data content and data format); (2) reliable data; and (3) timely access to the data by SROs and the SEC. FINRA believes this can be achieved most effectively, efficiently, and expeditiously by expanding FINRA's existing OATS requirements to additional securities and non-FINRA member broker-dealers and by consolidating exchange data in a central repository to be used with OATS data'').

[184] *See* BATS Letter, p. 2.

[185] *See* FINRA/NYSE Euronext Letter, p. 14; FINRA Letter.

[186] *Id.*

[187] *See* FINRA Letter, p. 6. Specifically, FINRA proposed enhancements to OATS and outlined a phased approach for implementation. It explained that, under its approach, implementation would begin with equity securities in the first two phases, followed by options in the third and fourth phases. FINRA further proposed that it could ''establish an intraday abbreviated order submission capability based on SIFMA's drop-copy proposal.'' FINRA estimated the initial cost for the first two phases of the OATS enhancement would be between $100 to $125 million and the ongoing annual costs to be between $30 million and $40 million. While FINRA's proposal appears to include many of the elements required by Rule 613, the Commission notes that the proposal does not include a Customer-ID (which was similarly lacking in the SIFMA proposal), nor would all broker-dealers be required to report order information to the central repository (certain firms that route orders exclusively to another reporting firm that is solely responsible for further routing decisions would be exempt from reporting obligations; additionally, FINRA proposed retaining exemptive authority in certain limited situations to provide relief to small member firms that do not otherwise qualify for exclusion from the definition of an OATS Reporting Member). Further, FINRA's proposal would not collect customers' names, addresses and account numbers. *See* FINRA Proposal Letter, p. 10; 14–16; Appendix. The Commission believes a unique Customer-ID and customer account information are critical to the efficacy and usefulness of the consolidated audit trail, and therefore is requiring the NMS plan submitted for its consideration to include such information.

[188] *Id.* This commenter also noted that OATS compliance rates have improved to over 99% since the system was first implemented, and emphasized that creating a new system would result initially in low compliance rates until users became familiar with the system. *Id.* at p. 11; *see also* FINRA/NYSE Euronext Letter, p. 8.

[189] *See* FIF Letter, p. 6 (also providing thoughts on the functionalities of OATS that should be considered in creating the consolidated audit trail, such as OATS' ability to identify and reject duplicative reporting; to link reports between firms and Nasdaq exchanges without using a unique customer identifier; its possible flexibility in incorporating additional order types; its current incorporation of quote data; and its current identification of index arbitrage and program trading, and ability to possibly add a large trader identification field ''to enhance analysis of high volume, algorithm trading'').

[190] *See* BOX Letter, p. 2; CBOE Letter, p. 2.

[191] *See* BOX Letter, p. 2.

[192] *See* CBOE Letter, p. 2.

[193] *See* SIFMA Drop Copy Letter. The FIX Protocol is a series of messaging specifications for the electronic communication of trade-related messages. It has been developed through the collaboration of banks, broker-dealers, exchanges, industry utilities and associations, institutional investors, and information technology providers from around the world. These market participants share a vision of a common, global language for the automated trading of financial instruments. *See http://fixprotocol.org/what-is-fix.shtml* (last viewed on May 30, 2012).

[194] *Id.* at p. 1.

[195] *Id.* at p. 1–2.

allowing data to be reported by 8:00 a.m. Eastern Time the following trading day, rather than in real time as proposed, provide the SROs with a wider range of options for how they choose to meet the requirements of the adopted Rule compared with the requirements of the proposed Rule. This wider range of options could more easily accommodate an OATS-based approach or other approaches for the creation of a consolidated audit trail, as suggested by commenters, consistent with the requirements of Rule 613.

The Commission notes, however, that OATS, in its current form, has certain limitations and does not include certain attributes that the Commission deems crucial to an effective and complete consolidated audit trail.[196] Some of the limitations of OATS that would need to be addressed to meet the requirements of Rule 613 include:

- At present, only FINRA members are required to report trade and order activity through OATS. The resulting exclusion of some exchange-based and other types of non-member activity could lead to significant gaps in the data as an order is generated, routed, re-routed, and finally executed, canceled, or modified;
- OATS does not currently require the collection of market-making quotes submitted by registered market makers (in those stocks for which they are registered), resulting in further, significant gaps in the data;
- OATS is a part of a process by which FINRA collects data from its members for its own regulatory use. OATS is not a central repository and therefore does not presently provide other regulators with ready access to a central database containing processed, reconciled, and linked orders, routes, and executions ready for query, analysis, or download; and
- OATS does not presently collect options data, and does not afford regulators an opportunity to perform cross-product surveillance and monitoring;
- OATS does not collect information on the identities of the customers of broker-dealers from whom an order is received. As discussed above in Section I., the Commission believes that the integrated inclusion of such data elements into a single consolidated audit trail provides many important regulatory benefits.

III. Discussion

A discussion of each of the key provisions of Rule 613, as adopted, is set forth below.

A. NMS Plan

1. Description of the Rule

a. Implementation of the Consolidated Audit Trail Through an NMS Plan

As proposed, the consolidated audit trail would have been created, implemented, and maintained through an NMS plan approved by the Commission. As proposed, Rule 613(a)(1) would have required each national securities exchange and national securities association to jointly file on or before 90 days from approval of the Rule an NMS plan to govern the creation, implementation, and maintenance of a consolidated audit trail and a central repository.[197] The Commission would then have been required to publish the NMS plan for public comment pursuant to Rule 608 of Regulation NMS under the Exchange Act,[198] and, following the period of public comment, would consider whether or not to approve the NMS plan. In the Proposing Release, the Commission stated its expectation that the exchanges and FINRA would ''cooperate with each other and take joint action as necessary to develop, file, and ultimately implement a single NMS plan to fulfill this requirement.'' [199]

The Commission requested comment on this approach. Specifically, the Commission requested comment on whether requiring the exchanges and FINRA to jointly file an NMS plan that would contain the requirements for a consolidated audit trail was the most effective and efficient way to achieve the objectives of Rule 613, or whether the Commission should require the exchanges and FINRA to standardize or otherwise enhance their existing rules. The Commission further requested comment on which approach would be most efficient in improving the ability to monitor cross-market trading, or to undertake market analysis or reconstructions, and why.

Two commenters discussed how the consolidated audit trail should be created and implemented through an NMS plan.[200] One noted that the Rule should provide the SROs with sufficient flexibility to develop an NMS plan that meets the overarching goals of the Commission.[201] The second suggested that the Rule should ''include only the elements needed for a [consolidated audit trail], and then leave it up to the SROs, [securities information processors] and involved vendors to develop the specifications for the data elements to be specified in the NMS plan, which would ultimately be subject to public comment and SEC approval.'' [202]

Other commenters objected in principle to the use of an NMS plan to create and implement the consolidated audit trail.[203] One commenter stated that implementing the consolidated audit trail through an NMS plan would be ''difficult and inefficient,'' given the need ''to respond and adapt quickly to new ways of trading and handling orders,'' and believed it would be difficult to jointly make necessary technology changes under an NMS plan because, based on the commenter's experience of collecting data for an existing audit trail, ''technology changes and changes to technical specifications must be made regularly and promptly with respect to firm-specific reporting requirements, interpretations, and codes to keep up with complex and evolving trading and routing strategies.'' [204] Another commenter argued that an NMS plan is ''unnecessary * * * given all of the governance issues with NMS plans'' because ''[t]he Commission can get most of what it needs with a few tweaks to the existing trade reports and by extending OATS to cover all NMS stocks and executions at exchanges.'' [205]

For the reasons discussed below, the Commission continues to believe that an NMS plan filed pursuant to Rule 608 of Regulation NMS [206] is the most effective mechanism to implement the consolidated audit trail, and is adopting Rule 613 with a number of modifications and clarifications to address the concerns of commenters.[207]

The Commission believes that the creation, implementation, and maintenance of the consolidated audit trail through an NMS plan will ensure that the SROs' expertise as the ''front line'' regulators of securities markets is drawn upon to develop the details of the consolidated audit trail, and to make appropriate adjustments as warranted to respond to changes in the securities markets and technology going forward.

[196] *See* Section II.A.1.c., *supra.*

[197] This Section III.A. discusses the use of a NMS plan to create, implement, and maintain a consolidated audit trail. Section III.C., *infra,* focuses on the process the SROs must follow when submitting the NMS plan to the Commission.

[198] 17 CFR 242.608. *See* Rule 613(a)(2).

[199] *See* Proposing Release, *supra* note 4, at 32568.

[200] *See* Thomson Reuters Letter, p. 2; CBOE Letter, p. 7.

[201] *See* Thomson Reuters Letter, p. 2.

[202] *See* CBOE Letter, p. 7.

[203] *See* FINRA Letter, p. 15; Angel Letter, p. 3.

[204] *See* FINRA Letter, p. 15.

[205] *See* Angel Letter, p. 3.

[206] *See* Rule 613(a). The proposed Rule provided that the NMS plan must be filed with the Commission pursuant to Rule 608. Adopted Rule 613(a)(2) clarifies that the NMS plan must also satisfy the requirements set forth in Rule 608(a). *See* Rule 608(a) of Regulation NMS; 17 CFR 242.608(a).

[207] *See* Section III.C., *infra.*

As such, under the Commission's approach, Rule 613 outlines a broad framework for the creation, implementation, and maintenance of the consolidated audit trail, including the minimum elements the Commission believes are necessary for an effective consolidated audit trail. Additionally, Rules 613(a)(1) and (a)(4), which require that each SRO jointly file and be a sponsor of the NMS plan, is being adopted as proposed. The Commission continues to believe that requiring all SROs to jointly file the NMS plan to establish the consolidated audit trail, as opposed to the flexibility provided by current Rule 608 of Regulation NMS under the Exchange Act,[208] which permits any two or more SROs to submit an NMS plan, is appropriate because such a requirement is expected to result in an NMS plan that is the product of negotiation and compromise among all of the SROs; in this regard, the NMS plan submitted to the Commission also may be more readily implemented as the NMS plan should take into consideration the capabilities of every SRO.

In response to the commenter that advocated granting additional flexibility to the SROs in developing the requirements of the NMS plan,[209] the Commission has made significant modifications to the Rule in several respects to increase the options available to SROs in developing the requirements of the NMS plan.[210] Furthermore, in instances where Rule 613 sets forth minimum requirements for the consolidated audit trail, the Rule provides flexibility to the SROs to draft the requirements of the NMS plan in a way that best achieves the objectives of the Rule. For example, Rule 613 requires the NMS plan submitted to the Commission for its consideration to require material terms of an order, such as order type, to be collected by the central repository.[211] However, the Rule does not enumerate specific order types or prescribe the format or nature of how this information would be represented. This would be left to the SROs developing the NMS plan and allows flexibility for the future, when new order types may be introduced and added, if appropriate.

Similarly, in response to the commenter stating that implementing the consolidated audit trail through an NMS plan would be ''difficult and inefficient'' given the need to respond and adapt quickly to new ways of trading and handling orders,[212] the Commission notes that, while the NMS plan submitted to the Commission for its consideration must contain the minimum necessary elements for the consolidated audit trail, and any amendments to an effective NMS plan initiated by plan sponsors will require approval by Commission order, the SROs should have flexibility to accommodate a variety of technological and other market developments without amending the NMS plan (*e.g.,* through the issuance and updating of technical specifications that are reasonably and fairly implied by the NMS plan). Underscoring this need to ensure the consolidated audit trail is regularly updated to remain compatible with best market practices, the Commission, as discussed in Section III.C.2.a.i., also has added general requirements to Rule 613 with regards to SROs monitoring and planning for the technological evolution of the consolidated audit trail. Further, as noted in Section III.B.3 below, the NMS plan must include a governance structure for the central repository that is designed to ensure efficient decision-making.

The Commission has also considered the comment that recommended that the Commission should leave it to the SROs, securities information processors (''SIPs'') and vendors to develop the specifications for the data elements in the NMS plan.[213] The Commission agrees in principle with the commenter, and believes that market participants other than SROs also could have valuable insights regarding the design of the specifications for the data elements, the central repository, and other aspects of the Rule. To address this concern, the adopted Rule requires the SROs to explain in the NMS plan the process by which they solicited views of their members regarding the creation, implementation, and maintenance of the consolidated audit trail, a summary of the views of such members, and how the plan sponsors took such views into account in preparing the NMS plan.[214] In addition, the Rule requires the NMS plan submitted to the Commission for its consideration to provide for the creation of an Advisory Committee to afford SRO members, and other interested parties as permitted by the NMS plan,[215] the opportunity to have input on the creation, implementation, and maintenance of the consolidated audit trail.[216] The Commission also notes that nothing in the Rule precludes the SROs, as plan sponsors, from consulting with others, including the SIPs and vendors, as they craft the NMS plan. Finally, pursuant to Rule 608(b)(1), the NMS plan will be published for public comment.[217] Thus, all interested persons, including market participants, regulatory authorities, and the general public, will have an opportunity to provide meaningful comments on the details and costs of the NMS plan submitted to the Commission, which the Commission will review and consider.

In response to the commenter that believed that the objectives of the consolidated audit trail could be achieved ''with a 'few tweaks' to the existing trade reports and by extending OATS,'' [218] the Commission notes, as described above, that existing trade reports and the current OATS process combined do not meet many of the requirements the Commission believes are essential for a consolidated audit trail. The Commission therefore believes that an NMS plan, as noted above, provides an effective mechanism for the SROs to create, implement, and maintain a consolidated audit trail meeting such requirements. However, it also notes that the adopted Rule does not preclude the infrastructure, nomenclature, format, or any other aspects of an existing order audit trail system, such as OATS, from being used for the consolidated audit trail, provided the NMS plan proposing to establish such an audit trail otherwise meets the requirements of Rule 613. The Commission stresses that existing order audit trails lack critical information such as the identity of the customer, data on principal orders or quotes, and a way to link orders across markets—information that the Commission believes is essential to the consolidated audit trail.[219]

[208] 17 CFR 242.608. *See* Rule 613(a)(2).

[209] *See* Thomson Reuters Letter, p. 2.

[210] *See* Section I., *supra;* Sections III.B., III.C., *infra.*

[211] *See* Section III.B.1.d.i.(A)., *infra.*

[212] *See* FINRA Letter, p. 15.

[213] *See* CBOE Letter, p. 7.

[214] *See* Rule 613(a)(1)(xi).

[215] *See* Rule 613(b)(7)(i). Because members of the SROs will be required to report data pursuant to the NMS plan, the Rule provides that the plan must require that the Advisory Committee include representatives of the member firms of the SROs. However, the Commission believes that it is advisable for the SROs to consider including other interested parties such as SIPs, vendors, investors, and/or academics on the Advisory Committee. In addition, the Commission expects that the Advisory Committee would include the Commission's Chief Technology Officer as an observer. *See* Section III.B.3.b., *infra.*

[216] *See* Rule 613(b)(7).

[217] 17 CFR 242.608(b)(1).

[218] *See* Angel Letter, p. 3.

[219] *See* Section II.A., *supra.* The Commission notes that, in the Proposing Release, it used the term ''proprietary orders'' to describe orders that were generated for the account of a broker-dealer. *See* Proposing Release, *supra* note 4, at 32570.

To avoid confusion with the proposed ''Volcker Rule,'' which proposes new regulations with respect to ''proprietary'' trading by commercial

B. Elements of the NMS Plan

As discussed above, the adopted Rule requires the SROs to submit an NMS plan to create, implement, and maintain a consolidated audit trail.[220] As adopted, the Rule permits the SROs to consider a wider array of solutions, in creating, implementing, and maintaining a consolidated audit trail. The Rule, however, also sets forth certain minimum requirements of the consolidated audit trail that must be included in the NMS plan submitted by the SROs to the Commission for its consideration. The Commission believes that it is important to set forth certain minimum requirements to ensure that the consolidated audit trail will be designed in a way that provides regulators with the accurate, complete, accessible, and timely market activity data they need for robust market oversight. The minimum audit trail requirements that must be included in the NMS plan submitted by the SROs are discussed below.

1. Recording and Reporting

a. Products and Transactions Covered

As proposed, Rule 613 would have applied to secondary market transactions in all NMS securities, which includes NMS stocks and listed options.[221] In the Proposing Release, the Commission also addressed the possibility of expanding the scope of the consolidated audit trail over time. Specifically, proposed Rule 613(i) would have required the NMS plan to include a provision requiring each national securities exchange and national securities association to jointly provide to the Commission, within two months after effectiveness of the NMS plan, a document outlining how such exchanges and associations would propose to incorporate into the consolidated audit trail information with respect to equity securities that are not NMS securities, debt securities, primary market transactions in NMS stocks, primary market transactions in equity securities that are not NMS securities, and primary market transactions in debt securities. The document also would have been required to identify which market participants would be required to provide the additional data and to include an implementation timeline and a cost estimate for including such data in the consolidated audit trail.[222] The Commission requested comment on whether expanding the consolidated audit trail to include the products and transactions specified above was an appropriate approach to the eventual expansion of the consolidated audit trail, and, if so, an appropriate and realistic timetable for doing so.

Several commenters expressed opinions on the scope of the products and transactions proposed to be covered by the Rule and how their inclusion in the consolidated audit trail should be phased in under the Rule.[223] One commenter urged the Commission to consider including additional asset classes in the scope of the products covered by the Rule, and specifically questioned the value of the consolidated audit trail without the inclusion of information on futures and other derivatives.[224]

The Commission also received comment on the proposed Rule's approach for considering a possible future expansion of the products and transactions covered by the consolidated audit trail. One commenter believed that its technology would allow development of a platform that would support multiple asset classes and expansion of the consolidated audit trail for use by other regulators.[225] Other commenters expressed general support for expanding the scope of products covered.[226] One specifically suggested expanding the scope of the Rule, for example, to include the ''creation of instruments that underlie the securities that make up [mortgage-backed securities] and [asset-backed securities].'' [227] Another suggested expanding the consolidated audit trail to all securities submitted to an exchange or clearing agency.[228] Yet another commenter, however, argued against allowing the exchanges, through the NMS plan, to have primary responsibility for specifying the data requirements of non-exchange-traded asset classes, stating that exchanges lacked experience with these instruments.[229]

The Commission has considered the comments discussed above and is adopting the Rule as proposed with respect to the scope of the securities that must be covered at this time, but, as described below, acknowledges the importance of a mechanism for considering other types of products in the future. Specifically, the adopted Rule requires that consolidated audit trail data be collected for all NMS securities.[230] However, the Commission also is adopting the requirement that the NMS plan require the SROs to jointly submit a document outlining a possible plan for expansion of the consolidated audit trail, as proposed, but with three modifications from the proposed Rule.

Rule 613(i) requires that the SROs jointly provide the Commission a document outlining how the SROs could incorporate the following additional products into the consolidated audit trail: Equity securities that are not NMS securities, debt securities, primary market transactions in equity securities that are not NMS securities, and primary market transactions in debt securities (''expansion document''). The adopted Rule also requires the expansion document to include details for each order and reportable event that may be required to be provided, which market participants may be required to provide the data, an implementation timeline and a cost estimate. The first modification from the proposed Rule is a technical change clarifying that Rule 613(i) is requiring the SROs to provide

banks and their affiliates, the Commission is using the term ''principal orders'' in this Release to describe orders that were generated for the account of a broker-dealer. *See* Securities Exchange Act Release No. 65545 (October 12, 2011), 76 FR 68846 (November 7, 2011) (File No. S7–41–11).

[220] *See* Section I., *supra*.

[221] *See* proposed Rule 613(c)(5).

[222] The Commission notes that any expansion of the consolidated audit trail to cover non-NMS securities would be effectuated through notice and comment.

[223] *See* Liquidnet Letter, p. 2 (suggesting limiting the scope of the first phase of audit trail implementation to end-of-day-reporting to ensure that it can be completed in a timely and cost-effective manner; this commenter also recommended that the first phase apply the consolidated audit trail to all market participants, not just the SROs, as proposed). *See also* FIF Letter, p. 7 (suggesting that the consolidated audit trail cover just NMS stocks—then at a later date, all NMS securities, including options); FINRA Proposal Letter, p. 5 (suggesting several phases of expansion, beginning with NMS stocks and over-the-counter (''OTC'') equity securities, and ultimately including standardized options, fixed income securities, conventional options, and security-based derivatives in the consolidated audit trail); SIFMA Letter, p. 16–17 (believing that OATS could form the basis for the consolidated audit trail, stating that OATS should be modified to include non-Nasdaq-listed securities, listed options, quotes, street side and exchange-to-exchange routing and market making and recommending phasing in NMS stocks first, then any additional data elements, then listed options and, finally, non-NMS securities); FIF Letter II, p. 2 (suggesting that the consolidated audit trail have ''multi-instrument capabilities, most importantly options and futures but also fixed income and other instruments).

[224] *See* Broadridge Letter, p. 4.

[225] *See* Nasdaq Letter II, p. 3.

[226] *See* Liquidnet Letter, p. 2; FINRA Proposal Letter, p. 5; SIFMA Letter, p. 16–17; Marketcore Letter, p. 1.

[227] *See* Marketcore Letter, p. 1.

[228] *See* Ameritrade Letter, p. 3. *See also* Mansfield Letter, p. 1 (suggesting other data, including ''metrics'' and ''market environmental information'' to be included in the consolidated audit trail).

[229] *See* Direct Edge Letter, p. 4.

[230] *See* Proposing Release, *supra* note 4, at 32568–70; Rule 613(c)(5).

the Commission with a document that outlines how an expansion of the consolidated audit trail could be accomplished in the future and is not, at this time, requiring that the SROs commit to expanding the consolidated audit trail beyond secondary market transactions in NMS securities.[231] However, the Commission notes that Rule 613(i) retains the requirement that SROs include an implementation timeline and a cost estimate; in this regard, the Commission expects that the SROs will address fully in the expansion document how any such expansion of the consolidated audit trail could be implemented in practice, and that such document would include sufficient detail for the Commission to ascertain how the SROs could proceed with such expansion. The Commission would expect to make the expansion document publicly available on its Web site and to solicit a wide range of comment on it to further inform and facilitate the expansion of the consolidated audit trail if appropriate, taking into account the relevant considerations contemplated by Rule 613(a)(1). In addition, the expansion document could inform the detailed plans that are to be prepared at least every two years by the CCO of the NMS plan.[232]

In addition, after considering the comments received relating to the potential expansion of the consolidated audit trail and how such an expansion might occur,[233] the Commission is making the second modification to the proposed Rule to extend the deadline for submitting the expansion document from two months to six months from the date of effectiveness of the NMS plan approved by the Commission. The Commission believes that the additional four months will provide the time necessary after the approval of the NMS plan by the Commission for the SROs to consider how they might expand the consolidated audit trail to capture orders and trading in these additional securities and thus will aid the Commission in receiving an outline or plan from the exchanges and associations that has had the benefit of additional time for analysis and planning. Finally, given the extension of the deadline for submitting the expansion document and the importance of information regarding primary market information in NMS stocks relative to other types of transactions as discussed in Section III.B.1.a. below, the Commission is removing the requirement that the expansion document discuss all primary market transactions in NMS stocks and is, instead, as discussed later, requiring that a discussion of the feasibility, benefits, and costs of incorporating into the consolidated audit trail information about allocations in primary market transactions in NMS securities be addressed with the NMS plan submission.[234] However, the expansion document must still include a discussion of primary market transactions in equity securities that are not NMS securities.

The Commission agrees in principle with the commenters that advocated a phased approach to implementation.[235] The Commission, however, has determined not to modify the proposed scope of the Rule, which applies to orders in NMS securities. The Commission also adopts substantially its proposed implementation timeframes that apply if and when the NMS plan is approved,[236] except that the NMS plan may provide up to one additional year before small broker-dealers will be required to provide information to the central repository.[237]

The Commission continues to believe that the Rule's requirement to include secondary market transactions in all NMS securities (*i.e.,* both listed equities and options) is a reasonable first step in the implementation of the consolidated audit trail. In addition, the Commission believes that applying the Rule solely to NMS securities should allow for a less burdensome implementation of the consolidated audit trail as compared to applying the Rule to a broader set of securities,[238] in large part because market participants already have experience with audit trails for transactions in these securities. And, as discussed in detail above,[239] there are many significant benefits of a consolidated audit trail that includes NMS securities (even if it is only limited to NMS securities).

With regards to a phased approach to implementation, the Commission notes that the data recording and reporting requirements would apply initially, as proposed, to the SROs but not to their members. This will allow members additional time to, among other things, implement the systems and other changes necessary to provide the required information to the central repository, including capturing customer and order information that they may not have previously been required to collect. Should the SROs determine that additional implementation phases might be appropriate (*e.g.,* applying the Rule first to equities and then to listed options), the Commission notes that the Rule does not preclude the SROs from proposing such phases, so long as the outer time parameters specified in the Rule, which the Commission is adopting as proposed, are met.[240]

The Commission agrees with commenters that the inclusion of additional products (even at a later date) could further enhance the ability of the SROs and the Commission to conduct effective market oversight for financial products currently trading in the marketplace.[241] The Commission also

[231] *See* Rule 613(i). Specifically, Rule 613(i) now provides that the SROs provide a document outlining how such exchanges and associations ''could'' incorporate non-NMS securities into the consolidated audit trail, rather than how the exchanges and associations ''would propose to'' incorporate non-NMS securities; and that the exchanges and associations should provide details for each order and reportable event that ''may'' be required to be provided, and which market participants ''may'' be required to provide the data. As proposed, the comparable provision of Rule 613(i) required that the exchanges and associations should provide details for each order and reportable event that ''would'' be required to be provided, and which market participants ''would'' be required to provide the data.

[232] *See* Section III.B.3.b., *infra.*

[233] *See* Ameritrade Letter, p. 3; Liquidnet Letter, p. 2; Marketcore Letter, p. 1; FINRA Proposal Letter, p. 5; SIFMA Letter, p. 16–17.

[234] *See* Rule 613(a)(1)(vi). *See also* Section III.C.2.a.i., infra.

[235] *See* note 222, *supra.*

[236] *See* Rule 613(a)(3), which states that the NMS plan must require the plan sponsors: (i) Within two months after effectiveness of the NMS plan to select a plan processor; (ii) within four months after effectiveness of the NMS plan to synchronize their business clocks and require the members of each such exchange and association to synchronize their business clocks; (iii) within one year after effectiveness of the NMS plan to provide to the central repository the data specified in Rule 613(c); (iv) within fourteen months after effectiveness of the NMS plan to implement a new or enhanced surveillance system(s) as required by Rule 613(f); (v) within two years after effectiveness of the NMS plan to require their members, except those members that qualify as small broker-dealers as defined in § 240.0–10(c), to provide to the central repository the data specified in Rule 613(c); and (vi) within three years after effectiveness of the NMS plan to require their members that qualify as small broker-dealers as defined in § 240.0– 0(c) to provide to the central repository the data specified in Rule 613(c).

[237] *See* Section III.D., *infra.*

[238] The Commission also believes that limiting the application of the Rule initially to only NMS securities should help ensure that the implementation schedule prescribed by the Rule is achievable. *See* Section III.D., *infra.*

[239] *See* Section II.A.2, *supra.*

[240] *See* note 223, *supra.*

[241] The Commission notes that the financial markets have become increasingly interrelated, with transactions occurring in the futures markets affecting transactions in the securities markets. To the extent that instruments other than NMS securities (*e.g.,* futures on a securities index or security-based swaps) can be substitutes for trading in NMS securities, or are otherwise linked to such trading (*e.g.,* as part of a strategy that involves multiple products), having access to an audit trail that includes these instruments would improve regulators' ability to more quickly detect potentially manipulative or other illegal activity that could

believes that it could be beneficial for the consolidated audit trail to be expanded over a reasonable period of time to include information on primary market transactions in equity and debt securities, as this data could be used to quickly assess potential violations of various rules under the Exchange Act such as, for example, Regulation M and Rule 10b–5.[242] For example, the primary market transaction data would allow regulators to more quickly identify whether any participant in an offering sold short prior to the offering in violation of Regulation M. The primary market transaction data would allow for identification of the cost basis for purchases by intermediaries and make it easier to assess whether subsequent mark-ups to investors in primary offerings are fair and reasonable and, if not, whether there has been a violation of the antifraud provisions of the federal securities laws, including Rule 10b–5.

The Commission considered the comment letter that agreed that ''policing the market requires a comprehensive approach'' but asserted the exchanges should not be primarily responsible for specifying requirements relating to asset-backed securities and other debt instruments, including swap instruments that are not exchange-traded.[243] In response, the Commission notes the Rule requires the SROs to submit a document outlining a plan for the possible expansion of the NMS plan to non-NMS securities—namely debt securities and equity securities that are not NMS securities.[244] The Commission also notes that FINRA, the SRO responsible for oversight of trading in the over-the-counter market, would participate in the preparation of such expansion document, and expects that FINRA would provide substantial input as to how the consolidated audit trail might be expanded to include non-NMS securities. Because the consolidated audit trail will be jointly owned and operated by the SROs pursuant to the NMS plan, however, the Commission believes that the involvement of all of the SROs in any potential expansion process is appropriate.

The Commission also notes that any expansion of the consolidated audit trail to include transactions in non-NMS securities would be effected through public notice and comment, and take into account the relevant considerations contemplated by Rule 613(a)(1). Furthermore, adopted Rule 613(b)(7), discussed in more detail later in this Release,[245] requires the NMS plan to include an Advisory Committee, which includes members of the plan sponsors and other interested parties as set by the NMS plan,[246] that would be available to provide consultation on matters concerning the central repository, including the securities subject to the Rule. Therefore, the Commission believes that the participation of FINRA, the public, and the Advisory Committee should assist the SROs in devising a document outlining the expansion of the consolidated audit trail to other securities.

The Commission continues to believe that the expansion document required by Rule 613(i) will provide valuable information to the Commission and help inform the Commission about the likely efficacy of expanding the scope of the consolidated audit trail to include information on equity securities that are not NMS securities, debt securities, primary market transactions in equity securities that are not NMS securities, and primary market transactions in debt securities. In addition, the expansion document will aid the Commission in assessing the feasibility and impact of the plan sponsors' proposed approach.

The Commission acknowledges that plan sponsors will incur costs to prepare the expansion document. For example, plan sponsors will be required to address, among other things, details for each order and reportable event for which data may be submitted; which market participants may be required to provide the data; an implementation timeline; and a cost estimate. Thus, the plan sponsors must, among other things, undertake an analysis of technological and computer system acquisitions and upgrades that would be required to incorporate such an expansion. The Commission, however, believes that it would be beneficial to receive a document outlining how the plan sponsors could incorporate into the consolidated audit trail securities in addition to NMS securities, such as over-the-counter equity and debt securities, as soon as practicable. This is because such an expansion document will aid the Commission in assessing both the feasibility of expanding the audit trail to these additional securities, possibly including, as commenters urged, instruments that underlie mortgage-backed securities and asset-backed securities, and the resulting potential benefits to the securities markets as a whole if the consolidated audit trail is expanded in the manner described in the document submitted by the plan sponsors pursuant to Rule 613(i).

b. Orders and Quotations

As proposed, Rule 613 would have required that information be provided to the central repository for every order in an NMS security originated or received by a member of an exchange or FINRA. Proposed Rule 613(j)(4) would have defined ''order'' to mean: (1) Any order received by a member of a national securities exchange or national

occur across markets. The Commission recognizes, however, that any such expansion to include products not under the Commission's jurisdiction, and thus not contemplated by this Rule, would need to be coordinated with the CFTC or other applicable regulatory authorities, and would likely require a separate rulemaking, which would include a consideration of the costs and benefits of such an expansion. In this regard, the Commission believes that it could be beneficial to discuss with the CFTC, at the appropriate time, the possibility of including within the consolidated audit trail data relating to futures or swap products regulated by the CFTC that are based on securities. The Commission is therefore directing the Commission staff to work with the SROs, the CFTC staff, and other regulators and market participants to determine how other asset classes, such as futures, might be added to the consolidated audit trail. The information from such an expanded consolidated audit trail could benefit both the CFTC and the Commission.

An example of a non-NMS security is a security-based swap. The Commission notes that, separately, it has proposed rules requiring the reporting of security-based swap information to registered security-based swap data repositories (''SDR'') or the Commission. *See* Securities Exchange Act Release No. 63446, File No. S7–34–10 (November 19, 2010), 75 FR 75208 (December 2, 2010) (proposing Regulation SBSR under the Exchange Act providing for the reporting of security-based swap information to registered security-based SDR or the Commission, and the public dissemination of security-based swap transaction, volume, and pricing information); *see also* Securities Exchange Act Release No. 63447, File No. S7–35–10 (November 19, 2010), 75 FR 77306 (December 10, 2010) (proposing rules governing the SDR registration process, duties, and core principles).

[242] *See* 17 CFR 242.100 *et seq.;* 17 CFR 240.10b–5. Rule 105 of Regulation M prohibits the short selling of equity securities that are the subject of a public offering for cash and the subsequent purchase of the offered securities from an underwriter or broker or dealer participating in the offering if the short sale was effected during a period that is the shorter of the following: (i) Beginning five business days before the pricing of the offered securities and ending with such pricing; or (ii) beginning with the initial filing of such registration statement or notification on Form 1–A or Form 1–E and ending with the pricing. Thus, Rule 105 prohibits any person from selling short an equity security immediately prior to an offering and purchasing the security by participating in the offering.

Rule 10b–5 provides that ''[i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange, (a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.''

[243] *See* Direct Edge Letter, p. 4.

[244] *See* Rule 613(i).

[245] *See* Section III.B.3.b., *infra.*

[246] *See* note 2145, *supra.*

securities association from any person; (2) any order originated by a member of a national securities exchange or national securities association; or (3) any bid or offer.[247] In sum, the Commission proposed that the Rule cover all orders (whether for a customer or for a member's own account), as well as quotations in NMS stocks and listed options.[248]

The Commission requested comment about the scope of its proposed definition of ''order,'' including whether principal orders [249] should be included in the scope of the consolidated audit trail and whether there are any differences between orders and quotations that should be taken into account with respect to the information that would be required to be provided to the central repository. The Commission also requested comment on whether non-firm quotations should be included in the consolidated audit trail and marked to show that they are not firm.[250]

Commenters generally supported the inclusion of principal orders in the definition of ''order,'' [251] but some expressed concern about including market maker quotations in the consolidated audit trail.[252] In particular, these commenters thought that the volume of quotes proposed to be collected was so large that it would require market participants to increase the capacity of their systems that would transmit data to the central repository, and thus recommended that market maker quotations be exempted from the Rule's reporting requirements.[253] One of these commenters specifically suggested that the Rule use the same approach as is currently used for the COATS—which contains order, quote (but only the top of market quote) and transaction data for all market participants.[254]

The Commission also received two comments regarding the inclusion of non-firm orders and quotes in the consolidated audit trail. One commenter, consistent with the proposed Rule, stated that only firm orders and quotes should be included.[255] Another commenter, however, believed that the proposed Rule did not go far enough, and stated that the Rule should require that information relating to indications of interest or similar communications be reported to, among other things, assist the SROs and the Commission in detecting ''spoofing,'' [256] where a market participant enters and quickly cancels limit orders or quotations with the intent of having those non-bona fide orders or quotations change the NBBO or create a misperception of the available market liquidity to induce others to change their trading decisions.

In addition to the comments regarding inclusion of principal and non-firm orders and quotes in the consolidated audit trail, some commenters suggested ways to narrow the definition of ''order.'' One commenter would exempt ''non-trading transfers of securities within a legal entity, such as internal journals of securities within a desk or aggregation unit,'' from the mandatory reporting requirements.[257] Another commenter—an options exchange—recommended that the Commission only require consolidated NBBO data to be reported with respect to options quotations, noting that there are millions of quotes per day on its exchange and that certain options, including out-of-the-money options, are subject to a high volume of quotation updates but generate limited trading activity.[258]

The Commission considered the comments regarding the scope of the quotes and orders that should be included in the Rule's definition of ''order,'' and acknowledges that costs will be incurred by SROs and their members to record and report this information to the central repository and by the central repository to receive, consolidate, store and make accessible such information.[259] The Commission also acknowledges that requiring the recording and reporting of all quotes and orders may entail more costs, such as additional development time and storage capacity, than if the Commission did not require the recording and reporting of market maker quotes or out-of-the-money options. Nevertheless, because the Commission continues to believe that many of the benefits of a consolidated audit trail can only be achieved if all orders and quotations are included, the Commission is adopting the definition of ''order'' in Rule 613(j)(4) (renumbered as Rule 613(j)(8)), as proposed, to include orders received by a member of an exchange or FINRA from any person, any order originated by a member of an exchange or FINRA, and any bid or offer, including principal orders.[260]

The Commission believes it is important for the consolidated audit trail to capture information for all principal orders and market maker quotations because principal orders and market maker quotations represent a significant amount of order and transaction activity in the U.S. markets. Effective surveillance of their trading is critical to detecting a variety of types of potential misconduct such as manipulation and trading ahead. By providing regulators comprehensive information about principal orders and market maker quotations throughout the U.S. markets—information that is not available to regulators today using existing audit trails—the consolidated audit trail would allow regulators to efficiently surveil for manipulative and other illegal activity by market making and other proprietary trading firms. In addition, any comprehensive market reconstruction or other market analysis would need to take into account principal orders and market maker quotations—which, as noted above, constitute a large percentage of the orders and trades in today's markets—to provide a complete and accurate picture of market activity.

Furthermore, the Commission believes that including principal orders and market maker quotations in the consolidated audit trail would permit SROs to more efficiently monitor the market for violations of SRO rules. Such monitoring requires determination of the exact sequence of the receipt and execution of customer orders in relation to the origination and execution of principal orders or market maker quotations. For example, SROs would be able to use the consolidated audit trail data to more efficiently detect instances when a broker-dealer receives a customer order and then sends a principal order or quote update to an exchange ahead of the customer order, potentially violating the trading ahead prohibitions in SRO rules.[261]

In addition, information on principal orders or market maker quotations could

[247] *See* Proposing Release, *supra* note 4, at 32570; proposed Rule 613(j)(4).

[248] *Id.*

[249] *See* note 219, *supra.*

[250] *See* Proposing Release, *supra* note 4, at 32571.

[251] *See* FINRA Letter, p. 10; SIFMA Letter, p. 15; Liquidnet Letter, p. 3; FINRA Proposal Letter, p. 6.

[252] *See* SIFMA Letter, p. 13; CBOE Letter, p. 5.

[253] *See* SIFMA Letter, p. 13; CBOE Letter, p. 5.

[254] *See* CBOE Letter, p. 5. *See also* Options Settlement Order, *supra,* note 60. *See, e.g.,* Securities Exchange Act Release No. 50996 (January 7, 2005), 70 FR 2436 (order approving proposed rule change by CBOE relating to Phase V of COATS).

[255] *See* Liquidnet Letter, p. 3.

[256] *See* Ameritrade Letter, p. 3.

[257] *See* SIFMA Letter, p. 15.

[258] *See* BOX Letter, p. 3.

[259] Such costs might include the costs to purchase or build new systems and/or costs to modify existing systems to record and report the required data. As discussed in Section I., *supra,* the NMS plan would include detailed information about costs for the public and the Commission to consider.

[260] *See* Rule 613(j)(4).

[261] *See, e.g.,* FINRA Rule 5320; NYSE Arca Equities Rule 6.16.

be useful in investigating illegal ''spoofing.'' The availability to regulators of comprehensive information about principal orders and market maker quotations would allow them to more efficiently and effectively identify the source of the orders or quotations and, thus, better determine whether the quoted price was manipulated or simply a response to market forces.

A further example where information on principal orders and market maker quotations would enhance regulatory efforts is in reviewing ''layering'' or other manipulative activity. Layering is a form of market manipulation where orders are placed close to the best buy or sell price with no intention to trade in an effort to falsely overstate the liquidity in a security. Layering attempts to manipulate the shape of the limit order book to move the price of a security or influence the trading decisions of others. Layering is often effected with principal orders, so inclusion of principal orders in the consolidated audit trail would aid regulators in the detection of this manipulative practice.[262]

The Commission considered the comment that recommended excluding certain quotations, such as those generated for out-of-the-money options, from the definition of ''orders'' required to be reported to the central repository.[263] The Commission, however, believes that such quotations must be included in the consolidated audit trail. Although there may be a high volume of quotations in out-of-the-money options with limited resulting trading activity, the Commission believes that having a record of those quotations is necessary to allow regulators to surveil high-speed quoting strategies for manipulative or other illegal behavior and to assess the impact of market making and other high-frequency quoting behaviors on the quality of the markets. Including these quotations is necessary for example, because the Commission may investigate allegations of a broker-dealer engaging in the practice of flooding the market with out-of-the-money option quotations for the purpose of manipulating the price of the option or related security, or to overload exchange execution systems. Based on the foregoing, to ascertain whether any illegal activity might be occurring through the misuse of quoting, the consolidated audit trail must require all bids and offers to be collected and reported to the central repository.

The Commission also considered the comment that asserted that ''non-trading transfers of securities within a legal entity, such as internal journals of securities within a desk or aggregation unit'' should be exempt from the reporting requirements of the Rule.[264] In response to this comment, the Commission notes that Rule 613 does not require the reporting of such transfers because they are not ''orders,'' as defined under Rule 613(j)(8). However, Rule 613 does require the NMS plan to require the reporting of the internal routing of orders at broker-dealers.[265]

The Commission also considered the comment that recommended including indications of interest in the definition of ''order.'' [266] The Commission, however, is not including indications of interest in the definition of ''order'' for purposes of the consolidated audit trail because the Commission believes that the utility of the information such data would provide to regulators would not justify the costs of reporting the information. Indications of interest are different than orders because they are not firm offers to trade, but are essentially invitations to negotiate. As such, the Commission believes that indications of interest are less likely to be used as a vehicle for illegal activity, such as manipulation or layering, because they would be less likely to induce a response from other market participants.

c. Persons Required To Report Information to the Central Repository

Under proposed Rule 613(c)(5), each national securities exchange and its members would have been required to collect and provide to the central repository certain data for each NMS security registered or listed on a national securities exchange, or admitted to unlisted trading privileges on such exchange; and, under proposed Rule 613(c)(6), each national securities association and its members would have been required to collect and provide to the central repository certain data for each NMS security for which transaction reports would be required to be submitted to a national securities association. Proposed Rule 613(c)(7) would have required each national securities exchange, national securities association, and any member of such exchange or association to collect and provide to the central repository certain details, delineated in such Rule, for each order and each reportable event. The Commission requested comment on whether requiring SROs and their members to report the required order information to the central repository was appropriate.

Several commenters broadly objected to the requirement that all broker-dealers report consolidated audit trail information to the central repository and/or proposed alternatives to such a requirement.[267] One commenter suggested that introducing brokers should be permitted to rely on their clearing firms for reporting to the central repository, arguing that requiring separate reporting by introducing brokers and clearing firms ''will only dilute the economic benefits realized by Introducing Brokers through such clearing arrangements and may result in increased costs to customers.''[268] This commenter also stated that it does not believe there is appreciable benefit to the Commission, FINRA or the markets in general in mandating reporting by introducing brokers.[269]

Similarly, another commenter urged the Commission to exclude broker-dealers from the consolidated audit trail reporting requirements if they route their orders exclusively to another reporting firm that is solely responsible for further routing decisions, on the basis that this would essentially result in duplicative reporting.[270] In addition, this commenter recommended the Commission exempt small broker-dealers from the reporting requirements if compliance would be unduly burdensome.[271] Another commenter, a small broker-dealer that manually handles orders, specifically suggested that the Commission adopt a provision similar to FINRA Rule 7470, which provides FINRA staff the authority to grant exemptions to broker-dealers that solely handle orders manually from

[262] *See* Section II.A., *supra.*

[263] *See* BOX Letter, p. 3.

[264] *See* SIFMA Letter, p. 15.

[265] *See* Rule 613(c)(7)(ii)(F). The Commission notes that the NMS plan submitted by the plan sponsors would need to provide appropriate detail as to how orders routed within a single broker-dealer would be reported. For example, the NMS plan would need to address the routing of an order received by a customer-facing sales desk within a broker-dealer to a separate trading or market-making desk within the same broker-dealer that actually determines how to execute the order.

[266] *See* Ameritrade Letter, p. 3.

[267] *See* CBOE Letter, p. 5; TIAA-CREF Letter, p. 2; Wachtel Letter, p. 1; SIFMA Letter p. 13; FINRA Proposal Letter, p. 5–6; GETCO Letter, p. 3–4; Nasdaq Letter II, p. 3.

[268] *See* TIAA–CREF letter, p. 2–3. Another commenter echoed this concern and recommended that the consolidated audit trail develop a means to avoid such duplicative reporting, explaining that this is a problem with the current OATS system. *See* Wells Fargo Letter, p. 2.

[269] *See* TIAA-CREF letter, p. 2.

[270] *See* FINRA Proposal Letter, p. 5–6.

[271] *Id.*

OATS recording and data transmission requirements.[272]

Three commenters argued that broker-dealers should not be required to report quotation information to the central repository that is available from other market participants.[273] Specifically, one commenter argued that broker-dealers should not be required to report information to the central repository that has already been reported to an SRO (*e.g.,* market maker quotes) because the SRO would also be reporting the information to the central repository.[274] Another commenter stated that it ''believes that, rather than requiring quote reporting by broker-dealers, only the exchanges and FINRA (through its Alternative Display Facility and proposed Quotation Consolidation Facility) should be required to report quotations,'' and added that ''[t]he exchanges and FINRA are in a position to provide quotation information at a lower cost and with more accuracy.'' [275] Similarly, a third commenter urged the Commission to consider ''whether surveillance systems could rely on quotation information disseminated by the SROs,'' instead of requiring all quotation data to be sent separately to the repository.[276]

The Commission considered the comments objecting to the requirement that broker-dealers report all consolidated audit trail information to the central repository. However, for the reasons discussed below, the Commission is adopting the requirements as proposed with regard to the obligation of members to report required data to the central repository.[277] Specifically, the Commission is adopting Rules 613(c)(5) and (6) as proposed. Rule 613(c)(5) provides that ''[t]he national market system plan submitted pursuant to this section shall require each national securities exchange and its members to record and report to the central repository the information required by [Rule 613(c)(7)] for each NMS security registered or listed for trading on such exchange or admitted to unlisted trading privileges on such exchange,'' and Rule 613(c)(6) provides that ''[t]he national market system plan submitted pursuant to this section shall require each national securities association and its members to record and report to the central repository the information required by paragraph (c)(7) of this section for each NMS security for which transaction reports are required to be submitted to the association.''

In essence, the Commission believes these provisions are appropriate because they require each party—whether a broker-dealer, exchange or ATS—that takes an action with respect to an order, and thus has the best information with respect to that action, to record and report [278] that information to the central repository.[279] For example, the broker-dealer originating an order—whether received from a customer or generated as a principal order—is in the best position to record the terms of that order, including the time of origination, as well as the unique customer and order identifiers. If the originating broker-dealer is required to record the time each order in a rapid series of principal orders is generated, for example, regulators will be able to more accurately reconstruct the sequence of those orders for purposes of conducting market surveillances for manipulative or other illegal activity, or for performing market reconstructions. In addition, requiring the originating broker-dealer to record the time an order was received from a customer could then help regulators more accurately determine whether the broker-dealer quickly traded ahead of the customer order. On the other hand, if the recording and reporting requirements initially applied only to the executing or routing broker-dealer, or the exchange in the case of market maker quoting, regulators would not know the precise time the order or quote was originated, and would not be able to implement or perform as efficiently effective surveillances, such as those discussed above. In addition, the lack of precise order origination time could interfere with the ability of regulators to perform accurate market reconstructions or analyses, particularly with respect to high frequency trading strategies. Thus, the Commission believes that every broker-dealer (and exchange) that touches an order must record the required data with respect to actions it takes on the order, contemporaneously with the reportable event, to ensure that all relevant information, including the time the event occurred, is accurately captured and reported to the consolidated audit trail.[280]

While a broker-dealer will be required to record any actions it takes with

[272] *See* Wachtel Letter, p. 1. The Commission notes any exemptions granted by FINRA under FINRA Rule 7470 may not exceed a period of two years, unless extended. *See* FINRA Rule 7470. FINRA's authority to grant exemptions under FINRA Rule 7470 expires on July 10, 2015. *See* FINRA Rule 7470(c).

[273] *See* CBOE Letter, p. 5–6; SIFMA Letter, p. 13; GETCO Letter, p. 3–4.

[274] *See* CBOE Letter, p. 5–6 (stating its belief that ''it would be redundant for both the market makers and the exchanges to all submit this information to the CAT. We recommend that the exchanges be permitted to submit information on market maker quotes to the CAT. Market makers who submit quotes to an exchange would have no obligation other than to correctly identify themselves to the exchange as the party submitting the quotation. The exchange could add the rest of the required information (participant identifier, unique order identifier, etc.) to the quote and transmit it to the CAT'').

[275] *See* SIFMA Letter, p. 13.

[276] *See* GETCO Letter, p. 3–4. Another commenter proposed to develop a platform that would collect audit trail information from the SROs and other sources of information, and thus reduce the obligations on broker-dealers to report data. *See* Nasdaq Letter II, p. 3.

[277] *See* Rules 613(c)(5) through (7).

[278] The Commission notes that the Rule does not preclude the NMS plan from allowing broker-dealers to use a third party to report the data required to the central repository on their behalf. In particular, the Commission recognizes that introducing brokers may wish to contract with clearing broker-dealers for this purpose and that the SROs may need to amend their rules to address the allocation of responsibility between the parties. In such cases, the Commission expects that the clearing contract, as mandated by the SRO's rules, as amended, would address the allocation of responsibility for the reporting of required data.

[279] The Commission has adopted Rule 613(c)(5) and (6) using the terms ''record'' and ''report'' the required audit trail data, rather than ''collect'' and ''provide'' the required audit trail data, as proposed. *See also* Section III.B.1.e., *infra.*

[280] The Rule as adopted requires the NMS plan submitted to the Commission for its consideration to require broker-dealers and SROs to record and report to a central repository only the audit trail information for actions each took with respect to an order. For example, if a member receives an order from a customer, the member will be required to report its receipt of that order (with the required information) to the central repository. If the member then routes the order to an exchange for execution, the member will be required to report the routing of that order (with the required information) to the central repository. Likewise, the exchange receiving the routed order will be required to report the receipt of that order from the member (with the required information) to the central repository. If the exchange executes the order on its trading system, the exchange will be required to report that execution of the order (with the required information) to the central repository, but the member will not also be required to report the execution of the order. If the member executes the order in the OTC market, however, rather than routing the order to an exchange (or other market center) for execution, the member will be required to report the execution of the order (with the required information) to the central repository. In this regard, there is no duplicative reporting of audit trail information because each market participant is required to report only the audit trail data for the actions it has taken with respect to an order.

The Commission notes that, for orders that are modified or cancelled, Rule 613(c)(7)(iv) would require the broker-dealer who received the modification from a customer, for example, to report the order modification to the central repository. Thus, if broker-dealer A received a modification to a customer's order from the customer, broker-dealer A would be required to report such modification to the central repository. If broker-dealer A had already routed the customer's order to another broker-dealer (''broker-dealer B''), the customer's modification would also need to be reported by broker-dealer A to broker-dealer B. The receipt of the customer's modification by broker-dealer B would also need to be reported to the central repository, pursuant to Rule 613(c)(7)(iv). The same reporting obligations would apply if the modification were originated by broker-dealer A.

respect to an order because such recordation would capture information, particularly the time stamp, which is needed by regulators for the reasons discussed above, the Commission notes that nothing in the Rule precludes the NMS plan submitted to the Commission for its consideration from allowing an introducing broker or other broker-dealer to use a third party, such as a clearing broker-dealer, to report the data recorded by the introducing broker or other broker-dealer to the central repository.

The Commission acknowledges that SROs and their members will incur costs to record and report the audit trail data required by Rules 613(c)(5), 613(c)(6) and 613(c)(7).[281] The Commission also acknowledges that, in some instances, the information required to be recorded and reported by some market participants, for example, market makers, may indeed be available from other market participants (in the case of market makers, the exchanges) and that there might be additional costs for all market participants to record and report information. However, for the reasons noted above, the Commission believes that requiring every market participant that touches an order to record and report the required audit trail data to the central repository, and thus requiring these market participants to incur these costs is appropriate. The Commission believes that such costs will depend on the exact details of how information is to be recorded and reported to the central repository, including whether third-parties, such as clearing-brokers or exchanges, facilitate the transmission of such data. But because these costs depend on details that are not being prescribed by the Commission, Rule 613 requires that the SROs must, in their proposal of the specific mechanisms by which data will be reported to the central repository, include cost estimates of their solution, as well as a discussion of the costs and benefits of the various alternatives considered but not chosen.[282] More so, as discussed above in Section I, once the Commission receives the submitted NMS plan, it will be able to use such plan-specific details and costs estimates, as well as public comment on the NMS plan, in determining whether to approve the NMS plan.

The Commission also considered the comment that small broker-dealers should be granted an exemption from the Rule,[283] and, as discussed in Section III.D., is adopting Rule 613(a)(3)(vi), which provides that the NMS plan shall require each SRO to require small broker-dealers to provide audit trail data to the central repository within three years after effectiveness of the NMS plan, as opposed to within two years as proposed.[284] The Commission believes that completely exempting small broker-dealers from reporting requirements would be contradictory to the goal of Rule 613, which is to create a comprehensive audit trail. In effect, an exemption to small broker-dealers from the requirements of the Rule would eliminate the collection of audit trail information from a segment of the broker-dealer community and would thus result in an audit trail that does not capture all orders by all participants in the securities markets for NMS securities. The Commission notes that illegal activity, such as insider trading and market manipulation, can be conducted through accounts at small broker-dealers just as readily as it can be conducted through accounts at large broker-dealers. In addition, granting an exemption to certain broker-dealers might create incentives for prospective wrongdoers to utilize such firms to evade effective regulatory oversight through the consolidated audit trail. The Commission recognizes, however, that small broker-dealers, particularly those that operate manual systems, might be particularly impacted because of their more modest financial resources and may need additional time to upgrade to an electronic method of reporting audit trail data to the central repository, and thus believes that allowing the NMS plan to permit such broker-dealers up to an extra year to begin reporting data to the central repository if the plan sponsors believe such an accommodation is reasonable, is appropriate. The Commission believes up to an additional year could allow small broker-dealers extra time to explore the most cost-effective and most efficient method to comply with the Rule. The Commission acknowledges that permitting small broker-dealers up to three years to begin reporting the required audit trail data to the central repository will delay the ability of regulatory authorities to obtain full information about all orders from all participants, which in turn will result in delaying the full regulatory benefit of the consolidated audit trail. However, the Commission believes that such an accommodation to small broker-dealers is reasonable, given the fact that small broker-dealers may face greater financial constraints in complying with Rule 613 as compared to larger broker-dealers.[285] The Commission also notes that many small broker-dealers are introducing broker-dealers and may be able to use their clearing broker-dealers to report the data to the central repository, thereby potentially reducing some of their costs.

d. Reportable Events and Consolidated Audit Trail Data Elements

As proposed, Rule 613 would have required SROs and their respective members to provide certain information regarding each order and each ''reportable event'' to the central repository. A reportable event would have been defined in proposed Rule 613(j)(5) to include, but not be limited to, the receipt, origination, modification, cancellation, routing, and execution (in whole or in part) of an order.

For the reportable event of receipt and origination of an order, proposed Rule 613(c)(7)(i) would have required the reporting of the following data elements: (1) Information of sufficient detail to identify the customer; (2) a unique customer identifier for each customer; (3) customer account information; (4) a unique identifier that would attach to an order at the time of receipt or origination by the member; (5) a unique identifier for the broker-dealer receiving or originating an order; (6) the unique identifier of the branch office and registered representative receiving or originating the order; (7) the date and time (to the millisecond) of order receipt or origination; and (8) the material terms of the order.

For the reportable event of routing of an order, proposed Rule 613(c)(7)(ii) would have required the reporting of the following information by the member or SRO that is doing the routing, each time an order is routed: (1) The unique order identifier; (2) the date on which an order was routed; (3) the exact time (in milliseconds) the order was routed; (4) the unique identifier of the broker-dealer or national securities exchange that routes the order; (5) the unique identifier of the broker-dealer or

[281] Such costs might include the costs to purchase or build new systems and/or costs to modify existing systems to record and report the required data. As discussed in Section I., *supra,* the NMS plan would include detailed information about costs for the public and the Commission to consider.

[282] *See* Section III.C.2.iii., *infra.*

[283] *See* Wachtel Letter, p. 1.

[284] *See* Section III.D., *infra.*

[285] If a clearing broker-dealer receives an order from a small broker-dealer during the period between the time the Rule is applicable to large broker-dealers and the time the Rule is applicable to small broker-dealers, the broker-dealer performing the clearing function for the small introducing broker will be subject to only the requirements of the Plan applicable directly to the clearing broker-dealer, while the small introducing broker will not be subject to the reporting requirements at that time.

national securities exchange that receives the order; (6) the identity and nature of the department or desk to which an order is routed if a broker-dealer routes the order internally; and (7) the material terms of the order.

Rule 613(c)(7)(iii), as proposed, also would have required the collection and reporting by the SRO or member receiving a routed order of the following information: (1) The unique order identifier; (2) the date on which the order is received; (3) the time at which the order is received (in milliseconds); (4) the unique identifier of the broker-dealer or national securities exchange receiving the order; (5) the unique identifier of the broker-dealer or national securities exchange routing the order; and (6) the material terms of the order.

For the reportable events of modification or cancellation of an order, proposed Rule 613(c)(7)(iv) would have required the following data be collected and reported: (1) The date and time (in milliseconds) that an order modification or cancellation was originated or received; (2) the price and remaining size of the order, if modified; (3) the identity of the person responsible for the modification or cancellation instruction; and (4) other modifications to the material terms of the order.

For full or partial executions of an order, proposed Rule 613(c)(7)(v) would have required the following information to be collected and reported to the central repository: (1) The unique order identifier; (2) the execution date; (3) the time of execution (in milliseconds); (4) the capacity of the entity executing the order (whether principal, agency, or riskless principal); (5) the execution price; (6) the size of the execution; (7) the unique identifier of the national securities exchange or broker-dealer executing the order; and (8) whether the execution was reported pursuant to an effective transaction reporting plan or pursuant to the OPRA Plan.

The Commission received comments on the information proposed to be recorded and reported to the central repository for each reportable event (*i.e.,* the consolidated audit trail data elements) but did not receive comments on the proposed definition of reportable event in proposed Rule 613(j)(5) (*i.e.,* the events that trigger consolidated audit trail reporting requirements). However, the Commission is making clarifying changes to proposed Rule 613(j)(5) (renumbered as Rule 613(j)(9)) to define a ''reportable event'' as including the original receipt of a customer's order by a broker-dealer; the origination of an order by a broker-dealer (*i.e.,* a principal order); and the receipt of a routed order. Thus, Rule 613(j)(9), as adopted, provides that ''[t]he term reportable event shall include, but not be limited to, the original receipt or origination, modification, cancellation, routing, and execution (in whole or in part) of an order, and receipt of a routed order.'' The Commission believes these changes from the proposal are appropriate because they conform Rule 613(j)(9) to the provisions of Rule 613(c)(7). Specifically, Rule 613(c)(7) is structured around each ''reportable event;'' therefore, audit trail data is listed according to the data that must be reported upon ''original receipt or origination'' of an order (Rule 613(c)(7)(i)); ''routing'' of an order (Rule 613(c)(7)(ii)); ''receipt of an order that has been routed'' (Rule 613(c)(7)(iii)); ''modification or cancellation'' of an order (Rule 613(c)(7)(iv)); and ''execution'' of an order (Rule 613(c)(7)(v) and (vi)).

As noted above, the Commission received comments on the information proposed to be recorded and reported to the central repository with each reportable event (*i.e.,* the consolidated audit trail data elements) and, in response, is adopting the Rule with certain modifications from the proposed Rule with respect to certain of the consolidated audit trail data elements. In so adopting the Rule, the Commission acknowledges that costs will be incurred by SROs and their members to record and report this information to the central repository and by the central repository to receive, consolidate, store and make accessible such information.[286] However, the Commission believes that the costs to SRO members for reporting this information, and the costs to the central repository for collecting and storing this information, will significantly depend on the exact details of how this information will be gathered and transmitted by the various types of market participants covered by Rule 613. The Commission is therefore requiring the SROs to include as part of the NMS plan submitted to the Commission for its consideration pursuant to the Rule, details of how each of the different data elements would be recorded, reported, collected, and stored, as well as cost estimates for the proposed solution, and a discussion of the costs and benefits of alternate solutions considered but not proposed. The Commission also notes that the SROs are not prohibited from proposing additional data elements not specified in Rule 613 if the SROs believe such data elements would further, or more efficiently, facilitate the requirements of the Rule.

Once the SROs have submitted an NMS plan with these details, the Commission will be able to use this information to determine whether to approve the NMS plan. The Commission at this time is only directing the SROs to develop and submit a detailed NMS plan that includes each of the data elements. The Commission is not making a final determination of the nature and scope of the data elements to be included in the consolidated audit trail—as discussed above, these determinations will be made after the SROs submit the NMS plan, and the Commission and public have had an opportunity to consider the proposed data elements.

Rather, at this time the Commission is only making a more limited determination. The benefits the Commission and the public will receive from being able to consider the detailed costs and benefits of the specific set of data elements submitted to the Commission for its consideration pursuant to the Rule justify the costs of preparing the NMS plan with such data elements included.

A discussion of these consolidated audit trail data elements follows.

i. Material Terms of the Order

As proposed, Rule 613 would have required broker-dealers to report the material terms of the order upon origination or receipt of an order and upon routing, modification, and cancellation of an order.[287] Proposed Rule 613(j)(3) (renumbered as Rule 613(j)(7)) defined material terms of the order to include, but not be limited to, the following information: (1) The NMS security symbol; (2) the type of security; (3) price (if applicable); (4) size (displayed and non-displayed); (5) side (buy/sell); (6) order type; (7) if a sell order, whether the order is long, short, or short exempt;[288] (8) if a short sale,

[286] In particular, the Commission acknowledges that certain elements are not collected by existing audit trails and thus SROs and members would incur additional costs to record and report such information. The Commission also acknowledges that there might be additional costs with respect to assigning customer identifiers, the broker-dealer identifiers and the order identifiers because such assignments might, depending on the NMS plan, require coordination amongst various different entities and possibly further systems changes.

[287] *See* proposed Rules 613(c)(7)(i)(I), 613(c)(7)(ii)(G), 613(c)(7)(iii)(F), and 613(c)(7)(iv)(D).

[288] A broker or dealer currently must mark all sell orders of any equity security as long, short, or short exempt. *See* Rule 200(g)(1) under the Exchange Act, 17 CFR 242.200(g)(1). A sell order may be marked short exempt only if the conditions of Rule 201(c) or (d) under the Exchange Act are met (17 CFR

the locate identifier; (9) open/close indicator; (10) time in force (if applicable); (11) whether the order is solicited or unsolicited; (12) whether the account has a prior position in the security; (13) if the order is for a listed option, option type (put/call), option symbol or root symbol, underlying symbol, strike price, expiration date, and open/close; and (14) any special handling instructions.

The Commission requested comment on whether there are any items of information that are required to be recorded and reported by existing audit trail rules, or to be provided to the SROs or the Commission upon request, that were not proposed but should have been included in the Rule. One commenter suggested that two data elements be added to aid regulators in detecting the original source of orders that violate laws or are involved in market manipulations.[289] Specifically, this commenter recommended that the proposed Rule should capture the identity of the individual who originated the order (in addition to identifying the firm) and the system he or she used to originate the order.[290] Another commenter questioned the need for information regarding whether an account has a prior position in a security.[291] The commenter expressed skepticism about the value of knowing, in real time, whether the customer has a prior position in the security, since the length of time the position has been held would not be captured. This commenter also questioned how the Commission's requirement that the prior position in a security be reported would work in the situation where a client has multiple accounts but it is the first time the client has opened a position in one of the accounts.[292] Another commenter provided specific information on the exact data elements that it could incorporate into the consolidated audit trail if it were chosen as the central processor under Rule 613.[293]

The Commission considered the views of the commenter that questioned the value of knowing whether a customer has a prior position in a security. The Commission also considered the commenter's concern about potential reporting complications for clients with multiple accounts, as well as general comments urging the Commission to reduce the burdens of the Rule, and is adopting proposed Rule 613(j)(3) (renumbered as Rule 613(j)(7)) with modifications to delete certain data elements.

After considering the commenters' views, and re-evaluating the necessity of requiring certain specific data elements, the Commission has determined not to require the locate identifier (if a short sale); whether the order is solicited or unsolicited; and whether the account has a prior position in the security. The Commission believes the consolidated audit trail can still achieve significant benefits without requiring the routine recording and reporting of these specific data elements to the central repository.[294] While this information may be useful for certain investigations and market analyses, the Commission believes that this additional data could be readily obtained from a follow-up request to a broker-dealer if the other data required by proposed Rule 613(j)(3), particularly relating to the customer behind the order, is included in the consolidated audit trail. Thus, the Commission believes that it is unnecessary to require this additional data to be reported as a standard part of the consolidated audit trail. In effect, the Commission believes that the benefits of having these specific audit trail data elements are minimal. As such, the Commission does not believe the benefits to the Commission and the public to consider the detailed costs and benefits of such data elements justify the costs to SROs for including them in their NMS plan submission.

In response to the commenter who recommended that the proposed Rule should capture the identity of the individual who originated the order (in addition to identifying the firm) and the system he or she used to originate the order,[295] the Commission notes that Rule 613 defines ''customer'' as: ''(i) The account holder(s) of the account at a registered broker-dealer originating the order; and (ii) any person from whom the broker-dealer is authorized to accept trading instructions for such account, if different from the account holder(s).'' [296] The Rule does not require the identification of the individual registered representative who placed the order.[297] Further, the Commission does not believe that ''the system he or she used to originate the order'' is of significant enough regulatory value to require that information to be recorded and reported under Rule 613 at this time.

(A) Order Type

As proposed, the Rule would have required that members report the order type as an element of the material terms of an order. In the Proposing Release, the Commission explained that the proposed Rule does not specify the exact order types (*e.g.,* market, limit, stop, pegged, stop limit) that could be reported under the Rule in recognition that order types may differ across markets and an order type with the same title may have a different meaning at different exchanges.[298] The Commission also noted that markets are frequently creating new order types and eliminating existing order types. Thus, the Commission preliminarily believed that it would not be practical to include a list of order types in the proposed Rule as part of the required information to be reported to the central repository.

The Commission received one comment in response to its request for comment on its proposed approach to handling order types. This commenter believed that the Commission did not think that order types were needed for the consolidated audit trail, and argued that this information is ''essential for any attempts to use the order data to reconstruct the state of the limit order book at any point in time.'' [299] The Commission agrees that information about an order's type is important and notes that the Rule, as proposed, did require order types to be reported.[300] Thus, the Commission is adopting the Rule, as proposed, to require plan sponsors to include in the NMS plan submitted to the Commission for its consideration a requirement for SROs and members to report the order type as an element of the material terms of an order. The Rule, however, does not provide an exhaustive list of order types, as the Commission continues to believe that it is not feasible to do so in its Rule, for the reasons stated in the Proposing Release.[301] Rather, the Commission believes the plan sponsors should be responsible for determining how to describe and categorize specific order types in the NMS plan or in the NMS plan's technical specifications, as there is more flexibility to amend such

242.201(c) and (d)). *See* Rule 200(g)(2) under the Exchange Act, 17 CFR 242.200(g)(2).

[289] *See* Kumaraguru Letter, p. 1.

[290] *Id.*

[291] *See* Ameritrade Letter, p. 3.

[292] *Id.*

[293] *See* FINRA Proposal Letter, Appendix A.

[294] *See* Section II.A.2., *supra.*

[295] *See* Kumaraguru Letter, p. 1.

[296] *See* Rule 613(j)(3); *see also* Section III.B.1.d.iii.(C).(2)., *infra* (discussing the definition of ''customer'' as applied to investment advisers).

[297] *See* Section III.B.1.d.ii., *infra,* for a discussion of the proposed requirement to report the unique identifier of the registered representative receiving or originating an order.

[298] *See* Proposing Release, *supra* note 4, at 32575.

[299] *See* Angel Letter, p. 2–3.

[300] Order type information is important because it reflects the intention of the person originating an order with regard to how an order should be handled, and also provides information regarding the potential impact of orders on the market.

[301] *See* Proposing Release, *supra* note 4, at 32575.

documents and the SROs would have the most familiarity with the variations among the order types on their markets. The Commission notes that specific order types may differ across markets, and even an order type with the same title may have a different meaning at different exchanges. Further, SROs regularly develop new order types to respond to changes in market structures and trading strategies, and any list of order types will likely need to be updated over time.

(B) Special Handling Instructions

The proposed Rule also would have required that that any special handling instructions be reported as part of the material terms of an order.[302] The Commission specifically requested comment in the Proposing Release on whether the Rule should require, as part of the disclosure of special handling instructions, the disclosure of an individual algorithm that may be used by a member or customer to originate or execute an order, and, if so, how such an algorithm should be identified. The Commission received one comment noting the importance of requiring the special handling instructions to be included in the consolidated audit trail.[303] This commenter believed that special handling instructions were important for reconstructing the limit order book.[304] Regarding algorithms, commenters generally were not in favor of unique identifiers for algorithms.[305] One commenter urged against requiring customer information at the level of ''individual strategy, trading desk, or particular algorithm * * *.''[306] Another commenter stated that the proposed rule should not require that unique customer identifiers be affixed to computer algorithms.[307] This commenter pointed out that algorithms change daily, which would result in uncertainty about whether new identifiers are needed. Further, the commenter argued that firms would need to develop safeguards to ensure proprietary algorithms and trading strategies are not appropriated by competitors. This commenter suggested that, instead of requiring a unique customer identifier, the Commission could require that a ''flag'' be appended to orders generated by an algorithm.

The Commission agrees with the commenter that supported the proposed requirement that special handling instructions be reported[308] and is adopting this requirement as proposed.[309] The Commission believes that such information will be useful to regulators in attempting to recreate an SRO's limit order book for market reconstructions. When performing market reconstructions, it is important for regulators not only to have information regarding what orders were on the book, but the conditions or special instructions attached to those orders. Such information can be of key importance in determining the amount of accessible liquidity at any price point and whether or not certain orders were entitled to be executed at various price levels.

Additionally, the Commission considered the comments received regarding whether an individual algorithm should be reported and identified as part of an order's special handling instructions, and has determined not to adopt that requirement in recognition that algorithms change frequently and therefore it may be difficult to determine when and if new algorithm identifiers are necessary. The Commission also considered one commenter's concern regarding the proprietary nature of algorithms and the risk of competitors appropriating algorithms if they were required to be identified in the consolidated audit trail. However, the Commission notes that, because the disclosure of whether an order is a result of an algorithm that makes trading decisions based on a programmed investment strategy might be useful for the Commission and the SROs to sort or filter trade data to re-construct market events or to better evaluate potentially manipulative behavior or intent, the SROs may want to consider whether it would be feasible to include a ''flag'' or other indicator that would reveal whether an order was the result of an algorithmic trading calculation. Such a flag would not identify the actual algorithm used, but could instead indicate whether the order was the result of an algorithmic trade. Appending such a ''flag'' or indicator may aid regulatory authorities in their efforts to make preliminary assessments about market activity and better allow the SROs and the Commission to monitor the usage of algorithms over time. The Commission acknowledges that by not requiring that algorithms be recorded and reported to the central repository, the consolidated audit trail may not contain an audit trail data element that might prove useful to regulatory authorities. The Commission, however, believes that, should regulatory authorities need such information, regulators can submit a request for this information and obtain the information about whether the order was the result of an algorithm readily from the broker-dealer that handled the order.

ii. Unique National Securities Exchange, National Securities Association and Broker-Dealer Identifiers

The Commission proposed to require each member originating or receiving an order from a customer, and each national securities exchange, national securities association, and member that subsequently handles the order to report its own unique identifier to the central repository. Proposed Rule 613(c)(7)(i)(E) (renumbered as 613(c)(7)(i)(C)) would have provided that any member of an SRO, that originally receives from a customer or originates a principal order, shall collect and electronically report ''the unique identifier of the broker-dealer receiving or originating the order.'' Similarly, proposed Rule 613(c)(7)(ii)(D) provided that the SRO or any member of such SRO that routes an order shall collect and electronically report ''the unique identifier of the broker-dealer or national securities exchange routing the order.'' Proposed Rule 613(c)(7)(ii)(E) provided that the SRO or any member of such SRO routing an order shall collect and electronically report ''the unique identifier of the broker-dealer or national securities exchange receiving the order.'' Proposed Rule 613(c)(7)(iii)(D) provided that the SRO or any member of such SRO that receives an order shall collect and electronically report ''the unique identifier of the broker-dealer or national securities exchange receiving the order.'' Proposed Rule 613(c)(7)(iii)(E) provided that the SRO or any member of such SRO that receives an order shall collect and electronically report ''the unique identifier of the broker-dealer or national securities exchange routing the order.'' Proposed Rule 613(c)(7)(iv)(E) required, for a modification or a cancellation of an order, the identity of the person giving such instruction. Proposed Rule 613(c)(7)(v)(F) provided that the SRO or any member of such SRO that executes an order in whole or part report ''the unique identifier of the broker-dealer or national securities

[302] *See* proposed Rule 613(j)(3).

[303] *See* Angel Letter, p. 2–3.

[304] *Id.*

[305] *See* Managed Funds Association Letter, p. 2; SIFMA Letter, p. 11; SIFMA Drop Copy Letter, p. 2.

[306] *See* Managed Funds Association Letter, p. 2.

[307] *See* SIFMA Letter, p. 11. SIFMA subsequently submitted an alternative proposal that did not include a flag for algorithms, citing lack of clarity in the Commission's definition of algorithmic order, and stating that the FIX standard lacks existing fields to flag such orders. *Id.* at 2.

[308] *See* Angel Letter, p. 2–3.

[309] *See* Rule 613(j)(7).

exchange executing the order.'' Further, the Commission proposed to require a member receiving an order from a customer to report, if applicable, ''the unique identifier of the branch office and the registered representative receiving or originating the order.'' [310]

Commenters generally supported the proposed use of unique identifiers for exchanges and broker-dealers.[311] One commenter explained that cross-market surveillance efforts are unduly complicated if a single market participant has a different identifier for each market, and stated that the current market participant identifier (''MPID'') system needed to be updated.[312] This commenter, however, questioned whether it was necessary for branch office and registered representative information to be included in the consolidated audit trail, stating that the information would increase the amount of data reported to the consolidated audit trail, but would be useful only in certain circumstances.[313] In another letter, the same commenter proposed to use Central Registration Depository (''CRD'') numbers to uniquely identify broker-dealers.[314] Under this system, the commenter suggested that SROs would be required to link the CRD numbers to unique MPIDs to create a cross-referenced database, so that data could be searched and retrieved at the firm level (by CRD number) or by the unique market center identifiers used by firms for each transaction on a specific market center.[315] For activity not occurring on a national securities exchange, the commenter proposed continued reporting with MPIDs currently used for OATS reporting.[316] Another commenter supported the use of MPIDs as unique identifiers for broker-dealers, suggesting that the MPIDs of the firms originating each order should be added to the trade report, but stated that only FINRA and the Commission should be allowed to access this information.[317]

After considering commenters' views requesting additional flexibility with respect to the unique identifiers requirement for national securities exchanges, national securities associations, and members, the Commission has determined to adopt the Rule to require plan sponsors to include in the NMS plan submitted to the Commission for its consideration a requirement for such unique identifiers, substantially as proposed. The Commission, however, has made two technical changes to the Rule text from the proposal to: (1) Add a defined term, ''CAT–Reporter-ID,'' in adopted Rule 613(j)(2) to refer to these unique identifiers, and (2) expressly permit that a ''code'' be used that uniquely and consistently identifies the national securities exchange, national securities association, or member. Specifically, adopted Rule 613(j)(2) provides that ''[t]he term CAT–Reporter-ID shall mean, with respect to each national securities exchange, national securities association, and member of a national securities exchange or national securities association, a code that uniquely and consistently identifies such person for purposes of providing data to the central repository.''

In response to the commenters that stated that firms' current MPIDs or CRD numbers may work as a viable unique broker-dealer identifier, the Commission believes it is appropriate to leave the decision of whether to specify an existing identifier, such as a firm's MPID or CRD number, or some other identifier such as one created under the unique legal entity identifier (LEI) standard under development by the International Standards Organization (''ISO'') (ISO 17442),[318] as the unique broker-dealer identifier, to the plan sponsors to assess and propose in the NMS plan. Therefore, while the adopted Rule continues to require the NMS plan to require these unique identifiers, the Rule does not specify which identifier to use, nor does the Rule specify the process for assigning unique broker-dealer identifiers.[319] In this regard, the Commission expects the plan sponsors to establish a process, to be described in the NMS plan, by which every national securities exchange, and every member of a national securities exchange or national securities association, can obtain a CAT–Reporter-ID.

The Commission also is adopting, substantially as proposed, rules requiring the NMS plan submitted to the Commission for its consideration to require each SRO and its members to report the unique identifier of the broker-dealer or SRO for each reportable event in the life of an order to the central repository, except to make two technical changes: to include the new defined term, ''CAT–Reporter-ID'' and to require the CAT–Reporter-ID or Customer-ID, if applicable, of the person giving a cancellation or modification instruction.[320] Specifically, Rule 613(c)(7)(i)(C), as adopted, provides that any member of an SRO that originally receives from a customer or originates a principal order shall record and report ''[t]he CAT–Reporter-ID of the broker-dealer receiving or originating the order.'' Rule 613(c)(7)(ii)(D) provides that any national securities exchange or

[310] *See* Proposed Rule 613(c)(7)(i)(F).

[311] *See* SIFMA Letter, p. 12; Liquidnet Letter, p. 6; FINRA Letter, p. 4; FINRA Proposal Letter, p. 6.

[312] *See* FINRA Letter, p. 4 (explaining that ''multiple firms can currently be represented by a single MPID that is used for market access arrangements and is assigned to another firm that has no direct relationship to the trading activity being reported under that MPID''). This commenter also supported the use of more specific ''sub-identifiers'' to allow regulators to distinguish between desks or trading units within a firm.

[313] *Id.* at p. 9. FINRA also requested that the Commission reconsider the need for reporting the identification of the beneficial owner, the identification of the person exercising investment discretion, and the unique identifier of the branch office and registered representative. For further discussion of this comment, *see* note 170 *supra* and accompanying text.

[314] *See* FINRA Proposal Letter, p. 6, 13. The CRD is the central licensing and registration system operated by FINRA which contains employment, qualification and disciplinary histories for securities industry professionals who do business with the public.

[315] *See* FINRA Proposal Letter, p. 6, 13.

[316] *Id.* at p. 6.

[317] *See* Angel Letter, p. 2.

[318] This standard is being developed by Technical Committee 68 (TC68) of ISO, in whose meetings a Commission staff representative participates. Its final publication is subject to the resolution of specific issues on implementation, operating procedures, and the need to coordinate with a global legal entity identifier initiative conducted by the global regulatory community, in which a Commission staff representative is also participating.

[319] One commenter requested the Commission consider how the Department of the Treasury's newly-created Office of Financial Research (''OFR'') would impact reporting requirements imposed by the consolidated audit trail. *See* SIFMA Letter, p. 22–23. The commenter noted that the collection powers granted to the OFR, as well as its authority to require standardized reporting of data, could affect how data is submitted to the consolidated audit trail. *Id.* at p. 22. The commenter suggested that any information that is provided to the consolidated audit trail should not be required to be provided to the OFR again or in a different format. *Id.* The Commission understands that the OFR has been participating in and encouraging efforts by interested parties to have a standard for assigning unique entity identifiers created by an internationally recognized standards body (''IRSB'') and that the ISO has issued a draft ISO standard, ISO 17442, for the financial services industry that is proposed to provide a viable global solution for the accurate and unambiguous identification of legal entities engaged in financial transactions. *See* ISO Press Release ''ISO Financial Services Standard Wins Industry Support Six Months Ahead of Publication,'' July 25, 2011. Because the ISO standard is still in draft form and issues of implementation, governance and operating procedures remain to be resolved, the Commission does not believe that it is appropriate for it to mandate the use of the ISO standard at this time. The Commission notes, however, that to the extent that unique entity identifiers become available from an IRSB, Rule 613 provides SROs with sufficient flexibility to submit, if they so chose, an NMS plan that makes use of those identifiers and requires all or some reporting parties to obtain such identifiers, assuming such identifiers otherwise meet the requirements of the Rule.

[320] *See* proposed Rule 613(c)(7)(iv)(E) (requiring the reporting of the identity of the person giving a modification or cancellation instruction for an order); adopted Rule 613(c)(7)(iv)(F) (requiring the CAT–Reporter-ID or Customer-ID of such person instead).

any member of an SRO that routes an order shall record and report ''[t]he CAT–Reporter-ID of the broker-dealer or national securities exchange routing the order.'' Rule 613(c)(7)(ii)(E) provides that any national securities exchange or member of an SRO that routes an order shall record and report ''[t]he CAT–Reporter-ID of the broker-dealer, national securities exchange, or national securities association to which the order is being routed.'' Rule 613(c)(7)(iii)(D) provides that the SRO or any member of an SRO that receives a routed order shall record and report ''[t]he CAT–Reporter-ID of the broker-dealer, national securities exchange, or national securities association receiving the order.'' Rule 613(c)(7)(iii)(E) provides that the SRO or any member of an SRO that receives a routed order shall record and report ''[t]he CAT–Reporter-ID of the broker-dealer or national securities exchange routing the order.'' Rule 613(c)(7)(iv)(F) provides that the SRO or any member of an SRO that receives an instruction to modify or cancel an order shall record and report ''[t]he CAT–Reporter-ID of the broker-dealer or Customer-ID of the person giving the modification or cancellation instruction.'' Rule 613(c)(7)(v)(F) provides that the national securities exchange or any member of an SRO that executes an order in whole or part shall record and report ''[t]he CAT–Reporter-ID of the broker-dealer or national securities exchange executing the order.'' Rule 613(c)(7)(vi)(B) provides that, if an order is executed in whole or part, a member of an SRO shall record and report ''[t]he CAT–Reporter-ID of the clearing broker or prime broker, if applicable.''

The Commission notes that CAT–Reporter-IDs will be reported to the central repository for each reportable event that the member or SRO is reporting to the central repository. The requirement to report CAT–Reporter-IDs in this manner will help ensure that regulators can determine which market participant took action with respect to an order at each reportable event. The Commission does not believe that the CAT–Reporter-ID of each member or market that touches an order needs to be tagged to and travel with an order for the life of the order, as long as the CAT–Reporter-ID of the member or exchange taking the action is reported to the central repository, and an order identifier(s) is reported at every reportable event of the order. The Commission believes the details of how these data are reported to the central repository, and the specific methodologies used by the central repository to assemble time-sequenced records of the full life-cycle of an order, is best left to the expertise of the SROs as they develop the NMS plan to be submitted to the Commission for its consideration. Instead, as adopted, Rule 613 requires that data in the central repository be made available to regulators in a linked fashion so that each order can be tracked from origination through modification, cancellation, or execution, and that the parties routing or receiving routes, or otherwise performing such actions, are identified for every reportable event.

After considering the comment opposing the requirement to report to the central repository the unique identifier of the branch office and registered representative receiving or originating an order,[321] the Commission has reconsidered the requirement in proposed Rule 613(c)(7)(i)(F) and is not adopting this requirement.[322] While this audit trail data may be useful in the context of certain investigations or market analyses, upon further consideration, the Commission believes that this information need not be required by Rule 613 because it is not critical information to help identify the customer responsible for trading a security, nor to capturing the entire life of an order as it moves from origination to execution or cancellation. In addition, the Commission believes that a requirement that a unique identifier of the branch office and registered representative receiving or originating the order be reported may not provide enough information in an initial assessment of whether illegal or manipulative activity is occurring in the marketplace to warrant that this information be required in the audit trail created by Rule 613. Further, should regulators determine that the identity of the branch office and registered representative receiving or originating the order is needed to follow-up on a specific issue, they may request the information directly from the broker-dealer as broker-dealers are required to make and keep records identifying the registered representative that receives an order pursuant to Exchange Act Rules 17a–3(a)(6)(i)[323] and 17a–4(b)(1).[324] As such, the Commission does not believe the benefits of including this information in the consolidated audit trail justify the costs to SROs for requiring them to devise a methodology to identify the branch offices and registered representatives receiving or originating an order, and a mechanism for reporting this type of data to the central repository.

iii. Unique Customer Identifier

(A) Proposed Rule

As proposed, Rule 613 would have required every SRO and broker-dealer to report a unique customer identifier to the central repository for any order originated by or received from such customer.[325] Specifically, proposed Rule 613(c)(7)(i)(B) (renumbered as Rule 613(c)(7)(i)(A)) would have required that a national securities exchange, national securities association or any member of such exchange or association that originally receives or originates an order to collect and electronically report ''a unique customer identifier for each customer.'' In the Proposing Release, the Commission noted that the unique customer identifier should remain constant for each customer, and have the same format, across all broker-dealers.[326]

The Commission requested comment on possible ways to develop and implement unique customer identifiers. For example, the Commission solicited input about who should be responsible for generating the identifier; whether a unique customer identifier, together with the other information with respect to the customer that would be required to be provided under the proposed Rule, would be sufficient to identify individual customers; and whether there were any concerns about how the customer information would be protected. The Commission specifically requested comment on what steps should be taken to ensure that appropriate safeguards are implemented with respect to the submission of customer information, as well as the receipt, consolidation, and maintenance of such information in the central repository.

(B) Comments on Proposed Rule 613(c)(7)(i)(B)

The Commission received comments that supported the general notion that identifying customers in an audit trail would be beneficial for regulatory purposes.[327] One commenter stated that a customer identifier on an order-by-order basis would ''enhance significantly the audit trails of the

[321] *See* note 313, *supra*.

[322] *See* proposed Rule 613(c)(7)(i)(F).

[323] 17 CFR 240.17a–3(a)(6)(i).

[324] 17 CFR 240.17a–4(b)(1).

[325] *See* Rule 613(j)(3) for a definition of ''customer.''

[326] *See* Proposing Release, *supra* note 4, at 32573; proposed Rule 613(c)(7)(i)(B).

[327] *See* CBOE Letter, p. 2; Managed Funds Association Letter, p. 2; FINRA Letter, p. 9; SIFMA Drop Copy Letter, p. 1; SIFMA Letter, p. 9.

markets.'' [328] Similarly, another commenter agreed that identifying the customer would be useful to regulators for purposes of market surveillance and enforcement.[329] Another commenter noted that it ''fully supports more granularity in an order audit trail, such as obtaining high-level customer identity information (*e.g.,* large trader identification), so that patterns of trading across multiple market centers can be quickly and readily identified, and [the commenter] agrees that the timeframe needed to identify customers should be greatly reduced; however, [the commenter] question[s] the utility of receiving the identity of both the beneficial owner and the person exercising the investment discretion, if different, for each and every order reported to the consolidated audit trail.'' [330]

However, other commenters disagreed with the need for a unique customer identifier and the proposed Rule's requirements for reporting a unique customer identifier with every order. These commenters generally focused on the complexity and cost of the systems changes required to implement the unique customer identifier requirement for every customer; [331] the complexity in the process for assigning unique customer identifiers; [332] the alternative ways that a customer could be identified without requiring a unique customer identifier as proposed; [333] and the concerns about how the privacy of customers might be compromised if every customer was assigned a unique customer identifier.[334]

One commenter discussed the complexity and cost of the systems changes required to implement the unique customer identifier requirement, as set forth in the Rule.[335] This commenter, who did not believe the Commission should require a unique customer identifier for every customer, noted the ''complexity of the technology development work involved'' in adding this identifier to the audit trail.[336] The commenter added that the work required to update internal architecture to report customer identifiers would be ''substantial'' because broker-dealer systems and processes may access and maintain customer (and proprietary) identification information in different ways and at different levels of specificity, and that sales and trading systems would need to be modified to report the unique customer identifiers with every order. This commenter also noted the ''significant costs'' generally associated with requiring a unique customer identifier.[337]

A few commenters also submitted their views on the complexity of the process for assigning unique customer identifiers.[338] One commenter noted that the process for assigning unique customer identifiers that the Commission discussed in the Proposing Release (*i.e.,* generating unique customer identifiers based on the input by a broker-dealer of a customer's social security number or tax identification number) would not create an administrative burden on individuals and non-broker-dealer entities.[339] Another commenter, however, noted difficulties associated with implementing a centralized process for assigning, storing and utilizing standardized customer identifiers [340] and another commenter characterized the ''implementation of a centralized customer identification system'' as a ''monumental task.'' [341] Another commenter believed that to satisfy the Rule's requirements, the industry would need to implement a completely new market-wide system to satisfy the unique customer identifier requirement, noting that this might not be feasible on the proposed timeline.[342] Another commenter characterized the collection of a unique customer identifier as a ''significant project unto itself.'' [343] One commenter observed that given the large number of retail investors (some with multiple accounts), the complexities associated with tracking retail investors' accounts, and the relatively small and infrequent amount of trading by typical retail investors, the Rule should not require unique customer identifiers for every customer.[344] Another commenter urged the Commission to specify whether the process required that a unique customer identifier be submitted at the time an order is originated or received and the procedure to be followed if an identifier is not available.[345]

A few commenters suggested alternative ways to identify a customer, rather than through a unique customer identifier.[346] One commenter suggested that customers could be identified by amending the current trade report.[347] Another commenter believed that ''sophisticated analysis could identify trading activity that *might* be coordinated, without using an account identifier, and that regulators could then perform further analysis to determine who traded by using [EBS] and other methods already available to the staff.'' [348] Another commenter noted that a possible method for identifying customers could be by linking customer information in EBS to trading information in OATS.[349] Another commenter noted that ''[i]t makes economical sense to use the current OATS and COATS audit trails and to expand those audit trails to include additional customer information, thereby providing a more complete audit trail for regulatory oversight for post trade analysis rather than building another audit trail system.'' [350]

Commenters also discussed the need for both a large trader identification number under Rule 13h–1 under the Exchange Act, the Commission's Rule implementing the large trader reporting system,[351] and a unique customer identifier under Rule 613.[352] One commenter stated that the Commission could alleviate some of the burdens of the proposed Rule, and increase the effectiveness of an identification system, if it required only large trader identification numbers to be reported instead of requiring a unique customer identifier for every customer.[353] This commenter believed that the Commission and the SROs are unlikely

[328] *See* CBOE Letter, p. 2.

[329] *See* Managed Funds Association Letter, p. 2.

[330] *See* FINRA Letter, p. 9.

[331] *See* SIFMA Drop Copy Letter, p. 1. *See also* SIFMA Letter, p. 9.

[332] *See* Liquidnet Letter, p. 4; SIFMA Letter, p. 10–11; Knight Letter, p. 2; Scottrade Letter, p. 1; Direct Edge Letter, p. 3; FINRA Proposal Letter, p. 4.

[333] *See* Angel Letter, p. 2; FIF Letter, p. 2; BOX Letter, 2.

[334] *See* SIFMA Letter, p. 10; Wells Fargo Letter, p. 3; Ross Letter, p. 1; ICI Letter, p. 3; FIF Letter, p. 2.

[335] *See* SIFMA Drop Copy Letter, p. 1. *See also* SIFMA Letter, p. 9.

[336] *Id.*

[337] *See* SIFMA Letter p. 9, 10.

[338] *See* Liquidnet Letter, p. 4; SIFMA Letter, p. 10–11; Knight Letter, p. 2; Scottrade Letter, p. 1; Direct Edge Letter, p. 3; FINRA Proposal Letter, p. 4; SIFMA Letter, p. 11.

[339] *See* Proposing Release, *supra* note 4, at 32573; Liquidnet Letter, p. 4.

[340] *See* SIFMA Letter, p. 10.

[341] *See* Knight Letter, p. 2.

[342] *See* Scottrade Letter, p. 1. *See also* Knight Letter, p. 2; Direct Edge Letter, p. 4.

[343] *See* Direct Edge Letter, p. 3.

[344] *See* FINRA Proposal Letter, p. 4.

[345] *See* SIFMA Letter, p. 11.

[346] *See* Angel Letter, p. 2; FIF Letter, p. 2; BOX Letter, p 2.

[347] *See* Angel Letter, p. 2. This commenter stated that ''[i]t would be relatively simple and cheap to add four fields to each trade report that would contain the account numbers of the buyer and seller and the Market Participant Identifier (MPID) for the original order entry firms.''

[348] *See* FIF Letter, p. 2. This commenter recommended that the requirement for such unique customer identifiers be tabled until after regulators have experience using CAT without this identifier.

[349] *See* FIF Letter, p. 2.

[350] *See* BOX Letter, p. 2.

[351] *See* Section II.A.3., *supra.*

[352] *See* SIFMA Letter, p. 11; FINRA Proposal Letter, p. 6–7.

[353] *See* SIFMA Letter, p. 11.

to be interested in routine transactions by small investors and would much more likely need accurate information about the orders of large traders because they are most likely to engage in transactions large enough to impact prices.[354] Another commenter noted that an alternative would be to only identify entities that have sponsored or direct access to market centers via a relationship with a sponsoring market participant and to identify customers whose trading activity would be required to be disclosed pursuant to Rule 13h–1.[355]

Certain commenters discussed concerns about how the privacy of customers might be compromised if every customer was assigned a unique customer identifier.[356] One commenter, noting the Commission's discussion in the Proposing Release that the unique customer identifiers could be based on a customer's social security number or taxpayer identification number, believed that the Commission's approach raises ''serious privacy concerns.'' [357] Another commenter noted that ''there is a legitimate privacy concern with having the unique customer identifier available to the marketplace, and creating a means to protect that privacy would add tremendous incremental cost to the [consolidated audit trail].'' [358] One commenter questioned how long and at what level customer information would be encrypted,[359] and another noted that ''[t]he proposal needs to clarify who will have access to customer data and how confidentiality will be ensured.'' [360]

(C) Adopted Rule

(1) Need for a Unique Customer Identifier

The Commission recognizes that the implementation of the unique customer identifier requirement may be complex and costly, and the reporting of a unique customer identifier will require SROs and their members to modify their systems to comply with the Rule's requirements. The Commission, however, believes that unique customer identifiers are vital to the effectiveness of the consolidated audit trail. The inclusion of unique customer identifiers should greatly facilitate the identification of the orders and actions attributable to particular customers and thus substantially enhance the efficiency and effectiveness of the regulatory oversight provided by the SROs and the Commission. Without the inclusion of unique customer identifiers, many of the benefits of a consolidated audit trail as described above in Section II.2. would not be achievable.

For example, unique customer identifiers will make regulatory inquiries and investigations more efficient by eliminating delays resulting from the current need to send information requests to individual market participants in search of this key information, as well as reducing the burden on regulators and market participants of such requests.[361] The identity of the customer is often necessary to tie together potential manipulative activities that occur across markets and through multiple accounts at various broker-dealers. Existing audit trails, however, do not identify the customer originating the order and thus do not allow SRO and Commission regulatory staff to quickly and reliably track a person's trading activity wherever it occurs in the U.S. securities markets. A unique customer identifier connected to each order will allow the SROs and the Commission to more quickly identify the customer that originated each order and therefore potentially more quickly and efficiently stop manipulative behavior through the submission of orders. In certain cases this might limit the losses of parties injured by malfeasance who currently may suffer losses during the weeks or months that it can currently take for regulators to obtain customer information through written requests for information.

Further, unique customer identifiers will aid regulators in reconstructing broad-based market events. Specifically, having unique customer identifiers will aid regulators in determining how certain market participants behaved in response to market conditions and may even reveal the identity of the market participant(s) who caused or exacerbated a broad-based market event. More so, unique customer identifiers would enable regulators to disaggregate the market activity of different participants in ways that could help address many important questions related to equity and equity options market structure, ranging from more detailed analyses of the potential impacts of high frequency trading, to studies of market liquidity, to trend analyses of the trading costs and general efficiency by which investors use our public markets to acquire or dispose of their securities holdings.

The Commission has considered commenters' concerns about the complexity of the process for creating and assigning unique customer identifiers and understands and acknowledges that the process of creating and assigning unique customer identifiers may not be simple and may result in additional costs to SROs and their members.[362] The Commission also considered the commenters' views that there may be alternative ways to identify the customer responsible for orders, and that, in the view of some

[354] *Id. See also* FINRA Proposal Letter, Appendix B (setting forth a method for identifying large traders through the ''registration of unique market participant identifiers rather than by requiring broker-dealers to provide the CAT processor with any large trader numbers assigned by the SEC in order reports, thereby minimizing the ability of market participants to reverse engineer a large trader's identity or trading strategy'').

[355] *See* FINRA Proposal Letter, p. 6–7.

[356] *See* SIFMA Letter, p. 10; Wells Fargo Letter, p. 3; Ross Letter, p. 1; ICI Letter, p. 2; FIF Letter, p. 2.

[357] *See* SIFMA Letter, p. 10 (noting that ''in recent years, increased concerns about identity theft and client confidentiality have led the securities industry to move away from using social security identification numbers or taxpayer identification numbers as a way to monitor clients and customers. The SEC has affirmed that it would guard access to customer social security and taxpayer identification numbers with even more safeguards than it does other information in the central repository of the consolidated audit trail. Although the SEC has a strong record of protecting investor privacy, the very presence of potentially billions of unique customer identifiers tied to personal information in a central repository would create a substantial risk of misuse and identity theft. The risk of unique customer identifiers being stolen or misused would be magnified in a real-time reporting system'').

[358] *See* Wells Fargo Letter, p. 3. However, this commenter also noted that, ''[w]hile the full panoply of privacy concerns that flow from having a unique order identifier being available to every participant in the order execution process may be difficult to assess, creating a system that has that unique identifier available for primarily the post trade review likely solves both the privacy and cost issues in a manner reasonable for both clients, market participants and regulators.'' *Id.*

[359] *See* Ross Letter, p. 1 (asking at what level of security to encrypt customer data, and for how long to encrypt it for, as well as how long the Commission would need to decrypt the customer's name—whether on a real time or overnight basis, and noting that data encryption is expensive and could enlarge message sizes.) *See also* ICI, p. 3 (suggesting that the Commission expressly state who would have access, when they could access it, and how they could use it; and also recommending requiring that all data sent to the central repository be encrypted and that certain fields be ''masked'' or that reporting of information in such fields be delayed until end-of-day to reduce concerns about leaked information being used for frontrunning).

[360] *See* FIF Letter, p. 2.

[361] Because existing SRO audit trails do not require customer information to be reported, regulators must request that information identifying the customer, often from a multitude of sources, which can result in significant delays in investigating market anomalies or violative trading. Additionally, indirect access to an exchange (such as ''sponsored access'' arrangements) also has made it more difficult to use the current EBS system and Rule 17a–25 to identify the originating customer because the broker-dealer through whom an order is sent to an exchange may not know or have direct access to information identifying the customer who originally submitted the order.

[362] *See* notes 331–334, *supra,* and accompanying text.

commenters, every individual customer need not be identified for purposes of an audit trail. As noted above, the Commission believes that the identification of each customer responsible for every order is critical to the effectiveness of a consolidated audit trail and does not agree that the commenters' alternative means of identifying a customer would be as effective as the method proposed by Rule 613. For example, the Commission considered the comment that customers could be identified by amending the trade report, but this approach would fail to identify customers associated with orders that are not executed.[363] Additionally, account numbers are assigned by broker-dealers for their own customers only, and account numbers vary between broker-dealers. Thus, the identity of a customer from a specific account number would not be apparent to regulators without the time-consuming requests for information Rule 613 specifically is seeking to avoid. The use of unique customer identifiers would permit regulators to readily trace market activity by the same customer back to that unique customer identifier even if such market activity were affected across multiple accounts and broker-dealers.

The Commission also considered the recommendations of some commenters that the consolidated audit trail should use the large trader identifier instead of a unique customer identifier.[364] The Commission, however, does not believe that the commenters' approach will address the regulatory need to obtain information on and to identify the holders of accounts for all order activity in the market for NMS securities because the use of the large trader identifier alone would identify only those traders that self-report as ''large traders'' pursuant to Rule 13h–1 and are assigned a large trader unique identifier. Thus, under the commenters' suggested approach, only a very small portion of customers—the very largest traders in the market—would be assigned a unique identifier for purposes of the consolidated audit trail. Smaller traders, however, also can be perpetrators of illegal activity, or otherwise impact the market. Accordingly, the Commission believes that information on all customers is necessary to achieve the goal of Rule 613.

Despite the wide and disparate array of views from commenters on the costs, complexities, and most efficient methodologies to generate and collect unique customer identifiers, the Commission believes that the potential benefits of including this information in the consolidated audit trail justify the costs to the SROs in requiring that they develop and include a detailed framework for unique customer identification as part of the NMS plan to be submitted for consideration by the Commission and the public. Therefore, the Commission is adopting the Rule substantially as proposed to provide that the NMS plan must require every member to report a unique customer identifier to the central repository upon origination or receipt of an order as required by Rule 613(c)(7)(i)(A). The Commission, however, is changing the term ''unique customer identifier,'' as used in the proposed Rule, to the term ''Customer-ID.'' Adopted Rule 613(j)(5) defines the term ''Customer-ID'' to mean, ''with respect to a customer, a code that uniquely and consistently identifies such customer for purposes of providing data to the central repository.'' [365]

Given the complexity and the various existing options for identifying a customer, the Commission believes that the plan sponsors, by engaging in a detailed process that combines their own expertise with that of other market participants, are in the best position to devise a methodology for, and estimate the costs of, including customer identifiers in the consolidated audit trail. Once the NMS plan was submitted, the Commission and the public would then be able to consider the details and costs of such a framework.

The Commission notes that the Rule does not specify the process for assigning the unique customer identifiers, or the format for such identifiers; rather, the Rule contemplates that the plan sponsors have the flexibility to determine the precise way to assign or ''code'' these identifiers. In this regard, the Commission expects the plan sponsors to establish a process by which every broker-dealer can, in a cost-effective manner, obtain a unique customer identifier, or Customer-ID, for each of their customer(s).[366] The Commission also expects the plan sponsors to establish a process by which unique customer identifiers are reported to the central repository, and how this information is linked to the name and address of customers as stored in the central repository. The Commission further notes that Rule 613 does not specify that unique customer identifiers must be attached to every reportable event as orders are routed from one market or broker-dealer to another, or that these identifiers are reported at the same time and fashion as other customer-identifying information. Rather, the Commission is relying on the SROs, and other market participants,[367] to develop a proposal that maximizes efficiency and security, and that data in the central repository be made available to regulators in a linked fashion so that each order, and all subsequent reportable events, can be readily traced back to one or more customers through their unique identifiers.

In response to the commenter that questioned what should happen if a unique customer identifier was not available,[368] the Commission notes that the Rule does not set out a process for addressing a situation where a unique customer identifier is not available to a broker-dealer and/or customer. Instead, the Commission believes that the plan sponsors are in the best position to address this situation as they develop the overall process for assigning unique customer identifiers. In response to the comment that requested the Commission specify whether a unique customer identifier is required to be reported at the time an order is originated or received,[369] the Commission notes that Rule 613(c)(7)(i)(A) requires that the NMS plan require that this information be recorded contemporaneously with the reportable event, but permits the reporting of the identifier by 8:00 a.m. Eastern Time on the trading day following the day such information has been recorded.[370] In addition, in response to the commenter that believed that the consolidated audit trail should identify market participants with direct or sponsored access to markets,[371] the Commission notes that under the Rule, to assure the Commission and the SROs of an accurate and complete audit trail for every action that every market participant takes with respect to an order, the sponsored party will be assigned a Customer-ID and the

[363] *See* Angel Letter, p. 2.

[364] *See* SIFMA Letter, p. 9–11; FINRA Proposal Letter, p. 4 and 6.

[365] For purposes of the following discussion, the Commission will use the terms ''unique customer identifier'' and ''Customer-ID'' interchangeably.

[366] Under the Rule, each customer would be assigned a unique customer identifier, or Customer-ID. However, an order may have more than one Customer-ID if the account holder differs from the person from whom the broker-dealer is authorized to take trading instructions or if more than one person is an account holder for the account or is authorized to give trading instructions for the account.

[367] *See* Rule 613(a)(1)(xi).

[368] *See* SIFMA Letter, p. 11.

[369] *See* SIFMA Letter, p. 11.

[370] *See* Section III.B.1.e., *infra*.

[371] *See* FINRA Letter, p. 8–9.

sponsoring broker-dealer will be assigned a CAT–Reporter ID under Rule 613.

The Commission also considered the privacy and security concerns that commenters raised with respect to the use of Customer-IDs.[372] In response to these comments, the Commission is revising proposed Rule 613, as discussed in more detail in Section III.B.2.e. below, to include additional mechanisms to safeguard the privacy and confidentiality of the audit trail data, including the Customer-ID, in large part to address the privacy concerns raised by commenters.[373] In response to the commenter that questioned when and at what level customer information would be encrypted,[374] the Commission notes that, while Rule 613 does not explicitly require that this information be encrypted, the Rule contains several safeguards to ensure the privacy and confidentiality of the audit trail data. Specifically, adopted Rule 613(e)(4) requires the NMS plan to include policies and procedures, including standards, to be used by the plan processor to ensure the security and confidentiality of all information reported to the central repository. In addition, one of the considerations the NMS plan must address is how the security and confidentiality of all information, including customer information, reported to the central repository, will be ensured.[375] Based on these provisions, the Commission believes that plan sponsors would need to make sure customer information is protected, and the plan sponsors could require such data to be encrypted.

Additionally, the Commission believes that privacy concerns also could be mitigated if the plan sponsors determine, as permitted by Rule 613, that the unique customer identifiers not travel with the order, and instead be reported to the central repository only upon the receipt or origination of an order. Therefore, if the plan sponsors make this decision, the SROs and their members will not be able to use the unique customer identifier to track the identity of a customer(s) or a customer's order flow.[376] While the unique customer identifier will be linked to information that is sufficient to identify a customer (*e.g.,* the name and address of the customer) and customer account information[377] at the central repository, this information will be accessible only by regulators for regulatory purposes.[378] The Commission also notes that the plan sponsors could determine not to require that a customer's social security number or tax identification number be used as a customer's unique identifier to the extent they believe that there are privacy and confidentiality concerns.

(2) Definition of ''Customer''

As proposed, Rule 613(j)(1) (renumbered as Rule 613(j)(3)) defined ''customer'' as ''[t]he beneficial owner(s) of the account originating the order; and [t]he person exercising investment discretion for the account originating the order, if different from the beneficial owner(s).'' The Commission received two comments regarding the inclusion of beneficial owners in the definition of customer. One commenter questioned the use of a unique customer identifier for both a beneficial owner of an account and the person exercising investment discretion, if different, and noted that if a trade comes into question, the person exercising investment discretion, not the beneficial owner, likely will be the ''first person of interest in any type of review or investigation of such trading activity.''[379] Another commenter requested further clarity regarding the definition of ''customer'' for purposes of Rule 613, and suggested that the Commission should define ''beneficial owner'' to be sure this term is applied correctly.[380] This commenter specifically stated that ''[t]he SEC should also provide a definition for the terms 'beneficial owner' and 'customer' to eliminate any doubts as to whom these labels apply. For example, is the 'customer' the entity directing the trade or the beneficial owner of the account?'' and added that, ''for registered investment advisers, the unique customer identifier should be associated with the investment adviser rather than the underlying beneficial owner. Frequently, investment advisers aggregate orders for multiple beneficial owners in 'bulk' orders that are routed together and allocated on an average-priced basis to ensure best execution.''[381]

In response to commenters' concerns about the use of the term ''beneficial owner,'' the Commission is revising Rule 613(j)(1), as proposed (renumbered as Rule 613(j)(3)), to state that ''[t]he term 'customer' shall mean: (i) [t]he account holder(s) of the account at a registered broker-dealer originating the order; and (ii) [a]ny person from whom the broker-dealer is authorized to accept trading instructions for such account, if different from the account holder(s).'' The Commission believes that the revised Rule will provide it with the customer information required to achieve the objectives of the consolidated audit trail.[382]

In adopting this revised definition, the Commission is clarifying its intent that, with respect to the ''account holder'' reference under Rule 613(j)(3), the NMS plan submitted to the Commission for its consideration must require broker-dealers to capture information on only the individuals or entities that currently are required to be recorded in the books and records of the broker-dealer pursuant to Rule 17a–3(a)(9) under the Exchange Act.[383] Because this provision does not require broker-dealers to obtain information about their account holders beyond what they are required to obtain today, the Commission believes the modification to the proposed Rule is appropriate because it will reduce the proposed Rule's burden on broker-dealers in recording and reporting information about a ''customer,'' as that term will be defined under Rule 613(j)(3). The Commission notes that, under the Rule, as adopted, for joint accounts—where two individuals are required to provide information under Rule 17a–3 of the Exchange Act for one account—information for both persons listed on the joint account would be recorded and reported under Rule 613.[384]

The Commission also believes that it is important to capture the person that has authority to give trading instructions to a broker-dealer for an account, if different from the account holder, because such person likely will be of interest in a review or investigation of activity in such account.

[372] *See* ICI Letter, p. 2–4; SIFMA Letter, p. 10–11; Angel Letter, p. 2; Ross Letter, p. 1.

[373] *See* Section III.B.2.e., *infra.*

[374] *See* Ross Letter, p. 1.

[375] *See* Rule 613(a)(1)(iv).

[376] *See also* Section III.B.2.e., *infra,* for a discussion of the provisions in the NMS plan designed to protect the privacy and confidentiality of the consolidated audit trail data.

[377] *See* Rule 613(j)(4).

[378] *See* Rule 613(e)(2). *See also* Section III.B.2.d., *infra.*

[379] *See* FINRA Letter, p. 9.

[380] *See* SIFMA Letter, p. 11.

[381] *Id.*

[382] The Commission also notes that it retains the authority to request additional information from broker-dealers (and other market participants it regulates) where information about a customer of a broker-dealer beyond that required by Rule 613(j)(3) is needed to fulfill its mission.

[383] Rule 17a–3(a)(9), among other things, requires a broker-dealer to make and keep a record of the name and address of the ''beneficial owner'' of each cash or margin account with the broker-dealer. 17 CFR 240.17a–3(a)(9). Rule 613 is not intended to alter in any way the information that a broker-dealer is currently required to obtain under Rule 17a–3(a)(9).

[384] The Commission notes that, under Rule 613, both joint account holders would also receive their own unique customer identifier.

Thus, the Commission is modifying the proposed Rule to clarify its intent that under Rule 613 the NMS plan also must capture, in the definition of customer, ''[a]ny person from whom the broker-dealer is authorized to accept trading instructions, if different from the account holder(s).'' [385] Knowing the identity of the person who is authorized to give the broker-dealer trading instructions for an account, whether the account holder or an adviser or other third party, is a vital component in the investigative process. Further, when investigating violations of the federal securities laws, it is important to promptly identify all potentially relevant parties who may have made trading or investment decisions, which could include both the person authorized to give the broker-dealer trading instructions for such account and the account holder.[386]

Pursuant to the revised definition of ''customer'' under adopted Rule 613, for example, if an order is entered to buy or sell securities for the account of an investment company or other pooled investment vehicle (a ''fund''), the Rule will capture, in the definition of customer, the fund itself or, if the account at the broker-dealer is held only in the name of the fund's investment adviser from whom the broker-dealer is authorized to accept trading instructions, the Rule will capture the investment adviser.[387] If the account at the broker-dealer is held in the name of the fund itself, the Rule will capture both the name of the fund (pursuant to Rule 613(j)(3)(i)), as well as the name of the fund's investment adviser from whom the broker-dealer is authorized to accept trading instructions (pursuant to Rule 613(j)(3)(ii)). In addition, if an adviser enters an order on behalf of clients that each maintain separate accounts at the broker-dealer originating the order, using those accounts, the Rule would capture both the adviser—as the person providing trading instructions to the broker-dealer (pursuant to Rule 613(j)(3)(ii))—and the clients, who are the account holders at the broker-dealer (pursuant to Rule 613(j)(3)(i)). If an adviser instead enters an order to buy or sell securities using its own account held at the broker-dealer originating the order, the Rule would capture the adviser (pursuant to Rule 613(j)(3)(i)) but would only capture any client accounts to which the adviser allocates executed trades (pursuant to Rule 613(c)(7)(vi)) if those client accounts were held separately at the same broker-dealer as well.

Furthermore, in cases where multiple individuals in the same trading firm transact through a single account maintained at a broker-dealer in the name of that trading firm, the Rule will require the NMS plan to require recording and reporting of the Customer-ID of the trading firm associated with that account, and not the Customer-IDs of the individual traders who had placed the orders.[388] The Commission understands that in some cases broker-dealers may have knowledge of the individual traders transacting within the same firm-wide account, and may even provide reports to the firm holding the account that summarizes trade activity according to individual trader. Because such information is not captured by the Rule, but may be useful in informing regulators about the potential manipulative activities, the SROs may wish to consider how such information might be incorporated into the consolidated audit trail in the future.

The Commission is also modifying a related provision of the Rule, Rule 613(c)(7)(i)(A), to reflect that more than one Customer-ID must be provided upon original receipt or origination of an order if the account holder and the person authorized to give the broker-dealer trading instructions for such account are different or if more than one person is an account holder for the account (such as, for example, joint account holders). Specifically, Rule 613(c)(7)(i)(A) provides that ''Customer-ID(s)'' (*i.e.,* multiple Customer-IDs) must be provided for each customer, if that is applicable. In addition, the Commission notes that every ''customer,'' as defined by Rule 613(j)(3) will be assigned a Customer-ID; thus, two Customer-IDs maybe associated with one order under the Rule.

iv. Unique Order Identifier

As proposed, the Rule would have required the NMS plan to require each member of an exchange or FINRA to attach, to each order received or originated by the member, a unique order identifier that would be reported to the central repository and that would remain with that order throughout its life, including routing, modification, execution, or cancellation. Specifically, proposed Rule 613(c)(7)(i)(D) (renumbered as Rule 613(c)(7)(i)(B)) would have provided that the national market system plan shall require each national securities exchange, national securities association, and any member of such exchange or association to collect and electronically provide to a central repository details for each order and each reportable event, including, but not limited to, ''a unique identifier that will attach to the order at the time the order is received or originated by the member and remain with the order through the process of routing, modification, cancellation, and execution (in whole or in part).'' In the Proposing Release, the Commission stated that the use of such an identifier would allow the SROs and the Commission to efficiently link all events in the life of an order and help create a complete audit trail across all markets and broker-dealers that handle the order.[389] Proposed Rules 613(c)(7)(ii)(A), 613(c)(7)(iii)(A), and 613(c)(7)(v)(A) would have required the reporting of a unique order identifier to the central repository for the reportable events of routing and execution. The Commission did not propose to mandate the format of such an identifier or how the identifier would be generated.

The Commission requested comment on whether a unique order identifier that would remain with the order for its life would be necessary or useful for an effective consolidated audit trail. The Commission also specifically requested comment on, among other things, the feasibility and merits of its proposed approach for attaching a unique order identifier to an order, as well as on how multiple ''child'' orders that may result if the original ''parent'' order is subsequently broken up, or an aggregation of multiple original orders into a single order, should be addressed.

Several commenters expressed opinions on the proposed unique order identifier requirement, with some noting that the Commission's proposal imposed ''significant'' burdens or challenges on market participants, and others offering alternatives to the

[385] *See* Rule 613(j)(3)(ii).

[386] For the purpose of Rule 613(j)(3), natural persons who are employed by an entity that is an account holder, and who are authorized to trade for that account, are not considered different from the account holders, and are therefore not covered by Rule 613(j)(3)(i).

[387] Pursuant to the definition of ''customer'' under adopted Rule 613, the Rule would not capture owners of a fund because they are not the account holders at the broker-dealer.

[388] This is because, for the purpose of Rule 613(j)(3), natural persons who are employed by an entity that is an account holder, and who are authorized to trade for that account, are not considered different from the account holders, and are therefore not covered by Rule 613(j)(3)(ii).

If an individual creates and operates two separate entities (as an employee of each such entity) that each maintain a trading account at one or more broker-dealers, the broker-dealers would be required to record and report the Customer-IDs of those entities, and not the customer ID of the individual trader.

[389] *See* Proposing Release, *supra* note 4, at 32576.

Commission's approach to identifying orders.[390] For example, some commenters suggested that the Rule permit the approach used for OATS reporting, in which the broker-dealer initiating or receiving an order would generate its own order identifier, but pass on a separate routing identifier to the entity to which it routes the order, which would generate its own order identifier, but retain and report that routing identifier as well, so that information about the order can be linked together as it is passed from venue to venue.[391] One of these commenters also believed that the OATS approach would avoid certain complexities that could occur with a unique order identifier, such as when the original order is broken up into multiple ''child'' orders.[392] In a subsequent comment letter, the commenter stated that it could require two new order event types that would allow customer orders handled on a riskless principal or agency basis to be linked to the related representative orders.[393] Another of the commenters suggested that ''the adopted CAT filing should require that an order be tracked through its lifecycle and [the Commission should] leave the technical details to [a] requirements analysis.'' [394]

Another commenter was concerned that, if the originating firm's or customer's name was used as part of the unique order identifier, this could create ''potential privacy information risks as every new destination (both internally across information barriers within a firm and externally across broker-dealers) would see where an order originated.'' [395] Similarly, a third commenter supported the OATS approach of linking a series of separate order identifiers in part because it believed that, if a unique identifier were to pass from firm-to-firm, there was a risk that information about the origin of an order might be inferred.[396] Yet another commenter recommended that the Commission standardize how the order identifier should be structured to ensure consistent reporting between firms, instead of leaving this decision to the plan sponsors.[397]

The Commission has considered the comments received regarding the requirement that the NMS plan mandate a unique order identifier, and is adopting Rule 613 with significant modifications [398] that provide more flexibility for the SROs, as the plan sponsors, to determine whether the NMS plan will require a single unique order identifier or a ''series of order identifiers.'' Specifically, the Rule, as adopted, requires that every order have a ''CAT-Order-ID,'' defined as ''a unique order identifier or series of unique order identifiers that allows the central repository to efficiently and accurately link all reportable events for an order, and all orders that result from the aggregation or disaggregation of the order.'' [399]

The Commission has modified the Rule from the proposal so that the SROs can draw upon their own expertise, as well as those of other market participants, in developing the most accurate and efficient methodology for tracking an order through its life. Thus, the SROs may submit an NMS plan in which they require a single unique order ID to travel with each originating order; the SROs may submit an NMS plan in which, as suggested by a number of commenters, a series of order IDs, each generated by different market participants, is reported to the central repository in a manner that allows for the accurate linking of reportable events; or the SROs may submit an NMS plan based on any other methodology that meets the requirements of the Rule.

The Commission expects that the details of the methodology proposed by the SROs in the NMS plan will, in part, be based on how the generation and reporting of order identifiers would interact with other technical details involving order tracking in the consolidated audit trail, such as the potential for multiple orders to be aggregated, routed, and disaggregated. However, though the Commission is not prescribing a particular methodology, the Rule does require that SROs take into account a number of considerations, such as accuracy and cost, in designing their methodology.[400]

The Commission notes that, with this modification, a wider array of possible solutions is now available to the SROs as they develop the NMS plan to be submitted to the Commission for its consideration, including those that may better accommodate the infrastructure of existing audit trails and thereby potentially, and possibly significantly, reduce implementation burdens. As indicated above, several commenters suggested that the Rule accommodate the linked order identifier approach, currently used by OATS.[401] However, the Commission also notes that, though the adopted Rule could accommodate such an approach, there historically have been limitations on the accuracy and reliability of linking orders in OATS.[402] It will therefore be very important for the NMS plan to demonstrate how the approach it has selected will ensure that information about all reporting events pertaining to an order will be efficiently and accurately linked together in a manner that allows regulators efficient access to a complete order audit trail.[403] As discussed below, the reliability, accuracy, and confidentiality of the data reported to and maintained by the central repository, as well as the method by which the data in the central repository can be accessed by regulators, are considerations for the Commission in evaluating the NMS plan.[404]

The Commission emphasizes that, under the adopted Rule, regardless of the specific method chosen by the SROs, all orders reported to the central repository must be made available to regulators in a uniform electronic format and in a form in which all events pertaining to the same originating order are linked together in a manner that ensures timely and accurate retrieval of the information for all reportable events

[390] *See* Thomson Reuters Letter, p. 3; Liquidnet Letter, p. 6–7; SIFMA Letter, p. 12; FINRA Letter, p. 7; FIF Letter, p. 3; FIF Letter II, p. 2.

[391] *See* Liquidnet Letter, p. 6–7; SIFMA Letter, p. 12; FINRA Letter, p. 7; FIF Letter, p. 3.

[392] *See* FINRA Letter, p. 7–8. FINRA expressed concern that, if two child orders from the same parent order are sent to the same market center, regulators would need to look at time stamps and other attributes, such as share quantity and price, to attempt to create an accurate linkage for each individual child order. FINRA stated that this complexity could be avoided if members used a separate unique routed order identifier for each routed order. *Id.*

[393] *See* FINRA Proposal Letter, p. 7–8.

[394] *See* FIF Letter II, p. 2.

[395] *See* SIFMA Letter, p. 12. *See also* SIFMA Drop Copy Letter, p. 2 (suggesting a routed order identifier or a child order identifier which would be separate from the unique order identifier of the parent order, and would be reported to the consolidated audit trail separately on a non-real-time basis, as well as linkage information).

[396] *See* FIF Letter, p. 3 (recommending the linking of the order information in a fashion similar to OATS whereby the information would only be available to regulators).

[397] *See* SIFMA Letter, p. 12. In addition, another commenter suggested that order identifiers should be unique by broker and day, similar to the approach used by OATS. *See* Liquidnet Letter, p. 7.

[398] *See* Rule 613(c)(7)(i)(B); Rule 613(c)(7)(ii)(A); Rule 613(c)(7)(iii)(A); Rule 613(c)(7)(iv)(A); Rule 613(c)(7)(v)(A); Rule 613(c)(7)(vi)(C); and Rule 613(j)(1).

[399] *See* Rule 613(j)(1).

[400] *See* Section III.C.2.a., *infra.*

[401] *See* FIF Letter, p. 3; Liquidnet Letter, p. 7; SIFMA Letter, p. 12; SIFMA Drop Copy Letter, p. 12; FINRA Letter, p. 8.

[402] *See* Section II.A., *supra.*

[403] *See* Rule 613(j)(1). For example, one of the methods that the SROs could consider using to demonstrate the efficacy of their approach would be to engage appropriate third party experts to confirm that the system's proposed design and functionality would achieve its stated accuracy and reliability benchmarks.

[404] *See* Section III.C.2.a.i., *infra;* Rule 613(a)(1)(iii) and (iv).

for that order.[405] The Commission believes the consolidated audit trail will still achieve significant benefits with this modification.

The Commission recognizes the complexities of order routing in today's markets, including, as noted by a commenter,[406] the frequent splitting of larger orders into numerous ''child'' orders or the bundling of smaller orders into one larger order. The Commission believes, however, that since, in today's complex markets, orders are currently and routinely aggregated and disaggregated, practical solutions to record such orders can be developed by the plan sponsors to ensure they are accurately and efficiently tracked through a variety of aggregation and disaggregation events.

With regard to the concern expressed by a commenter that the use of an order identifier(s), as required by Rule 613, could provide the ability to deduce the origin of an order, thereby revealing confidential trading strategies or raising privacy concerns,[407] the Commission notes that this commenter assumed that a unique order identifier ''would very likely require members to include the originating firm's or customer's name as part of the identifier.'' [408] The Commission believes, however, that the SROs will be able to devise a way to assign order identifiers—through random number sequences or otherwise—that would protect the identity of broker-dealers and their customers from disclosure to persons other than authorized regulatory personnel. The Commission also notes that, as discussed in Section III.B.2.e. *infra,* the adopted Rule requires the NMS plan submitted to the Commission for its consideration to incorporate a variety of policies and procedures to ensure the security and confidentiality of all information reported to the central repository.

Furthermore, because the Rule requires the SROs to discuss the details of each aspect of the NMS plan submitted to the Commission for its consideration, the Commission and the public will be able to consider how well the methodology the SROs developed to link reportable events for the same order meets the considerations of accuracy and reliability, as well as those of security and confidentiality. The Commission will then be able to use this information in determining whether to approve the NMS plan submitted.

v. Time Stamp

The proposed Rule would have required SROs and their members to report the date and time, to the millisecond, that an order was originated or received, routed out, and received upon being routed, modified, cancelled, and executed.[409] Specifically, proposed Rules 613(c)(7)(i)(H) (renumbered as 613(c)(7)(i)(E)), 613(c)(7)(ii)(C), 613(c)(7)(iii)(C), 613(c)(7)(iv)(B) (renumbered as 613(c)(7)(iv)(C)), and 613(c)(7)(v)(C) provided that the ''time of order receipt or origination (in milliseconds)'' would be recorded for every order originated or received, routed, modified, cancelled or executed, by a broker-dealer or SRO.

Several commenters expressed opinions on the time stamp requirement. One commenter believed a millisecond standard was not precise enough, explaining that many exchanges currently execute orders in less than a millisecond.[410] This commenter explained that, to detect the manipulative or fraudulent behavior of high frequency traders, it is necessary that time stamps be accurate to a level more detailed than the speed at which trades are executed; otherwise, it would not be possible to determine the time sequence in which trades occurred. The commenter suggested that reports from execution venues (*e.g.,* exchanges, ATSs, dark pools, and large internalizers) should be required to be accurate to 0.01 milliseconds.[411] This commenter also suggested that a more liberal time stamp standard of one second might be more appropriate for low-volume broker-dealers.[412] Another commenter, however, expressed concern about the proposed millisecond time stamp requirement, explaining that, ''[a]lthough firm systems tend to capture time stamps in milliseconds, reporting in milliseconds would require changes to internal systems given that existing audit trails such as OATS require reporting of time stamps accurate only to the second.'' [413] Another commenter believed that, because computers have a certain rate of error when keeping time (''time drift''), it is difficult to sequence orders based on millisecond time stamps.[414] As a result, according to this commenter, there is ''no real value in requiring data to this level of specificity [based on milliseconds], especially if the goal of time stamping is to sequence the lifecycle of a single order as it moves from origination to execution.'' [415]

The Commission has considered the comments regarding the precision of the proposed time stamp requirement for the consolidated audit trail and is adopting the millisecond time stamp requirement with modifications from the proposal.[416] As adopted, the Rule provides that the NMS plan submitted shall require the time stamps as set forth in Rule 613(d)(3).[417] Rule 613(d)(3) provides that the NMS plan must require each SRO and its members to ''[u]tilize the time stamps required by paragraph (c)(7) of this section, with at minimum the granularity set forth in any national market system plan submitted pursuant to this section, which shall reflect current industry standards and be at least to the millisecond.'' Rule 613(d)(3) also provides that, ''[t]o the extent that the relevant order handling and execution systems of any national securities exchange, national securities association, or member of such exchange or association utilize time stamps in increments finer than the minimum required by the national market system plan, such plan shall require such national securities exchange, national securities association, or member to utilize time stamps in such finer increments when providing data to the central repository, so that all reportable events reported to the central repository by any national securities exchange, national securities association, or member can be accurately sequenced.'' Rule 613(d)(3) further provides that ''[t]he national market system plan shall require the sponsors of the national market system plan to annually evaluate whether industry standards have evolved such that the required time stamp standard should be in finer increments.''

The Commission notes that SIPs currently support millisecond time stamps [418] and other entities in the

[405] *See* Rule 613(e)(1).

[406] *See* FINRA Letter, p. 4–7.

[407] *See* SIFMA Letter, p. 12. *See also* FIF Letter, p. 3.

[408] *See* SIFMA Letter, p. 12.

[409] *See* proposed Rules 613(c)(7)(i)(H), 613(c)(7)(ii)(C), 613(c)(7)(iii)(C), 613(c)(7)(iv)(B), 613(c)(7)(v)(C).

[410] *See* Endace Letter, p. 1–2.

[411] *See* Endace Letter, p. 1. The Commission notes that this commenter also suggested that the same time increment be extended to market data feeds to help increase transparency and deter fraudulent activity; however, this comment is outside the scope of this Release.

[412] *Id.* at 2–3.

[413] *See* SIFMA Letter, p. 14.

[414] *See* FIF Letter, p. 6–7.

[415] *Id. See* Section III.B.1.d.v., *infra,* for further discussions of ''time drift'' and the issues raised by this commenter in that regard.

[416] *See* Proposed Rules 613(c)(7)(i)(H), 613(c)(7)(ii)(C), 613(c)(7)(iii)(C), 613(c)(7)(iv)(B), and 613(c)(7)(v)(C).

[417] *See* Rules 613(c)(7)(i)(E), 613(c)(7)(ii)(C), 613(c)(7)(iii)(C), 613(c)(7)(iv)(C), and 613(c)(7)(v)(C).

[418] *See, e.g.,* Securities Industry Automated Corporation's (''SIAC'') Consolidated Quotation System (''CQS'') Output Specifications Revision 40

Continued

securities industry currently conduct business in millisecond increments or finer.[419] The Commission believes that, given the speed with which the industry currently handles orders and executes trades, it is important that the consolidated audit trail utilize a time stamp that will enable regulators to better determine the order in which reportable events occur. The entry time of orders can be critical to enforcement cases. For example, the timing between order origination and order entry is important in investigating possible market abuse violations, such as trading ahead of a customer order. In general, determining whether a series of orders rapidly entered by a particular market participant is manipulative or otherwise violates SRO rules or federal securities laws, otherwise being able to reconstruct market activity, or performing other detailed analyses, requires the audit trail to sequence each order accurately. The Commission believes that, for many types of common market activities that operate at the level of milliseconds or less, time stamps in increments greater than a millisecond would not allow this sequencing with any reasonable degree of reliability.

In response to the comment that a millisecond standard is not sufficiently precise, as many exchanges currently execute orders in less than a millisecond,[420] adopted Rule 613(d)(3) provides that the NMS plan must require that, to the extent that the order handling and execution systems of any SRO or broker-dealer utilize time stamps in increments finer than the minimum required by the NMS plan time stamps, such SRO or member must use time stamps in such finer increments when reporting data to the central repository, so that reportable events reported to the central repository by any SRO or member can be accurately sequenced. The Commission believes this approach will improve the accuracy of records with respect to the sequencing of events that occur very rapidly, especially with respect to those market participants that have elected to use time stamps in increments finer than a millisecond.

The Commission recognizes, as a commenter noted,[421] that computers have a certain rate of deviation when keeping time. The requirement that clocks be synchronized within a level of granularity to be specified in the NMS plan[422] is designed to ensure that time drift does not exceed a defined level of deviation. However, the Commission believes that time stamps reported with a millisecond or finer granularity would still provide significant benefits even, contrary to one commenter's assertion,[423] if the time drift between systems is larger than a millisecond. This is because such time stamps would still allow an accurate sequencing of reportable events as may commonly occur within in a single system, tied to a single clock, at levels of a millisecond or finer (*e.g.,* high-frequency trading algorithms). Any drift of such a system's clock relative to the clocks of other systems may of course hinder the time-sequencing of cross-system events, but it would not preclude the ability of regulators from performing a detailed, accurate time-sequenced analysis of all the orders, cancellations, modifications, and executions performed by the specific system of interest.[424] In this regard, the Rule is analogous to the current requirements for OATS reporting: FINRA requires clocks to be synchronized to the second, and requires time stamps to be reported to FINRA in seconds, unless those time stamps are captured by the FINRA member in milliseconds, in which case they must reported to FINRA in milliseconds (notwithstanding the clock sync remaining at a second).[425]

The Commission acknowledges that changes (with their associated costs) might be required to internal broker-dealer systems to comply with a millisecond time stamp requirement. However, given the benefits outlined above, and the apparent widespread use of millisecond time stamps in the industry today,[426] the Commission believes the cost of requiring the SROs to develop a plan that provides for millisecond time stamps, and to discuss the costs and benefits of the specific solution chosen, is justified.

The Commission also acknowledges that broker-dealers who presently report time stamps to OATS in millisecond increments, but whose systems direct and capture their order activity in finer time increments, could incur costs associated with these time stamps being reported to the central repository with the same granularity at which they are recorded by the broker-dealers.[427] The Commission recognizes that there may be alternatives to reporting events in finer than millisecond increments that enable the central repository to use a different method for accurately time-sequencing sub-millisecond events originating from within a system or systems on a single clock. Therefore, in developing the NMS plan to be submitted to the Commission for its consideration, if the SROs identify one or more such alternatives, the Commission believes that they should address such alternatives in the NMS plan,[428] how such alternatives (*i.e.,* an alternative to reporting in finer than millisecond increments) would ensure that reportable events may be accurately time-sequenced at the sub-millisecond level, and the costs associated with such alternatives both on their own terms and relative to a requirement to report events in the same sub-millisecond time stamp as used by a broker-dealer for directing and capturing orders.[429]

The Commission also notes that, because millisecond time stamps may become inadequate to investigate trading as technology evolves and trading speeds increase, the adopted Rule requires that the NMS plan submitted to the Commission for its consideration require the plan sponsors to annually evaluate whether industry standards have evolved such that a finer increment time stamp is appropriate. As this approach is tied to the then-current industry standard used to assess whether to shorten the future time stamp increment, the Commission also believes that this approach helps assure that the time stamps in the consolidated

(January 11, 2010); SIAC's Consolidated Tape Service (''CTS'') Output Specifications Revision 55 (January 11, 2010); and Nasdaq's Unlisted Trading Privileges Plan Quotation Data Feed Interface Specifications Version 12.0a (November 9, 2009).

[419] *See, e.g., http://batstrading.com/resources/features/bats_exchange_Latency.pdf* (describing, among other things, the time it takes to accept, process, and acknowledge or fill a member order).

[420] *See* Endace Letter, p. 1.

[421] *See* FIF Letter, p. 7.

[422] *See* Section III.B.1.h., *infra,* for a discussion of clock synchronization.

[423] *See* FIF Letter, p. 6–7.

[424] Similarly, although reporting in increments finer than a millisecond would also enable the accurate time-sequencing of events originating from within a single system or systems operating off the same clock, the Commission recognizes that the effects of time drift across the clocks of different systems could limit the efficacy of time-sequencing sub-millisecond events across those systems.

[425] *See* FINRA's Order Audit Trail System, Frequently Asked Questions, *http://www.finra.org/Industry/Compliance/MarketTransparency/OATS/NMS/P122893* (last visited on May 15, 2012).

[426] *See* Endace Letter, p. 1 (stating that ''[t]oday Exchanges such as NYSE Euronext and BATS are claiming that they are executing orders in less than a millisecond (see Wall Street Journal on the January 6th 2010) and are displaying details of these trades in increments of milliseconds on their market data feeds. Clearly from an Exchange perspective the publishing of trade data at one millisecond increments is not just possible, its current practice. However, Endace believes that one millisecond increments is not good enough''); SIFMA Letter, p. 14 (acknowledging that, ''[a]lthough firm systems tend to capture time stamps in milliseconds, reporting in milliseconds would require changes to internal systems given that existing audit trails such as OATS require reporting of time stamps accurate only to the second'').

[427] *See* SIFMA Letter, p. 14.

[428] *See* Rule 613(a)(1)(xii).

[429] *See* Rule 613(a)(1)(vii).

audit trail will be in line with technological developments. Should the industry standard move to a finer time standard, the plan sponsors could modify the minimum standard required by the NMS plan by submitting an amendment to the NMS plan under Rule 608 of Regulation NMS. Such an amendment would need to be considered and would be subject to approval by the Commission, as well as subject to public notice and comment.[430]

vi. Additional Routing Data Elements

Proposed Rules 613(c)(7)(ii) and (iii) would have required that certain additional information be collected and reported specifically to allow regulators to track the life of an order through the routing process. The Commission requested comment as to whether information regarding the routing of orders would be necessary or useful for an effective consolidated audit trail, and asked if any information, in addition to the data elements proposed, should be included in the consolidated audit trail relating to routing.

One commenter noted that the proposed Rule would capture the routing of an order internally within a broker-dealer, but not the routing of an order internally within an exchange from one execution system to another.[431] This commenter also noted that, as proposed, the Rule would not require an SRO or member to report information indicating that an order was ''flashed'' or otherwise displayed in a ''step-up'' mechanism.[432] The commenter believed that this information would be important for the consolidated audit trail to capture.[433]

The Commission believes that it is important to capture the routing of an order internally within a broker-dealer to, for example, evaluate best execution practices.[434] Capturing the time at which a broker-dealer received a customer's order and the time that such order was executed can help determine if the broker-dealer delayed acting on its customer's order. The time at which an order was routed can affect the evaluation of whether the broker-dealer fulfilled its best execution obligations, and, thus, the Commission believes that this internal broker-dealer routing information should be captured by Rule 613. The Commission, however, does not believe that data regarding order processing (*i.e.,* management of an order) within exchange systems is as useful as data regarding internal routing within a broker-dealer[435] because, for example, unlike broker-dealers, exchanges do not have best execution obligations. Further, any issues with an SRO's internal processing would occur at a single venue—the SRO—and, thus, there could be direct follow-up with the SRO. Additionally, the Commission notes that the consolidated audit trail will not collect information indicating whether orders were flashed or displayed in a ''step-up'' mechanism as it concerns an exchange's internal processing and dissemination to its members of an order in the instance when the exchange cannot execute the order because the exchange does not have any available trading interest at the NBBO (depending on the side of the order).[436] Orders that are flashed or displayed through a ''step-up'' mechanism are not executable because they are displayed only to members of an exchange as an indication of a broker-dealer's interest. The Commission believes it is appropriate not to require the reporting of these flashed or ''stepped-up'' orders to the central repository because, as noted above, the Commission believes that the tracing of processes within an exchange is not as material to regulators as the routing of orders between markets. Further, as stated, SROs do not have the same legal obligations with regard to handling customer orders as broker-dealers; therefore, the Commission does not believe it is necessary, at this time, to require the consolidated audit trail to track an SRO's internal processing of orders.

The Commission has considered the comments related to the data that is required to be recorded and reported when an order is routed and is adopting Rules 613(c)(7)(ii) and (iii) substantially as proposed.[437] The Commission notes that the Rule requires that the NMS plan require the broker-dealer routing an order and the broker-dealer receiving a routed order—both actions that are defined as ''reportable events'' under Rule 613—record and report the CAT-Reporter-ID of the broker-dealer routing the order and the CAT-Reporter-ID of the broker-dealer receiving the routed order. The Commission believes the requirement to report this information on both the routing and receiving end of a route is not duplicative but, rather, is useful. Specifically, information regarding when a broker-dealer received a routed order could prove useful in an investigation of allegations of best execution violations to see if, for example, there were delays in executing an order that could have been executed earlier. In addition, if a market participant is required to report when it receives an order, regulators could solely rely on information gathered directly from that market participant when examining or investigating the market participant. For example, if a regulator needs to investigate a delay between the time a market participant received an order and the time the market participant acted on the order, under Rule 613, as adopted, the regulator could use information recorded and reported by the market participant itself, rather than rely on information about the receipt and action taken on the order that would be provided by a third party. Information from a third party may be less accurate in general and may not accurately reflect events to the extent there are latencies in order transmission. In addition, the Commission relies on data such as that which would be recorded under Rule 613(c)(7)(ii) and (iii) to improve its understanding of how markets operate and evolve, including with respect to the development of new trading practices, the reconstruction of atypical or novel market events, and the implications of new markets or market rules. For these reasons, the Commission believes that it is important to have both the routing broker-dealer and the receiving broker-dealer report their CAT-Reporter-IDs to the central repository, and that such information could aid regulatory authorities when analyzing the trades of market participants.[438]

To reflect terms that have been modified elsewhere in the Rule as

[430] *See* Rule 608(b)(1) under Regulation NMS, 17 CFR 242.608(b)(1).

[431] *See* GETCO Letter, p. 4.

[432] *Id.*

[433] *Id.*

[434] OATS rules currently require the recording and reporting of orders routed internally. *See* FINRA Rule 7440(c).

[435] The Commission acknowledges that certain orders received by an exchange may be routed to another exchange; however, the routing of such an order to the other exchange is largely subject to the rules of the exchange and Rule 613 will capture such routing as a reportable event.

[436] In general, flash orders are communicated to certain market participants and either executed immediately or withdrawn immediately after communication. The Commission has proposed and sought comment on whether to amend Rule 602 of Regulation NMS under the Exchange Act to eliminate an exception for the use of flash orders by equity and options exchanges. *See* Securities Exchange Act Release Nos. 60684 (September 18, 2009), 74 FR 48632 (September 23, 2009); 62445 (July 2, 2010), 75 FR 39625 (July 9, 2010).

[437] *See* Section III.B.1.d.vi., *supra,* for a discussion of the modifications to Rule 613(c)(7)(ii) through (iii).

[438] The Commission notes that OATS rules also require both the FINRA reporting member routing an order and the FINRA reporting member receiving the order to record and report certain audit trail data. *See* FINRA Rule 7440(C). *See also* Rule 613(c)(7)(ii)(D) and Rule 613(c)(7)(iii)(D) through (E).

adopted, the terms ''unique order identifier'' and ''unique identifier'' in Rule 613(c)(7)(ii) and (iii) have been replaced with the terms ''CAT-Order-ID'' and ''CAT-Reporter-ID.'' In addition, Rule 613(c)(7)(ii) and (iii) now reflect the new time stamp requirement contained in Rule 613(d)(3). Specifically, Rules 613(c)(7)(ii)(C) and 613(c)(7)(iii)(C) provide that the time at which an order is routed or received must be recorded and reported pursuant to Rule 613(d)(3), rather than simply in milliseconds as proposed. The Commission believes these conforming changes are appropriate to reflect the revised terms in the adopted Rule.

vii. Additional Modification, Cancellation, or Execution Data Elements

In addition to the data elements discussed above, proposed Rules 613(c)(7)(iv) and (v) would have required that certain information be collected and provided specifically to allow regulators to track the life of an order through modification, cancellation, or execution. The Commission requested comment as to whether information required under the Rule as proposed would be sufficient to create a complete and accurate consolidated audit trail, and asked if any information, in addition to the data elements proposed, should be included in the consolidated audit trail relating to modifications, cancellations, or executions.

In response, one commenter noted that broker-dealer order management systems may differ in their treatment of order modifications and cancellations, as some, for example, may capture or report only modified data elements, and not necessarily all of the elements of a modified order.[439] The commenter recommended that the consolidated audit trail accommodate such differences, and further suggested requiring only the submission of the order identifier for a cancelled order, not the order's other data elements.[440] Another commenter believed that, ''[a]s in the case of the current OATS system, execution data provided to the consolidated audit trail should identify where the trade was publicly reported and have a common identifier that links the audit trail execution reports for the buy and sell orders to the public trade report.'' [441]

After consideration of the comments regarding the specific audit trail data required for orders that are modified, cancelled, or executed, the Commission is adopting Rules 613(c)(7)(iv) and (v) substantially as proposed, with a modification to require that the NMS plan include a requirement that the CAT-Order-ID for such orders also be recorded and reported to the central repository. This modification is designed to ensure that an order identifier be reported for orders that have been modified or cancelled. The Commission believes that the order identifier is a critical piece of information that will efficiently link an order across markets. Adopted Rules 613(c)(7)(iv) and (v) will also require that the NMS plan submitted to the Commission for its consideration require the recording and reporting of the CAT-Reporter-ID of the broker-dealer or Customer-ID of the person giving the modification or cancellation instruction to reflect the new terminology of the adopted Rule. In addition, Rules 613(c)(7)(iv) and (v) reflect the new time stamp requirement contained in Rule 613(d)(3), as adopted. Specifically, Rules 613(c)(7)(iv)(C) and 613(c)(7)(v)(C) provide that the time at which an order is modified, cancelled, or executed must be recorded and reported pursuant to Rule 613(d)(3), rather than simply in milliseconds as proposed.

The Commission believes it is necessary to require the NMS plan to require the information under Rule 613(c)(7)(iv) and (v) for each order and reportable event because it will assist the Commission and SROs in identifying all changes made to an order (including an execution) and those market participants responsible for the changes (or execution). The Commission believes this information, in combination with the proposed information pertaining to order receipt or origination, will provide regulators with a comprehensive view of all material stages and participants in the life of an order. Among other things, this order information should help regulators investigate suspicious trading activity in a more efficient manner than is currently possible. Regulators will have access to information identifying the customer behind the order and will also see how a customer's order is handled across markets. This data also will improve regulators' understanding of how markets operate and evolve, including with respect to the development of new trading practices, the reconstruction of atypical or novel market events, and the implications of new markets or market rules. In addition, the Commission believes that most of the data proposed to be recorded and reported by the Rule for order modification, cancellation, and execution is data that most broker-dealers already generate in the course of handling an order pursuant to the existing audit trail requirements of several SROs.[442]

The Commission notes that regulatory staff at an SRO or the Commission could use execution information required under Rule 613(c)(7)(v), which will be consolidated with the other audit trail information required under Rule 613 to, for example, detect patterns of reported and unreported transactions effected by a broker-dealer in a particular security by comparing the data reported to the central repository regarding an execution with information reported pursuant to a transaction reporting plan or the OPRA Plan. Depending on the results of that analysis, regulators may undertake further inquiry into the nature of trading by that broker-dealer to determine whether the public received accurate and timely information regarding executions, and whether the broker-dealer complied with the trade reporting obligations contained in SRO rules. Patterns of reported and unreported transactions by a particular broker-dealer could also be indicia of market abuse, including the failure to obtain the best execution for customer orders, or possible market manipulation. Thus, the ability to compare the consolidated order execution data, including customer information, with the trades reported to the consolidated tape would be an important component of an effective market surveillance program that is not possible today because regulators currently do not have access to comprehensive cross-market audit trail data, and the process of identifying customers is very labor intensive, time-consuming, and error prone.

In response to the commenter that recommended that the consolidated audit trail accommodate differences in the treatment of modifications by broker-dealer order management systems (*i.e.,* those that report only the modified data elements, not the entire order), and suggested that only an order identifier be reported for a cancellation, not the cancelled order's other data elements,[443] the Commission notes that Rule 613 does not require all of the data elements of a modified order to be reported to the central repository. The Rule only requires the NMS plan to require the reporting of the CAT-Order-ID; the date and time the modification

[439] *See* SIFMA Drop Copy Letter, p. 4.

[440] *Id.*

[441] *See* Liquidnet Letter, p. 7.

[442] *See, e.g.,* FINRA Rule 7440(d); Nasdaq Rule 6950; NYSE Rule 132B.

[443] *See* SIFMA Drop Copy Letter, p. 4.

is received or originated; the CAT-Reporter ID of the broker-dealer or the Customer-ID of the person giving the modification instruction; if modified, the price and remaining size of the order; and any other changes to the material terms of the order. The adopted Rule also requires the NMS plan to require the date and time a cancellation is received or originated and the CAT-Reporter-ID of the broker-dealer, or Customer-ID of the person, giving the cancellation instruction to be reported to the central repository. The Commission believes this will ensure that regulators can determine the market participant or person responsible for the cancellation of an order,[444] and the date and time of the cancellation.

In response to the commenter that suggested that the Rule should require that the execution data be linked with the public trade report using a common identifier,[445] the Commission notes that Rule 613(c)(7)(v)(G) requires the NMS plan submitted to the Commission for its consideration to require that, for an order that has been executed, the SRO or member that executes the order must report to the central repository whether the execution was reported pursuant to an effective transaction reporting plan or OPRA, as applicable. The Commission has considered the commenter's further suggestion that a common identifier link the audit trail execution reports for the buy and sell orders to the public trade report and is not mandating such a requirement under Rule 613; the Commission believes that Rule 613 and its requirements provide a sufficient initial framework for collecting audit trail data that will enhance the ability of regulators to surveil the market for NMS securities.[446] Accordingly, the Commission is adopting Rule 613(c)(7)(v)(G), as proposed, which requires that the plan sponsors include in the NMS plan submitted to the Commission for its consideration a requirement that the broker-dealer report to the central repository whether a trade was reported pursuant to an effective transaction reporting plan or OPRA.

e. Rule 613(c)(3): Information To Be Recorded Contemporaneously With the Reportable Event and Reported to the Central Repository by 8:00 a.m. Eastern Time on the Trading Day Following the Day Such Information Has Been Recorded

i. Proposed Rule 613(c)(3)

As proposed, Rule 613(c)(3) would have required the NMS plan to require each SRO and member to collect and provide to the central repository, on a ''real time'' basis, key data for each order and each reportable event, including the origination or receipt of an order, as well as the routing, cancellation, modification, or execution of the order.[447] Specifically, the proposed Rule would have provided that ''[t]he national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and member to collect and provide to the central repository the information required by paragraphs (c)(7)(i) through (v) of this section on a real time basis.''[448] In the Proposing Release, the Commission noted that ''real time'' meant ''immediately and with no built in delay from when the reportable event occurs.''[449]

ii. Comments on Proposed Rule 613(c)(3)

The Commission received a variety of comments about the achievability of the real-time requirement; the accuracy of audit trail data that would be collected and provided in real time; the necessity, merits and usefulness of real-time audit trail data; the costs of real-time reporting; and the proposed Rule's requirement that all audit trail data be collected and reported in real time. These comments are discussed below.

Several commenters believed that reporting data on a real-time basis was achievable.[450] Of these comments, one commenter stated that its current systems could be used to support real-time reporting, and that real-time reporting may be easier to achieve than intraday or end-of-day batch processing.[451] Similarly, another commenter, endorsing the use of FIX Protocol, stated that FIX Protocol is already widely used throughout the financial industry, and that ''[a]ll FIX messages are generated in real time for trading.''[452]

A significant number of commenters, however, expressed concern about the proposed requirement that the audit trail data be collected and provided to the central repository in real time.[453] Some of these commenters focused on the effect a real-time reporting requirement would have on their systems, and the systems changes that might be needed to achieve real-time reporting. Specifically, commenters argued that a real-time collection and provision requirement would require many industry participants to build entirely new systems or to undertake significant technological upgrades to comply with a real-time reporting requirement.[454] Other commenters stated that real-time reporting would strain their order handling systems and result in latencies and delays in the processing of customer orders.[455] Additionally, one commenter questioned the ability of a real-time consolidated audit trail system to handle periods of immense volume, like the volume on May 6, 2010.[456]

Other commenters who expressed concern about the real-time reporting requirement questioned the accuracy of data that would be reported in real

[444] *See* Section III.B.1.iii., *supra.*

[445] *See* Liquidnet Letter, p. 7.

[446] While the Commission is not requiring that execution data be linked with the public trade report using a common identifier, the Commission notes that the Rule does not prohibit the SROs from including a provision in the NMS plan for the establishment of a common identifier to link the audit trail execution reports for buy and sell orders to the public trade report.

[447] *See* Rule 613(j)(9) for a definition of ''reportable event.''

[448] *See* proposed Rule 613(c)(3).

[449] *See* Proposing Release, *supra* note 4, at 32572.

[450] *See* Thomson Reuters Letter, p. 3; Aditat Letter, p. 2; FTEN Letter p. 3; Ameritrade Letter, p. 1 (stating that the scalability of its systems could support real-time reporting); Nasdaq Letter II, p. 3 (stating that a platform supported by FTEN and SMARTS technology would support the real-time provision of data).

[451] *See* Ameritrade Letter, p. 1.

[452] *See* Aditat Letter, pp. 1–2. FIX Protocol is a series of messaging specifications for the electronic communication of trade-related messages. It has been developed through the collaboration of banks, broker-dealers, exchanges, industry utilities and associations, institutional investors, and information technology providers from around the world. *See* What is FIX? *available at http://fixprotocol.org/what-is-fix.shtml* (last visited on May 7, 2011).

[453] *See* Scottrade Letter, p. 1; ICI Letter, pp. 4–6; FINRA/NYSE Euronext Letter, p. 4; GETCO Letter, p. 2; BATS Letter, pp. 1–2; SIFMA Letter, pp. 3–8; SIFMA February 2012 Letter, p. 1; CBOE Letter, pp. 4–5; Direct Edge Letter, p. 3; FINRA Letter, pp. 10–13; Wells Fargo Letter, p. 3; Knight Letter, pp. 2–3; Leuchtkafer Letter; Broadridge Letter, p. 3; FIF Letter, p. 4; SIFMA Drop Copy Letter, p. 1; Ross Letter, p. 1; FINRA Proposal Letter, p. 3; FIA Letter, pp. 1–2.

[454] *See* Scottrade Letter, pp. 1–2; ICI Letter, pp. 4–5; SIFMA Letter, pp. 4–5; Knight Letter, p. 2. *See also* BATS Letter, p. 2; Broadridge Letter, p. 3; FIF Letter, p. 4; GETCO Letter, pp. 3–4; CBOE Letter, p. 4; FIA Letter, p. 2. In particular, FIA noted its belief that ''real-time reporting accounts for a significant portion of the considerable costs associated with the CAT.'' *See* FIA Letter, p. 2.

[455] *See* FINRA/NYSE Euronext Letter, p. 5; FINRA Letter, p. 13; SIFMA Letter, p. 5; CBOE Letter, p. 4 (stating that, ''given the increased speed of order submission, quote changes, and order cancellation, modifications and executions, a real time submission requirement could strain the systems capacities and computer resources of SROs and many member firms'').

[456] *See* FINRA Letter, p. 13. *See also* Berkeley Letter, p. 2 (noting the ''peta-scale'' problem of collecting audit trail data generally).

time.[457] One commenter, for example, noted that there would not be an opportunity for data validation if consolidated audit trail data were required to be reported in real time.[458] Another commenter stated that the real-time processing required by real-time reporting would create data integrity issues and, thus, lead to poorer data quality as compared to an approach with a more liberal timeframe, such as next day, or ''T+1,'' reporting.[459] FINRA similarly commented that the data integrity issues that arise when audit trail data is provided on a T+1 basis would be exacerbated by a real-time system.[460] FINRA stated that it performs over 40 billion data validations of order events submitted through OATS every day, and requires its members to repair rejected OATS data.[461]

A number of commenters discussed whether a real-time reporting requirement is necessary. One commenter stressed that the real-time availability of data would facilitate the identification of cross-market events and their origins.[462] This commenter explained that a platform developed using FTEN and SMARTS technology would include real-time risk management and surveillance capabilities.[463] However, most commenters did not believe that real-time data typically would be useful to the Commission and SROs.[464] One commenter explained that using audit trail data before having an opportunity to validate it ''may result in a severely distorted picture of trading and interfere with effective oversight.''[465] Another commenter stated that ''real-time order information is inherently incomplete and could even be inaccurate and therefore misleading to the users of the data.''[466] Some commenters were of the view that the Commission had significantly overvalued the regulatory benefit of real-time data.[467] One of these commenters noted that, ''[b]ased on its experience in conducting surveillance, [it] does not believe that it is essential that all of the information proposed to be captured in the CAT be received real time or near-real-time.''[468] A commenter suggested that, to the extent any information had to be submitted in real time, it should be limited to data related to certain key events, such as order receipt and origination, order transmittal, execution, modification, and cancellation.[469] Other commenters generally questioned the value of real-time audit trail data, arguing that regulators would still need to rely on traditional investigative techniques, such as taking testimony, to establish securities law violations.[470] Another commenter believed that ''[m]any potential uses for the data, including enforcement inquiries probing market behavior, may require either multiple days' worth of data, or data from other markets that is not available on a real-time basis,'' limiting the ability to use such real-time data provided by the consolidated audit trail.[471]

Some commenters questioned whether the substantial costs that would be associated with providing the data on a real-time basis would outweigh the benefits.[472] One commenter believed that ''the SEC has significantly overestimated the incremental utility of real-time data over data received on a T+1 basis'' and that ''the costs associated with the breadth of real-time reporting proposed by the Commission would be significant and far outweigh the minimal regulatory benefit gained by such a reporting system.''[473]

Some commenters who questioned the value of the real-time reporting requirement also suggested that the Commission consider a different timeframe for the reporting of audit trail information. Several commenters, for example, suggested a later timeframe for reporting audit trail data to the central repository. One commenter, an exchange, stated that ''[o]ur strong preference would be for submission of information to the central repository through a batch process after the close of the trading day involved.''[474] Another commenter suggested a compromise whereby broker-dealers would be subject to next day (or later) reporting requirements, while the SROs could leverage their existing real-time monitoring tools and provide real-time trading information for use in the consolidated audit trail.[475] Several commenters recommended that the Commission permit end-of-day reporting.[476] One commenter noted that end-of-day reporting would alleviate some of the practical challenges firms would face with a requirement to identify beneficial owners on a real-time basis.[477] Another commenter suggested that a reporting deadline of 10–15 minutes would be substantially more workable than a ''real-time'' reporting requirement.[478] Finally, one commenter

[457] *See* FINRA/NYSE Euronext Letter, p. 5–6; Knight Letter, p. 2–3; CBOE Letter, p. 4; Wells Fargo Letter, p. 3; FINRA Letter, p. 11–12; SIFMA Letter, p. 5; Direct Edge Letter, p. 3; FIA Letter, p. 2.

[458] *See* FINRA/NYSE Euronext Letter, p. 5–6 (noting that ''drawing conclusions based solely on real time data increases the potential for inaccuracy because the data has not gone through the full range of validations * * * .''). *See also* Wells Fargo Letter, p. 3 (''[*A*]*ccurate* market information often does not happen in real time.''); FINRA Letter, p. 11–12 (stating that current order-handling practices make ''accurate real time order reporting problematic, and automated surveillance is only useful if the underlying data is accurate and complete * * * .''); SIFMA Letter, p. 5 (''There also would be data integrity costs in the form of less reliable data, or data that would have to be revised or resubmitted where it otherwise may not have been required if firms had a short window of time to more thoroughly 'scrub' or validate their submissions.''); Direct Edge Letter, p. 3 (''Real-time data may be less reliable than information collected after the validations that come with settling a transaction.'').

[459] *See* Knight Letter, p. 2–3. *See also* CBOE Letter, p. 4 (''[G]enerally our belief is that next day (T+1) data, which incorporates additional information such as cleared trade data, is a better report resource for generating surveillance and compliance reviews.''); FINRA/NYSE Euronext Letter, p. 6 (stating that, ''from a market surveillance standpoint, reliable and complete data received on a T+1 basis * * * is generally superior to unvalidated real-time data''); FIA Letter, p. 2 (''We believe the Commission's Proposal overvalues any potential benefits achieved by real-time reporting as compared to reporting on day after trade, or 'T+1,' basis.'').

[460] *See* FINRA Letter, p. 11–12.

[461] *Id.* at p. 11.

[462] *See* Nasdaq Letter I, p. 9–10.

[463] *See* Nasdaq Letter II, p. 3.

[464] *See* ICI Letter, p. 5; Leuchtkafer Letter; GETCO Letter, p. 2; FIA Letter, p. 2; Scottrade Letter, p. 2; BATS Letter, p. 2; Angel Letter, p. 3; Broadridge Letter, p. 3; CBOE Letter, p. 4; FINRA/NYSE Euronext Letter, p. 4, 6; FINRA Letter, p. 11; SIFMA Letter, p. 3, 7; SIFMA Drop Copy Letter, p. 1; FINRA Proposal Letter, p. 4, 10–11.

[465] *See* FINRA Letter, p. 11.

[466] *See* SIFMA February 2012 Letter, p. 1.

[467] *See* FINRA/NYSE Euronext Letter, p. 4; FINRA Letter, p. 11; FIA Letter, p. 2.

[468] *See* FINRA Proposal Letter, p. 4.

[469] *See* SIFMA Drop Copy Letter, p. 1–2. *See also* FINRA Proposal Letter, p. 10.

[470] *See* GETCO Letter, p. 2; BATS Letter, p. 2.

[471] *See* FIA Letter, p. 2.

[472] *See* Scottrade Letter, p. 1–2; FINRA/NYSE Euronext Letter, p. 4; GETCO Letter, p. 2; BATS Letter, p. 2; SIFMA Letter, p. 3–8; SIFMA February 2012 Letter, p. 1; CBOE Letter, p. 4; FINRA Letter, p. 11–13; Wells Fargo Letter, p. 3; FIA Letter, p. 2.

[473] *See* FINRA/NYSE Euronext Letter, p. 4. Similarly, FINRA believes '' the SEC has significantly overvalued the regulatory benefits to be achieved * * * while underestimating some of the problems with relying on real-time data. This is true not only because certain information is difficult, if not impossible, to provide on a real-time basis, but also because real-time data is less reliable.'' *See* FINRA Letter, p. 10–11. *See also* SIFMA February 2012 Letter, p. 1 (stating, ''[a]ny potential incremental benefit of receiving this information on a real-time basis is, in our view, substantially outweighed by the additional expense and implementation delays associated with building and maintaining a real-time system''); FIA Letter, p. 2 (''It is not apparent to us from the Proposal that the additional costs associated with a *real-time* audit trail, compared to a T+1 audit trail, would be offset by any incremental benefits to the Commission.'').

[474] *See* CBOE Letter, p. 4.

[475] *See* SIFMA Letter, p. 3; *see also* SIFMA February 2012 Letter, p. 1 (questioning the regulatory need for real-time data versus data provided on an ''end-of-day or 'T+1'' basis); FIA Letter, p. 2.

[476] *See* Scottrade Letter, p. 2; ICI Letter, p. 5; BATS Letter, p. 2; Angel Letter, p. 3; Broadridge Letter, p. 3.

[477] *See* ICI Letter, p. 6.

[478] *See* SIFMA Drop Copy Letter, p. 1. The commenter stated that ''implementation options

suggested that broker-dealers and SROs should retain audit trail information, and submit it only upon regulatory request, so that the central repository would only collect data needed for investigations or surveillance purposes.[479]

One commenter, who did not specifically advocate either real time or reporting on an end-of-day basis, supported a requirement that all trades be reported in a standardized format that will be accessible to the SEC at the end of each trading day.[480]

Some commenters suggested alternative means of collecting audit trail information, assuming such audit trail data would not be on a real-time basis and would not be through the reporting regime set forth by Rule 613. For example, one commenter suggested the Commission consider ''a consolidation'' of [OATS] and [COATS], audit trails that are produced on a T+1 basis; and a review of the prospect of extracting specific real-time data from surveillance reports currently used by SROs to perform post trade analysis, such as the Large Option Position Report * * * and large trader reports, to obtain real-time risk information that may impact a particular NMS issue or the market in general.'' [481] This commenter believed that a requirement of real-time reporting should be considered only after other available sources of data have been carefully reviewed, and only to the extent that such a requirement is both necessary and economically feasible.[482] Another commenter, however, urged the Commission not to ''lower its expectations for the CAT and accept a more limited audit trail based exclusively on existing systems.'' [483] One commenter suggested that the Commission consider a ''hybrid'' approach that would enhance elements of the quotation and transaction information reported in real time, while collecting and reporting more specific order information on a T+1 basis or later.[484]

Two commenters commented on the meaning of ''real time.'' [485] One commenter noted that ''[our members] request clarification on the definition of real-time data submission as it relates to each data element required by CAT. The granularity/definition of real-time for each element will have a major impact on SROs, their members and CAT system development from both a data quality and database design perspective . * * *'' [486] The other commenter noted that the ''[t]he term 'real time' is used throughout the document, but never defined. (There are several distinct meanings in the computer industry.)'' [487]

The Commission also received comments specifically relating to the cost of reporting the audit trail information in real time under the Rule as proposed. One commenter believed it would cost $1.25 million in initial costs to comply with the Rule as proposed.[488] The commenter divided its $1.25 million estimate into development costs of $750,000 and hardware costs of $500,000 (including hardware, circuits, etc.).[489] In addition, this commenter believed the development timeframe would be 9–12 months ''once final architecture is drafted,'' and would require approximately 6,000 hours of development work.[490] Notably, this commenter said that ''[t]he assumptions that drove this analysis were that any real time reporting of order events would leverage the capabilities contained within the [OATS] reporting today and that the revised real time system would retire the legacy systems of Bluesheets, OATS, OTS and TRACE.'' [491] With respect to ongoing costs to provide information, this commenter also stated that it believed the Commission had underestimated the ongoing costs of the proposal.[492] However, another commenter, who opined that the goals of the consolidated audit trail could be achieved for significantly lower costs than the Commission originally estimated, stated that, if the Rule permitted market participants to modify existing systems for collecting and reporting audit trail information, the consolidated audit trail objectives could ''be achieved and perhaps even surpassed.'' [493]

iii. Adopted Rule 613(c)(3)

As described in detail below, the Commission is adopting Rule 613 with two significant modifications to the proposed requirement that the NMS plan submitted to the Commission for its consideration require the collection and provision of key audit trail data to the central repository on a ''real time'' basis. First, the Rule, as adopted, no longer requires the real-time reporting of consolidated audit trail data but, instead, provides that order event audit trail data must be reported ''by 8:00 a.m. Eastern Time on the trading day following the day such information has been recorded by the national securities exchange, national securities association or member.'' [494] Second, the adopted Rule clarifies that this data is to be recorded ''contemporaneously with the reportable event,'' instead of in ''real time.'' [495]

(A) Reporting of Audit Trail Data by 8:00 a.m. Eastern Time on the Trading Day Following the Day Such Information Has Been Recorded

The Commission has considered the commenters' concerns regarding a ''real-time'' reporting requirement for audit trail data, including its achievability and cost effectiveness; the accuracy of audit trail data recorded and reported in real time; and the necessity, merits, and usefulness of real-time audit trail data.[496]

and complexity are significantly different if the reporting regime is within 'minutes' rather than 'seconds.' If real-time reporting is required in seconds, then significant re-engineering is required within broker-dealer order management systems and trading systems to support such a requirement (*e.g.,* passing additional information between systems, performance tuning to compensate for additional processing of payload). Instead, if the definition of real-time allows for reporting within minutes (*e.g.,* 10–15 minutes) of the events, it would be substantially less intrusive on order management systems and may allow for greater flexibility in designing reporting systems architecture and more standardized content for events such as order modifications, as described below. Also, as with prior implementations of new trade reporting regimes in the U.S. (*e.g.,* ACT and TRACE), having more liberal reporting timeframes for an appropriate initial period (*e.g.,* 12 months or more) to provide a sufficient period to optimize processes would be very helpful.'' This commenter also questioned ''the need for real-time reporting of the entire set of data elements in the CAT proposal,'' and believed that ''reporting on a T+1 (or in some cases later) basis should satisfy the SEC's stated regulatory objectives more efficiently.'' *Id. See also* Nasdaq Letter II, p. 3 (stating its proposed platform could support the provision of data in real time or within 10–15 minutes using drop copies).

[479] *See* GETCO Letter, p. 4. The commenter also believed this approach would lower the costs of the consolidated audit trail.

[480] *See* Bean Letter, p. 1.

[481] *See* BOX Letter, p. 2.

[482] *Id.* at p. 3.

[483] *See* Nasdaq Letter II, p. 2.

[484] *See* FINRA/NYSE Euronext Letter, p. 6. This commenter stated that ''[a]n alternative to the all-encompassing real time order audit trail set forth in the Proposal would be to standardize and consolidate existing real time reporting systems (*e.g.,* enhancing trade reporting and quotation systems with standardized and uniform identification for all broker-dealers) and enhance existing reporting requirements where the need is narrowly focused.'' *See also* FINRA Proposal Letter, p. 3–4, 10–11.

[485] *See* FIF Letter, p. 4; Ross Letter, p. 1.

[486] *See* FIF Letter, p. 4.

[487] *See* Ross Letter, p. 1.

[488] *See* Ameritrade Letter, p. 2.

[489] *Id.*

[490] *Id.*

[491] *Id.*

[492] *Id.*

[493] *See* Thomson Reuters Letter, p. 2.

[494] *See* Rule 613(c)(3). The Rule further provides that the NMS plan ''may accommodate voluntary reporting prior to 8:00 a.m. Eastern Time, but shall not impose an earlier reporting deadline on the reporting parties.'' *Id.*

[495] *Id.*

[496] *See* Scottrade Letter, p. 1–2; Angel Letter, p. 3; ICI Letter, p. 3–6; FINRA/NYSE Euronext Letter,

Continued

On the one hand, the Commission recognizes that there may be very considerable costs imposed on the industry if audit trail data was required to be reported to the central repository in real time—indeed, the Commission, in the Proposing Release, estimated the costs of creating a real-time consolidated audit trail by assuming that such a requirement would necessitate the wholesale creation of new industry-wide systems. On the other hand, the Commission also received a variety of comments suggesting that real-time reporting could be achieved in a cost-effective manner.[497] And yet other commenters suggested a hybrid approach. For example, SIFMA commented that, although it believed real-time reporting as originally proposed by the Commission would be too costly, intra-day reporting of a subset of audit data delayed 10–15 minutes would be possible. SIFMA further described how such reporting might be accomplished through the use of ''drop-copy'' data.[498]

With respect to concerns about the accuracy of consolidated audit trail data if real-time reporting were required, the Commission recognizes that the real-time reporting of data could result in accuracy issues to the extent SROs and broker-dealers would need to re-enter the required audit trail data into a separately prepared regulatory report containing the required audit trail data for submission to the central repository, as is the case today with OATS reports.[499] The Commission notes, however, that the use of certain existing technologies, such as ''drop copies'' described by SIFMA, could provide reliable and accurate audit trail data to the central repository because such ''drop copies'' would reflect the information captured by an SRO or member's order management and execution systems to enter, route, modify, and execute or cancel orders.

The Commission believes that, whether or not real-time reporting of data is required, the creation, implementation, and maintenance of a consolidated audit trail will likely be a complex and significant undertaking for the industry. It therefore recognizes the practical advantages of a more incremental, or more gradual, approach to such an undertaking. After considering the many comments received on the use of real-time data by regulators, the Commission has recognized that, although there might be some additional benefits to receiving data and monitoring the markets intra-day (such as for certain enforcement investigations and the facilitation of real-time cross-market surveillance), the majority of the regulatory benefits gained from the creation of an industry-wide consolidated audit trail, as described in the Proposing Release, do not require real-time reporting. Indeed, the extent of the potential uses of a consolidated audit trail discussed in Section II.A.2., *supra,* which do not rely on a real-time reporting requirement, illustrate the value of a consolidated audit trail even if data is not reported in real-time. Instead, the Rule, as adopted, provides that the NMS plan must require that order event data be reported ''by 8:00 a.m. Eastern Time of the trading day following the day such information has been recorded by the national securities exchange, national securities association or member.'' [500]

The Commission notes that, while the Rule provides that the NMS plan must impose a reporting deadline of 8:00 a.m. Eastern Time of the trading day following the day such information has been recorded by the national securities exchange, national securities association or member, the Rule also provides that the NMS plan may accommodate SROs and members that voluntarily satisfy their reporting obligations earlier.[501]

The Commission acknowledges that, by replacing the requirement that the SROs develop a plan for real-time reporting with a requirement for reporting by 8:00 a.m. the next trading day, the Commission has precluded the possibility that, as some commenters suggested, a mandatory real-time reporting NMS plan might be developed by the SROs for consideration by the Commission and the public.[502] However, given the overall scope and complexity of creating a consolidated audit trail, the Commission has determined that it would be more beneficial to have the SROs and their members focus on those key aspects of a consolidated audit trail that the Commission believes would be the most useful for improving regulatory oversight and monitoring (including, but not limited to, the use of unique customer identifiers, the ability to accurately link an order across its lifecycle, the inclusion of market making quotes, and the addition of options data), rather than focus on how to develop an NMS plan for real-time reporting that may not yield benefits that are equally as useful.[503] The Commission also believes that, as a consequence of this modification, the Rule, as adopted with the 8:00 a.m. reporting deadline, will more readily accommodate a consolidated audit trail that could build upon existing audit trail infrastructures. Meeting the requirement of the Rule may no longer necessitate the creation of completely new infrastructures. In particular, the Commission notes that the OATS technical specifications require OATS data to be reported by 8:00 a.m. the following calendar day.[504] Thus, the Rule, as adopted, would permit the SROs to submit an NMS plan to the Commission for its consideration with reporting timeframes comparable to OATS' requirement, with which all FINRA members are presently capable of complying.[505] As a result, broker-dealers might need to make fewer systems changes to comply with the

p. 4, 6; GETCO Letter, p. 2; BATS Letter, p. 1–2; SIFMA Letter, p. 3–8; CBOE Letter, p. 4–5; Direct Edge Letter, p. 3; FINRA Letter, p. 10–13; Wells Fargo Letter, p. 3; Knight Letter, p. 2–3; Leuchtkafer Letter; Broadridge Letter, p. 3; FIF Letter, p. 4; SIFMA Drop Copy Letter, p. 1; Ross Letter, p. 1; FINRA Proposal Letter, p. 3; Nasdaq Letter II, p. 3–4; FIA Letter, p. 1–2.

[497] *See* Thomson Reuters Letter, p. 3; Aditat Letter, p. 2; FTEN Letter p. 3; Ameritrade Letter, p. 1 (stating that the scalability of its systems could support real-time reporting); Nasdaq Letter II, p. 3 (stating that a platform supported by FTEN and SMARTS technology would support the real-time provision of data).

[498] *See* SIFMA Drop Copy Letter.

[499] *See* Section II.A.1.c., *supra.*

[500] *See* Rule 613(c)(3). The Commission notes that Rule 613, as proposed, was inconsistent in its use of the terms ''provide'' and ''report.'' To eliminate this inconsistency, the Commission is replacing all uses of ''provide'' with ''report,'' which the Commission believes more accurately describes the requirement the Commission is imposing on national securities exchanges, national securities associations, and members.

[501] *See* note 494, *supra.*

[502] *See* note 453, *supra,* and accompanying text.

[503] The Commission notes that, consistent with adopting an incremental approach to the creation of a consolidated audit trail, even though it is not requiring audit-trail data to be reported in real time, it is adding various additional requirements, discussed in Section III.C.2.a., *infra,* to the Rule regarding the evolution of the consolidated audit trail, including the possibility for reduced reporting times in the future as technologies evolve.

[504] The current OATS technical specifications require OATS reporting by 8:00 a.m. on the calendar day after the reportable event. The Commission notes that the FINRA rules for OATS reporting, however, require that data ''shall be transmitted on the day such event occurred''—unless information required by FINRA Rule 7440(b), (c), or (d) (order receipt and origination; order transmittal; order modifications, cancellations, and executions) is unavailable—in such cases, OATS requires reporting on the day the information becomes available. *See* FINRA Rule 7450(b)(2). Because of the discrepancy between the technical specifications and the applicable FINRA rule, the Commission approved FINRA's proposed rule change to allow OATS reporting as late as 8:00 a.m. the next day. *See* Securities Exchange Act Release No. 66021 (December 21, 2011), 76 FR 81551 (December 28, 2011).

[505] The Commission notes that the Rule, as adopted, provides that an NMS plan must require information to be reported by 8:00 a.m. the following trading day, while OATS requires information to be reported by 8:00 a.m. the following calendar day. Thus, the Rule as adopted provides for a longer reporting period than does OATS with respect to weekends and holidays.

Rule than they would have had to make if real-time reporting were required, though, as discussed in Section II.C.4., *supra,* OATS in its present form would still need to be modified to meet certain of the other requirements of this Rule.[506] Nevertheless, as suggested by many commenters, fewer systems changes to comply with the Rule should lead to lower costs incurred by broker-dealers.[507]

An additional consequence of the Commission's decision not to require real-time reporting is that, since meeting the requirements of the Rule may no longer necessitate the wholesale creation of new systems, the Commission's proposed cost estimates, which were based on this assumption, may no longer be applicable. As discussed in Section II.C.2., *supra,* the Commission believes that given the many different ways in which the SROs may develop an NMS plan that meets an 8:00 a.m. reporting requirement, the costs of such reporting will be highly dependent on the details of the specific plan proposed. The Rule, as adopted, therefore directs the SROs to provide these details, along with associated costs, in the NMS plan submitted to the Commission for the Commission and the public to consider. The Commission will be able to consider this information when determining whether to approve the NMS plan submitted.

(B) Recording of Audit Trail Data Contemporaneously With the Reportable Event

As noted above, the Rule as proposed would have required SROs and their members to ''collect'' audit trail data ''on a real time basis.'' In response to commenters who commented on the meaning of ''real time,'' the Commission is adopting this provision with modifications from the proposed Rule. Specifically, Rule 613(c)(3), as adopted, requires that ''[t]he national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and member to record the information required by paragraphs (c)(7)(i) through (v) of this section contemporaneously with the reportable event.''

The Commission believes that the term ''contemporaneously'' better reflects its intent, as noted in the Proposing Release, that information should be collected immediately and with no built-in delay from when the reportable event occurs. While, in response to commenters, the Commission is no longer requiring the real-time reporting of information, the Commission believes it is important for SROs and broker-dealers to ''record'' the events contemporaneously. The Commission expects that compliance with this requirement will not be difficult for SROs and broker-dealers with automated systems, which will contain much, if not all, of the data to be reported to the central repository as a result of processing and saving a record of any actions taken by the SRO or broker-dealer. On the other hand, broker-dealers that do not use automated systems will have to ensure that reportable events are manually recorded as they are occurring. In addition, the adopted Rule uses the term ''record'' in Rule 613(c)(3), instead of the proposed term ''collect,'' because the Commission believes that term more accurately reflects its intent that a contemporaneous record be made when an order event occurs.

f. More Flexible Format for Reporting Consolidated Audit Trail Data to the Central Repository

In the Proposing Release, the Commission expressed its preliminary view that data would need to be collected and provided by SROs and their members to the central repository in a uniform electronic format to assure regulators that they will have ready access to comparable cross-market data.[508] Specifically, Rule 613(c)(2), as proposed, provided that ''[t]he national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and member to collect and provide to the central repository the information required by paragraph (c)(7) of this section in a uniform electronic format.''

However, the Commission received comments suggesting that audit trail data does not necessarily need to be provided by SROs and their members to the central repository in a uniform electronic format, and that such data instead could be converted automatically into a uniform format by the central repository or a third party using existing technology, which could result in lower cost for the securities industry than originally estimated.[509] Specifically, two commenters indicated that technology exists today to convert or ''normalize'' data that may be produced from disparate systems into a uniform format and that, as a result, implementation of the consolidated audit trail could be simpler and less costly than originally contemplated by the Commission.[510] One of these commenters stated that a number of risk management services and surveillance systems currently receive automatically-generated copies, or ''drop copies,'' of order and execution messages, in real time, from a variety of broker-dealers and exchanges, and convert that information into a common standard format.[511] Two other commenters suggested that firms that currently use FIX should be allowed to continue utilizing FIX,[512] stating that FIX's prevalence in the financial industry would make it cheaper and easier to use FIX as the protocol of the consolidated audit trail.[513] Another commenter stated it could collect information directly from exchanges and other sources of information to minimize reporting obligations, and could leverage its own technology to get information directly from exchanges.[514]

In response to these comments, the Commission has modified this aspect of the proposed Rule. Specifically, adopted Rule 613(c)(2) allows the NMS plan to provide that SROs and their members can report data either ''in a uniform electronic format'' or ''in a manner that would allow the central repository to convert the data to a uniform electronic format, for consolidation and storage.''[515] In light of the comments that data from multiple sources could be converted into a uniform format,[516] this modification provides SROs with the flexibility, in devising the NMS plan, to better accommodate a range of proposals, including those based on leveraging technology in a cost-effective manner by permitting data to be converted to a uniform electronic format at the broker-dealer level or at the central repository. The Commission does not believe this change will reduce the accuracy or accessibility of the audit trail data provided to regulators (since

[506] As noted in the Proposing Release, *supra* note 4, at 32592, broker-dealers that rely mostly on their own internal order routing and execution management systems would have needed to make changes to or replace those systems to collect and report the required order and reportable event information to the central repository to comply with the proposed Rule.

[507] *See e.g.,* BATS Letter, p. 2; CBOE Letter, p. 2–3; Wells Fargo Letter, p. 2; Knight Letter, p. 3; High Speed, p. 1; FTEN Letter p. 1; Correlix Letter, p. 2; Thomson Reuters Letter, p. 2; FINRA Proposal Letter, p. 16; FINRA/NYSE Euronext Letter, p. 7.

[508] *See* Proposing Release, *supra* note 4, at 32572.

[509] *See* FTEN Letter, p. 3–4, 13–15; Thomson Reuters Letter, p. 2–3.

[510] *Id.*

[511] *See* FTEN Letter, p. 4, 12, 14. *See also* SIFMA Drop Copy Letter.

[512] *See* FIX Letter, p. 1; Aditat Letter, p. 2.

[513] *Id.*

[514] *See* Nasdaq Letter II, p. 3.

[515] *See* Rule 613(c)(2).

[516] *See* FTEN Letter, p. 3–4, 13; Thomson Reuters Letter, p. 2–3. *See also* SIFMA Drop Copy Letter.

the Rule still requires data to ultimately be provided to regulators in a uniform electronic format).

Further, by providing the SROs the ability to use a number of approaches to normalization, broker-dealers and SROs may not need to make substantial changes to their order management and execution systems to comply with Rule 613; instead, the central repository or the broker-dealers could convert such data into a uniform electronic format, and the Rule now provides the plan sponsors with the flexibility to use this approach in the NMS plan submitted to the Commission for its consideration. The Commission believes that, to the extent it avoids requiring broker-dealers and SROs to make substantial changes to their order management and execution systems to comply with Rule 613 regarding a uniform electronic format, this type of approach could be a more efficient and cost-effective method for collecting the specified audit trail data required by the Rule.[517] The Commission expects that the NMS plan submitted for its consideration will specify how any normalization approach that might be included in the plan will lead to accurate and reliable data.[518]

g. Timeframe for Reporting Other Data Elements to the Central Repository

i. Proposed Rule 613(c)(4)

While most order and execution information would have been required to be reported to the central repository on a real-time basis under the proposed Rule, the Commission also recognized that not all information required to be reported to the consolidated audit trail would be available to the SROs and their members in real time.[519] In general, the audit trail data required under this timeframe reflected information not typically available until later in the order handling and execution process. This information that would have been provided on an extended timeframe included: (1) The account number for any subaccounts to which the execution is allocated (in whole or part); (2) the unique identifier of the clearing broker or prime broker (if applicable); (3) the unique order identifier of any contra-side order(s); (4) special settlement terms (if applicable); (5) the short sale borrow information and identifier; (6) the amount of a commission, if any, paid by the customer and the unique identifier of the broker-dealer(s) to whom the commission is paid; and (7) the cancelled trade indicator (if applicable) (collectively, ''supplemental audit trail data'').[520] Proposed Rule 613(c)(4) would have permitted the supplemental audit trail data to be reported to the central repository promptly after the national securities exchange, national securities association, or member received the information, but in no instance later than midnight of the day that the reportable event occurs or the SRO or member receives such information.

The Commission solicited comments on proposed Rule 613(c)(4) and its requirement that certain audit trail information not available in real time be reported promptly after the national securities exchange, national securities association, or member received the information, but in no instance later than midnight of the day that the reportable event occurs or the SRO or member receives such information. One commenter believed that the timeframe for reporting the specific consolidated audit trail data listed above should be lengthened to T+1 or later.[521] This commenter was concerned that requiring broker-dealers to report certain data elements by midnight could disrupt the trading of certain products.

ii. Adopted Rule 613(c)(4)

After considering the commenter's views on proposed Rule 613(c)(4), the Commission is adopting the Rule with three modifications from the proposed Rule. First, to parallel the 8:00 a.m. deadline by which order event data must be reported to the central repository under adopted Rule 613(c)(3), adopted Rule 613(c)(4) requires that the NMS plan provide that supplemental audit trail data be reported by 8:00 a.m. Eastern Time on the trading day following the day the member receives the audit trail data, and provides that the plan may accommodate voluntary reporting prior to 8:00 a.m. Eastern Time, but shall not impose an earlier reporting deadline on the reporting parties.

Second, the adopted Rule no longer requires the reporting of (1) special settlement terms, (2) the amount of commission, if any, paid by the customer, and the unique identifier of the broker-dealer to whom the commission is paid, and (3) the short sale borrow information and identifier. Third, adopted Rule 613(c)(4) requires that the NMS plan provide for the reporting of certain customer identification and customer account information by 8:00 a.m. Eastern Time on the trading day following the day the member receives such data, instead of in ''real time,'' as proposed.[522] These modifications are discussed in more detail below.

(A) Reporting Timeframe

In response to the comments regarding the timing for reporting of consolidated audit trail data elements,[523] the Commission is adopting Rule 613(c)(4) with modifications to the timeframe for reporting supplemental audit trail data. Specifically, the Rule no longer requires that supplemental audit trail data be reported ''promptly'' after the broker-dealer receives the information but no later than midnight of the day that the reportable event occurred; rather, adopted Rule 613(c)(4) requires the NMS plan to provide that supplemental audit trail data be reported by 8:00 a.m. Eastern Time on the trading day following the day the broker-dealer receives such information. Although the NMS plan may permit broker-dealers to report such information prior to that time, it may not require such earlier reporting. The Commission believes it is appropriate that there be an extended timeframe for reporting this data because this information (*e.g.,* allocation to subaccounts) might not be available until later in the order handling and execution process and, on balance, the Commission does not believe it is necessary that it be reported to the central repository ''promptly''. Instead, the modification to Rule 613(c)(4), as proposed, now requires that the NMS plan provide that the supplemental audit trail data be reported by 8:00 a.m. Eastern Time following the day the member receives the information, which parallels the adopted Rule 613(c)(3) timeframe for reporting event data. The Commission believes this more flexible standard should reduce implementation burdens and simplify the requirements of adopted Rule 613, without materially

[517] The Commission believes that, if the NMS plan does not require data to be reported to the central repository in a uniform format, broker-dealers and SROs may not have to make substantial changes to their order management and execution systems to comply with Rule 613, and thus may face lower costs than if data were required to be reported in a uniform format because in that instance, broker-dealers may need to make substantial changes to their order management and execution systems to comply with Rule 613. The Commission acknowledges, however, that there would be costs to convert data to a ''uniform electronic format for consolidation and storage.'' On balance, however, the Commission preliminarily believes that broker-dealers might benefit from economies of scale when normalizing data.

[518] *See* Rule 613(a)(1)(iii).

[519] *See* Proposing Release, *supra* note 4, at 32578.

[520] *See* proposed Rule 613(c)(4), 613(c)(7)(vi) through (vii).

[521] *See* SIFMA Letter, p. 8; SIFMA Drop Copy Letter, p. 1.

[522] *See* Rule 613(c)(7)(viii).

[523] *See* Section III.B.1.g.i., *supra.*

reducing the utility of the consolidated audit trail.

The Commission notes that it has made a clarifying change to Rule 613(c)(4), as proposed, to specify that the obligation to report the supplemental audit trail data to the central repository only falls on a broker-dealer, and not on a national securities exchange or national securities association.[524] The Commission believes that this change is appropriate because only broker-dealers receive the types of audit trail data described in Rule 613(c)(vi) through (viii).[525]

(B) Elimination of Certain Data Elements

As previously noted, proposed Rule 613(c)(4) would have required that the following information be reported to the central repository: (1) The account number for any subaccounts to which the execution is allocated (in whole or part); (2) the unique identifier of the clearing broker or prime broker (if applicable); (3) the unique identifier of any contra-side order(s); (4) special settlement terms (if applicable); (5) the short sale borrow information and identifier; (6) the amount of a commission, if any, paid by the customer and the unique identifier of the broker-dealer(s) to whom the commission is paid; and (7) cancelled trade indicator (if applicable).[526]

After considering general comments suggesting that the Commission reduce the proposed reporting obligations under Rule 613, the Commission is not requiring the following data elements to be reported to the central repository: (1) Special settlement terms; (2) the amount of commission, if any, paid by the customer; (3) the unique identifier of the broker-dealer to whom the commission is paid; and (4) the short sale borrow information and identifier.[527] While this data may be useful in the context of certain investigations or market analyses, upon further consideration, the Commission believes that these data elements should not be required by Rule 613 because the Commission does not typically find that these particular audit trail data elements provide enough information relevant to an initial assessment of whether illegal or manipulative activity is occurring in the marketplace to warrant that they be required as a standard part of the audit trail created by Rule 613. If the Commission or the SROs find that such information would be useful to their regulatory responsibilities, they may request the information directly from the broker-dealer with the obligation to record this information, although requests related to short sale borrow information may pose unique challenges. In effect, the Commission believes that the benefit of having these specific audit trail data elements in the consolidated audit trail at this time is unlikely to justify the recording and reporting burden on broker-dealers of providing these elements, particularly in light of the other information required to be reported under Rule 613 and the regulators' ability to obtain this information through a follow-up request. The Commission notes that, if the SROs believe that having such data elements as part of the consolidated audit trail could be useful to their regulatory responsibilities, the SROs could determine to require SROs and their members to record and report such data as part of the NMS plan.

With respect to the account number for any subaccounts to which the execution is allocated (in whole or in part)—an audit trail data element that will be required by Rule 613(c)(4), as adopted—the Commission notes that obtaining allocation information is important because part of the goal of Rule 613 is to obtain audit trail information for the life of an order, which would include how an order was ultimately allocated (*i.e.,* to which specific customer and account). The Commission notes, however, that the Rule requires the NMS plan to require a broker-dealer to report only the account number of any subaccounts to which an execution is allocated that is contained in its own books and records for accounts and subaccounts it holds; there is no obligation for the broker-dealer to obtain any additional information about accounts or subaccounts from other broker-dealers or non-broker-dealers who submitted the original order. The Commission further notes that broker-dealers will remain subject to existing regulatory requirements, including recordkeeping and suitability requirements (*e.g.,* ''know your customer'' rules). Including the account number of any subaccounts to which an execution is allocated in the consolidated audit trail will allow regulators to understand how an allocation of the securities was made among customers of a broker-dealer to, for example, determine if the broker-dealer was favoring a particular customer, to better understand the economic interests of the customer, or as it relates to possible enforcement actions. Similarly, having information regarding the identity of the clearing broker or prime broker for the transaction, the identity of any contra-side order(s), and a cancelled trade indicator by 8:00 a.m. Eastern Time on the trading day following the day that the member receives such information will aid the Commission and the SROs in knowing all of the parties that touched an order (including the clearing broker, prime broker, and contra-side party to the order), and whether the order was cancelled. The Commission believes that all of this information will facilitate regulatory improvements as discussed above in Section II.A.2.

(C) Movement of Certain Data Elements From Event Data to Supplemental Audit Trail Data

As proposed, Rule 613 would have required that, in addition to the Customer-ID, customer account information and other specified information sufficient to identify a customer be reported in real time.[528] The Commission requested comment about the feasibility of this requirement. Several commenters expressed concern over the proposed requirement that customer information be reported in real time upon origination or receipt of an order.[529] One commenter believed that leakage of customer information could ''negatively impact investor willingness to trade in the U.S. markets,''[530] and, instead, urged regulators to rely on EBS to provide customer information.[531] Another commenter did not think it was feasible to provide customer information in real time.[532] Another commenter suggested that the Commission ''pare down its list of data points to focus on what would appear

[524] Rule 613(c)(4) now requires that ''each member of a national securities exchange or national securities association'' provide the information set forth in the Rule; as proposed, Rule 613(c)(4) required ''each national securities exchange, national securities association, and member'' to provide the information set forth in the Rule.

[525] The Commission has also amended Rule 613(c)(4), as proposed, to include the provision of information sufficient to identify the customer and customer account information. *See* Rule 613(c)(7)(viii); Section III.B.1.g.ii.(C)., *supra.*

[526] *See* proposed Rule 613(c)(4), 613(c)(7)(vi), 613(c)(7)(vii).

[527] *See* proposed Rules 613(c)(7)(vi)(D), 613(c)(7)(vi)(E), and 613(c)(7)(vi)(F).

[528] *See* Proposing Release, *supra* note 4, at 32573; proposed Rule 613(c)(7)(i)(A), (C).

[529] *See* Liquidnet Letter, p. 3; Direct Edge Letter, p. 4 (emphasizing that it would be more important for exchanges to obtain the identity of the brokers on both sides of an execution for cross-market surveillance purposes); SIFMA Letter, p. 6, 9; Ameritrade Letter, p. 3.

[530] *See* FIF Letter, p. 2–3.

[531] This commenter suggested an alternative if the Commission believed customer information was necessary, using both EBS and OATS: EBS could send the central repository customer account information (including account number), and OATS would add a field for the account number to link the OATS reports and customer information together. *Id.* at p. 2–3.

[532] *See* SIFMA Letter, p. 6, 9.

on a trade ticket and certain client demographic information.'' [533] This commenter explained that its suggested approach ''makes sense because for most brokers pulling trade ticket information from frontend systems will be straightforward, and client demographics should be easily pulled and populated onto a system for easy retrieval.'' [534] Another commenter was of the view that only customer information regarding the person exercising investment discretion for the account originating the order, such as an investment adviser, should be required to be reported.[535] This commenter explained that if a trade is not executed an investment advisor would not typically provide information about the owners of the underlying accounts to the broker-dealer and thus this commenter suggested that it would be more practical to disclose underlying account information in relation to executed trades.[536] Another commenter suggested that there be a ''requirements analysis'' that considers the availability of order and trade data, and noted that allocation data is not available at the time of order entry.[537]

In recognition of commenters' concerns that this information may not be available in real time [538] and to reduce the reporting burdens on broker-dealers, the Commission is moving data elements, including the customer's name, address, and account information, and large trader identifier (if applicable) (collectively defined as ''customer attributes'') from the order event data category to the supplemental audit trail data category.[539] As a result, the Commission is adopting the Rule to provide that the NMS plan require that customer attributes [540] including the customer's name, address,[541] and customer account information be reported under Rule 613[542] no later than 8:00 a.m. Eastern Time on the trading day following the day that the member receives the information.[543] The Commission expects that the Customer-ID will be able to be linked to the customer attributes in the consolidated audit trail.

The Commission believes that, to realize many of the objectives of a consolidated audit trail, the specific attributes of a customer must be recorded and, when needed, made available to regulators. Without these customer attributes, the data recorded is effectively anonymized, which would prevent regulators from using the enhanced consolidated audit trail data to take any enforcement action against specific individuals. The Commission believes customer attributes [544] are necessary because regulatory authorities need to accurately and efficiently identify the customer to effectively surveil and analyze the markets, and enforce the securities laws. For example, as noted in the Proposing Release,[545] a trader may trade through multiple accounts at multiple broker-dealers. Being able to identify the account holder aids in the identification and investigation of suspicious trading activity. Accordingly, the unique customer identifier that is required to be reported to the central repository for original receipt, origination, modification, or cancellation of an order,[546] and that links together all reportable events by the same customer, must ultimately link back to information regulators could use to identify the party. With this information, regulators could more quickly initiate investigations, and more promptly take appropriate enforcement action. While this information could be requested from broker-dealers by the Commission and the SROs on a case-by-case basis, the Commission believes that achieving these benefits requires having such information maintained in a uniform format that is readily accessible to the Commission and the SROs.

Furthermore, in response to the commenters concerns with respect to the confidentiality of this sensitive information,[547] and as discussed in more detail below, the adopted Rule includes requirements for enhanced safeguards with respect to the privacy and confidentiality of consolidated audit trail data, including customer information.[548]

In response to the commenter who suggested only information appearing on the trade ticket and certain client demographic information [549] be collected, the Commission notes that it may be feasible for the NMS plan to allow customer identifying and account information to be reported by a broker-dealer to the central repository only when the customer opens or closes an account (or at the time the consolidated audit trail is first implemented for pre-existing accounts)—this information may not need to be re-reported with every order.[550] Under this approach, the specified customer attributes may be stored in the central repository and automatically linked to an order whenever an order with the applicable Customer-ID is reported. As the Commission noted in the Proposing Release,[551] broker-dealers today, as part of their books and records requirements, must take reasonable and appropriate steps to ensure the accuracy of the customer information with respect to orders received.[552] Following adoption of the Rule, and the creation and implementation of the consolidated audit trail, broker-dealers will continue to be subject to this requirement as they report customer information to the central repository. The Commission believes that allowing the specified customer attributes to be reported to the central repository by 8:00 a.m. Eastern Time on the trading day following the day that a broker-dealer first receives this information appropriately balances the regulatory need with the practical burdens of supplying it in real time as originally proposed.

In response to the commenter who stated that an investment adviser would not typically provide information about the owners of the underlying accounts to the broker-dealer if the trade is not executed,[553] the Commission notes that, in the case of an adviser that enters an order to buy or sell securities using its own account held at the broker-dealer originating the order, the Rule, as adopted, would only require the NMS

[533] *See* Ameritrade Letter, p. 2–3.

[534] *Id.*

[535] *See* Liquidnet Letter, p. 3.

[536] *See* Liquidnet Letter, p. 3, 5–6.

[537] *See* FIF Letter II, p. 2.

[538] *See* SIFMA Letter, p. 6; Liquidnet Letter, p. 3.

[539] *See also* Rule 613(j)(4) which defines ''customer account information'' to include, but not be limited to, account number, account type, customer type, date account opened, and large trader identifier (if applicable).

[540] Rule 613(j)(3), as adopted, defines the term ''customer'' to mean the account holder(s) of the account at a registered broker-dealer originating the order; and any person from whom the broker-dealer is authorized to accept trading instructions for such account, if different from the account holder(s).

[541] *See* Proposing Release, *supra* note 4, at 32573.

[542] The Commission notes that, under the Rule, a broker-dealer must only report the account number for the account the customer used to submit an order, not the account numbers for all accounts of a customer.

[543] *See* Rule 613(c)(4).

[544] As adopted, Rule 613(c)(7)(viii) provides that, ''[f]or original receipt or origination of an order, the following information: (A) Information of sufficient detail to identify the customer; and (B) Customer account information'' be recorded and reported to the central repository.

[545] *See* Proposing Release, *supra* note 4, at 32578.

[546] *See* Section III.B.1.d.iii., *supra.*

[547] *See* FIF Letter, p. 3.

[548] *See* Section III.B.3.b., *infra.*

[549] *See* Ameritrade Letter, p. 2–3.

[550] However, if any information previously reported by a broker-dealer to the central repository changes, the broker-dealer would need to report the updated information to the central repository by 8:00 a.m. Eastern Time on the trading day following the day that the broker-dealer receives the updated information.

[551] *See* Proposing Release, *supra* note 4, at 32566.

[552] *See, e.g.,* Rules 17a–3, 17a–4, 17a–25 under the Exchange Act, 17 CFR 240.17a–3, 17a–4, 17a–25.

[553] *See* Liquidnet Letter, p. 3, 5–6.

plan to require the capture of information about the owners of the underlying client accounts for which the order was placed if there is an executed trade, and if the executed trade is allocated (pursuant to Rule 613(c)(7)(vi)) to the accounts of the adviser's clients at the same broker-dealer.[554] However, the Commission notes that, in the case of an adviser that enters an order on behalf of clients that each maintain separate accounts at the broker-dealer originating the order, using those accounts, the Rule would require the NMS plan to require the capture of both the adviser—as the person providing trading instructions to the broker-dealer (pursuant to Rule 613(j)(3)(ii))—and the clients, who are the account holders at the broker-dealer (pursuant to Rule 613(j)(3)(i)), even if the order did not result in execution.

Finally, in the Proposing Release,[555] the Commission specifically requested comment on whether there are laws or other regulations in other jurisdictions that would limit or prohibit members from obtaining the proposed customer information for non-U.S. customers. The Commission also requested comment on how members currently obtain such information. If broker-dealers did encounter special difficulties in obtaining customer information from other jurisdictions, the Commission requested comment on how the proposed consolidated audit trail requirements should be modified to address such difficulties.

The Commission received one comment on this issue.[556] The commenter expressed concern that, if broker-dealers were forced to refuse orders from non-U.S. customers because the laws of another jurisdiction prohibited disclosure of certain customer information, U.S. broker-dealers would be penalized and trading activity may shift offshore.[557] The commenter recommended that the Commission adopt a limited exemption that would allow broker-dealers to accept orders from non-U.S. broker-dealers without providing customer information, in recognition of the fact that these broker-dealers are subject to regulation in their home countries.[558]

In the Rule, as adopted, ''customer'' is defined as ''(i) [t]he account holder(s) of the account at a registered broker-dealer originating the order; and (ii) [a]ny person from whom the broker-dealer is authorized to accept trading instructions for such account, if different from the account holder(s).'' Under this definition, the non-U.S. broker-dealer referred to above is the ''customer'' of the U.S. broker-dealer for purposes of the rule. The U.S. broker-dealer would be required to record customer information for transactions in NMS securities only with respect to its foreign broker-dealer customer. There is no requirement to record information about the customers of such foreign broker-dealer. Because the Rule as adopted does not require a non-U.S. broker-dealer placing orders in NMS securities through a U.S. broker-dealer to provide information about its customers to the consolidated audit trail, the Commission believes that the requested limited exemption is unnecessary.

Although the Commission is aware that the privacy laws of some, but not all, foreign jurisdictions may hinder a foreign broker-dealer's ability to disclose personal identifying and account information of their customers absent customer authorization, the Rule as adopted does not require the foreign broker-dealer to disclose this information about its customers.[559] Accordingly, a non-U.S. customer desiring to trade in the U.S. markets would be permitted to do so through a foreign broker-dealer without having to disclose its personal data to the consolidated audit trail. Because the Rule as adopted does not require a foreign broker-dealer to disclose personal identifying and account information of its customers to the consolidated audit trail, the Commission does not believe that trading in NMS securities will shift offshore as a result of the customer identification requirements.

h. Clock Synchronization

As proposed, Rules 613(d)(1) and (2) required that the NMS plan filed with the Commission include a requirement that each SRO and its members synchronize their business clocks that they use for the purposes of recording the date and time of any event that must be reported to the time maintained by the National Institute of Standards and Technology (''NIST''), consistent with industry standards.[560] The SROs and their members also would have been required to annually evaluate the clock synchronization standard to determine whether it should be changed to require finer increments, consistent with any changes to industry standards.[561] This clock synchronization would have been required to occur within four months after effectiveness of the NMS plan.[562]

A few commenters expressed concerns with the Commission's proposed approach to clock synchronization, and a few commenters provided comments specifically relating to the Commission's estimated costs relating to clock synchronization.[563] One commenter preferred a synchronization standard measured in seconds and believed that synchronizing at the millisecond level would require specialized software configurations and expensive hardware.[564] This commenter also was of the view that there could be material problems with systems latency if processors were required to re-synchronize clocks every few seconds to address ''time drift'' issues—further deviations from the time maintained by the NIST that may occur after a clock is synchronized.[565] Another commenter suggested that a clock synchronization standard shorter than the three second standard currently required by FINRA for OATS compliance might be impossible to achieve across market participants.[566] A third commenter was concerned that implementing clock synchronization could require firms to make modifications to a variety of related applications.[567] One commenter noted that synchronizing clocks to milliseconds would require costly specialized software and hardware.[568]

On the other hand, one commenter—a provider of data capture and time stamping technology—noted that ''[t]he advent of relatively low cost GPS receivers that derive absolute timing information accurate to better than 0.1 micro-seconds has significantly eased the problem of clock synchronization across multiple global locations,'' that ''[s]uch technology costs a few thousands of dollars per installation,'' and that ''[i]t is already in use by exchanges and high frequency

[554] *See* Rule 613(j)(3); *see also* Section III.B.1.d.iii.(C)(2)., *supra* (discussing the definition of ''customer'' as applied to investment advisers).

[555] *See* Proposing Release, *supra* note 4, at 32573.

[556] *See* SIFMA Letter, p. 21.

[557] *Id.*

[558] *Id.*

[559] The Rule does, of course, require the NMS plan submitted to the Commission for its consideration to require the foreign broker-dealer to disclose information about itself to the U.S. broker-dealer, as such information would be expected to be part of the records of the U.S. broker-dealer holding a foreign broker-dealer account.

[560] *See* proposed Rule 613(d)(1).

[561] *See* proposed Rule 613(d)(2).

[562] *See* proposed Rule 613(a)(3)(ii).

[563] *See* SIFMA Letter, p. 14; FIF Letter, p. 6–7; Broadridge Letter, p. 3; Endace Letter, p. 2.

[564] *See* FIF Letter, p. 6.

[565] *See* FIF Letter, p. 6–7 (stating that currently ''time drift'' is an issue, despite advancements in synchronization technology, with at least one exchange experiencing time drifts between one and three seconds, and the SIP having its own time drift).

[566] *See* SIFMA Letter, p. 14.

[567] *See* Broadridge Letter, p. 3.

[568] *See* FIF Letter, p. 7.

traders.'' [569] Another commenter expressed support generally for the Commission's proposed approach to clock synchronization.[570]

After considering the comments received on this issue, the Commission is adopting Rule 613(d)(1) as proposed. As this provision requires that the NMS plan require clock synchronization consistent with industry standards, the Commission expects the NMS plan that is submitted to specify the time increment within which clock synchronization must be maintained, and the reasons the plan sponsors believe this represents the industry standard. The Commission notes that FINRA currently requires its members to synchronize their business clocks used for OATS reporting to within one second of the time maintained by NIST.[571] The Commission believes that the current industry standard for conducting securities business is more rigorous than one second. For example, as one commenter noted, technology used today by exchanges and high frequency trading firms synchronizes clocks to increments well within the millisecond level.[572] The Commission recognizes, as another commenter noted, that some firms may need to upgrade their technology to meet the industry standard,[573] and that there will be attendant costs for such upgrading.[574]

The Commission continues to believe that it is appropriate to require members of the securities industry to synchronize their clocks to the time maintained by NIST. Effective clock synchronization is essential to maintaining an accurately time-sequenced consolidated audit trail, particularly one where time stamps will be in millisecond increments or less. Because the consolidated audit trail will capture trading activity occurring across markets, if the business clocks used by SROs and their members for the purposes of recording the date and time for reportable events are not properly and consistently synchronized, the consolidated audit trail data will not be accurately time-sequenced. It is critical for the consolidated audit trail to allow regulators the capability to accurately determine the order in which all reportable events occur.[575]

The Rule as proposed required that both the SROs and their members annually evaluate the clock synchronization standard to determine whether it should be changed to require finer increments, consistent with any changes in the industry standard.[576] The Commission believes that the obligation to evaluate the clock synchronization standard annually should be borne by the SROs as the plan sponsors, not SRO members. The Commission believes that it is appropriate for the SROs, as regulators of the securities markets and users of the consolidated audit trail data, to have the obligation to evaluate whether a change in the clock synchronization standard is warranted.[577] Therefore, the adopted Rule provides that the NMS plan shall require SROs to evaluate annually the clock synchronization standard set forth in the NMS plan.[578]

The Commission recognizes, as a commenter noted,[579] that time drift is an issue that must be addressed by the plan sponsors, to prevent a deterioration of the accuracy of the data in the consolidated audit trail. Therefore, the Commission expects the NMS plan to address the maximum amount of time drift that would be allowed before clocks must be re-synchronized, and why this is consistent with the industry standard.

As with many other aspects of the Rule, the costs of this requirement are highly dependent on the details of the solution proposed by the SROs because the Commission is leaving it up to the SROs to determine the maximum allowable time drift. As such, the SROs must discuss in their submitted plan the clock-synchronization standard they proposed, what alternatives were considered, and the rationale behind their choice. Once the NMS plan is received, the Commission, as well as the public, will be able to consider the extent to which the proposed synchronization standard supports the ability of regulators to fully achieve the benefits afforded by the creation of a cross-market consolidated audit trail.

2. Central Repository

a. Central Repository as a Facility of the SROs

As proposed, Rule 613(e) required that the NMS plan provide for the creation and maintenance of a central repository,[580] which would have been a ''facility'' of each exchange and FINRA.[581] The central repository would have been jointly owned and operated by the exchanges and FINRA, and the NMS plan would have been required to provide, without limitation, the Commission and SROs with access to, and use of, the data reported to and consolidated by the central repository for the purpose of performing their respective regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations.[582] Each of the exchanges and FINRA would have been a sponsor of the plan [583] and, as such, would have been jointly responsible for selecting a plan processor to operate the central repository.[584]

The Commission requested comment on the need for a central repository to receive and retain the consolidated audit trail information, whether there would be alternatives to creating a central repository for the receipt of order audit trail information, and whether it would be practical or appropriate to require the SROs to jointly own and operate the central repository.

A few commenters discussed the proposed ownership structure of the central repository.[585] One commenter argued that the central repository should be owned and operated by the Commission, or a non-SRO formed specifically to operate the central repository, and expressed concern that the central repository could be used by SROs as a source of revenue through the imposition of penalties.[586] Another commenter recommended that the Commission own the repository and not outsource it to a third party, explaining

[569] *See* Endace Letter, p. 2.

[570] *See* Liquidnet Letter, p. 8.

[571] *See* OATS Reporting Technical Specifications (May 3, 2011), available at *http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p123579.pdf* (last accessed December 8, 2011). In addition, FINRA allows clock drift of an additional two seconds before re-synchronization is required.

[572] *See* Endace Letter, p. 2.

[573] *See* FIF Letter, p. 6–7.

[574] The Commission notes that one commenter suggested that the cost might be limited because GPS receivers could be used and installed for a few thousand dollars per installation. *See* Endace Letter, p. 2.

[575] *See* Section III.B.1.d.v., *supra* (explaining the importance to enforcement cases of an accurately timed record of order events).

[576] *See* proposed Rule 613(d)(2).

[577] *See* Rule 613(d)(2).

[578] Rule 613(d)(2) provides that ''[e]ach national securities exchange and national securities association [shall] evaluate annually the clock synchronization standard to determine whether it should be shortened, consistent with changes in industry standards * * *.''

[579] *See* FIF Letter, p. 7.

[580] *See* proposed Rule 613(e)(1).

[581] The term ''facility'' is defined in Section 3(a)(2) of the Exchange Act, with respect to an exchange, to include ''its premises, tangible or intangible property whether on the premises or not, any right to use such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.'' 15 U.S.C. 78c(a)(2).

[582] *See* proposed Rule 613(e)(2).

[583] *See* proposed Rule 613(a)(4).

[584] *See* proposed Rule 613(a)(3)(i).

[585] *See* Ameritrade Letter, p. 4; High Speed Letter, p. 1; BATS Letter, p. 2.

[586] *See* Ameritrade Letter, p. 4.

that, in systemically important events, it may be necessary to have immediate and direct access to the data, without an intermediary.[587] Yet another commenter noted that the decision to use OATS or another system as the basis for the consolidated audit trail system should be separate from the choice of the party that will be responsible for building and operating the central repository.[588]

The Commission received a couple of comments specifically regarding the costs of the creation and maintenance of the central repository. FINRA, in one of its comment letters, submitted a ''blueprint'' for a version of a consolidated audit trail based on enhancements to OATS—though without certain key elements proposed to be required by the adopted Rule—and estimated initial costs for developing the repository to be between $100 million and $125 million, with ongoing annual costs to be between $30 million and $40 million.[589] Another commenter suggested the use of cloud computing for the central repository which it believed would cost less than $10 million per year.[590]

The Commission has considered the comments and is adopting as proposed the requirement in Rule 613(e)(1) that the NMS plan provide for the creation of a central repository. The Commission believes that having a central repository is important to ensuring access to consolidated data for the Commission and SROs, and for ensuring consistency, quality, and security in the audit trail data.

As adopted, Rule 613(e)(1) does not dictate a particular audit trail collection system to be used as the central repository for the consolidated audit trail, but, instead, delineates the required core features of such a system.

The Commission considered the commenter's recommendation that it should own the central repository[591] but determined that such ownership is not necessary as long as the central repository has the core features articulated in the Rule, the Commission and SROs have full access to the audit trail data for regulatory purposes, and the central repository is a facility of each SRO subject to Commission oversight.[592] The Commission notes that, because the central repository will be jointly owned by, and a facility of, each SRO, it will be subject to Commission oversight. The Commission will have unfettered access to the data in the central repository without being its owner.

The Commission also considered the comment that the central repository should be owned by a non-SRO specifically formed to operate the central repository.[593] The Commission, however, believes that it will have more regulatory authority over the central repository as a facility of each SRO than it would have if the central repository were owned or operated by a non-SRO. First, the Commission has the statutory obligation to oversee the SROs, including facilities thereof, and to ensure that SROs enforce compliance by their members with the respective SRO's rules, and the federal securities laws, rules, and regulations.[594] Second, a facility of an SRO is subject to the rule filing requirements of Section 19(b) of the Exchange Act.[595]

In response to the commenter who expressed concern that the plan sponsors would use the central repository to generate revenue through penalties,[596] the Commission notes that any penalty provisions must be provided in the NMS plan submitted to the Commission for its consideration, or in a future amendment to the NMS plan, if the NMS plan is approved. The Commission will review the NMS plan submitted for its consideration, which also will be subject to public notice and comment, to assure itself that the NMS plan is designed to be applied fairly and otherwise in a manner consistent with the Exchange Act. The Commission expects that the NMS plan's penalty provisions would provide sufficient detail regarding the circumstances in which any penalties would apply, and any restrictions on how payments of such penalties may be used, to permit the Commission to determine that such penalty provisions are fair and consistent with the Exchange Act. As the central repository will be a facility of the plan sponsors, the rules governing it must be consistent with the Exchange Act.[597] In addition, future amendments to the penalty provisions would either be reviewed as an amendment to the NMS plan, under Rule 608 of Regulation NMS, or, because the central repository is a facility of the SROs, as a proposed rule change of the central repository under Section 19 of the Exchange Act.[598] Additionally, the Commission has the authority to review any action taken or failure to act by any person under an effective NMS plan, pursuant to Rule 608(d)(1) of Regulation NMS.[599] Lastly, any penalty provisions included in the NMS plan approved by the Commission will be subject to the Commission's inspection and examination program of SROs to ensure they are implemented fairly in a manner consistent with the Exchange Act.[600]

In response to the comments regarding the costs of the creation and maintenance of a central repository, the Commission notes that the costs would be highly dependent on the decisions the SROs make with respect to each of the areas in which the Commission has provided flexibility to the SROs in crafting the NMS plan to be submitted to the Commission for its consideration. For example, cost estimates could vary depending on whether the NMS plan requires unique order identifiers or permits ''a series of order identifiers.'' Such cost estimates also could vary because the Rule does not specify details regarding, among other things, the security and confidentiality procedures of the central repository, the system for assigning customer identifiers, the format(s) of data reported to the central repository, the methods by which regulators will access data in the central repository, whether an annual independent evaluation will be

[587] *See* High Speed Letter, p. 1.

[588] *See* BATS Letter, p. 2.

[589] *See* FINRA Proposal Letter, p. 14–16.

[590] *See* High Speed Letter, p. 1.

[591] *See* Ameritrade Letter, p. 4.

[592] *See* note 581, *supra* (describing the nature of a ''facility'').

[593] *See* Ameritrade Letter, p. 4.

[594] *See, e.g.,* 15 U.S.C. 78b; 15 U.S.C. 78f(b); 15 U.S.C. 78o–3(b); 15 U.S.C. 78s(h)(1).

[595] Section 19(b)(1) of the Exchange Act defines the term ''proposed rule change'' to mean ''any proposed rule or rule change in, addition to, or deletion from the rules of [a] self-regulatory organization.'' Pursuant to Section 3(a)(27) and 3(a)(28) of the Exchange Act, the term ''rules of a self-regulatory organization'' means (1) the constitution, articles of incorporation, bylaws and rules, or instruments corresponding to the foregoing, of an SRO, and (2) such stated policies, practices and interpretations of an SRO (other than the Municipal Securities Rulemaking Board) as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors to be deemed to be rules.

[596] *See* Ameritrade Letter, p. 4.

[597] *See* note 581, *supra* (describing the nature of a ''facility'').

[598] 15 U.S.C. 78s.

[599] 17 CFR 242.608(d)(1). If the Commission does not make a finding that the action or failure to act is consistent with the provisions of the NMS plan and was applied in a manner consistent with the Act, or if it finds that such action or failure to act imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, the Commission, by order, can set aside such action and/or require such action with respect to the matter reviewed as the Commission deems necessary or appropriate in the public interest, for the protection of investors, and the maintenance of fair and orderly markets, or to remove impediments to, and perfect the mechanisms of, the NMS plan. 17 CFR 242.608(d)(3).

[600] The Commission notes that, as part of its inspection and examination program, its staff has the authority to examine the application of any penalty provisions in the NMS plan to determine whether they have been applied fairly. In this manner, the Commission will be able to monitor how the plan sponsors have applied any penalty provisions set out in the NMS plan approved by the Commission.

required, how reportable events related to the same order will be linked, or how errors will be processed. Such information will be known only after the filing of the NMS plan and, thus, the Commission believes it is appropriate to defer consideration of such costs until the NMS plan is submitted for its consideration. Once it is submitted, the Commission will be able to use this information in determining whether to approve the NMS plan.

The Commission notes that other provisions of the Rule that are applicable to the central repository, discussed below, have been modified from the proposal, including provisions relating to the format in which the data may be reported,[601] and to the security and confidentiality of the consolidated audit trail data.[602]

b. Receipt, Consolidation, and Retention of Data

1. Audit Trail Data

In addition to providing for the creation and maintenance of the central repository, Rule 613(e), as proposed, also would have required the central repository to receive, consolidate, and retain all data reported by the SROs and their members pursuant to the Rule and the NMS plan.[603]

The Commission is adopting, substantially as proposed, the provisions in Rule 613(e) regarding the responsibility of the central repository to receive, consolidate, and retain the audit trail data, but with a few modifications to reflect changes the Commission made to other sections of Rule 613.[604]

The first change to Rule 613(e)(1) is a conforming change to the modification in adopted Rule 613(c)(2) that permits the NMS plan to provide that audit trail data be reported to the central repository either in a uniform electronic format, or in a manner that would allow the central repository or a third party to convert the data to a uniform electronic format for consolidation and storage.[605] Given the need for cross-market comparability and ready access,[606] the adopted Rule requires that, to the extent the NMS plan does not require that data be reported to the central repository in a uniform electronic format, the central repository must convert the data to a uniform electronic format for consolidation and storage.[607] The Commission notes that, regardless of whether the NMS plan submitted to the Commission for its consideration elects to have the central repository normalize audit trail data reported, the Rule requires the central repository to consolidate and store the data in a uniform electronic format.

The second change to Rule 613(e)(1) reflects the Commission's view that, while it is appropriate to provide the plan sponsors with the flexibility to determine how an order will be identified, audit trail data must be stored in the central repository in a manner that will allow order information to be retrieved in a timely and accurate fashion. Accordingly, adopted Rule 613(e)(1) requires that the audit trail data consolidated in the central repository be stored ''in a form in which all events pertaining to the same originating order are linked together in a manner that ensures timely and accurate retrieval * * * for all reportable order events for that order.'' The Commission notes that, regardless of whether the NMS plan submitted to the Commission for its consideration elects to use a series of order identifiers or a unique order identifier, the Rule requires the central repository to be able to link together all reporting events pertaining to an order.

In looking ahead to considering the overall cost of creating, implementing, and maintaining a consolidated audit trail in connection with the NMS plan, the Commission recognizes that, in addition to the costs to SRO members who would be required to record and report data to the central repository, there also will be costs associated with creating and maintaining a central repository. These costs may include: (1) The purchase and maintenance of servers and systems to receive, consolidate, and retain audit trail data, and to allow access to and searches on the data; (2) the development of policies and procedures relating to the timeliness, accuracy, completeness, security, and confidentiality of the data collected; (3) the development and maintenance of a comprehensive information security program for the central repository; and (4) dedicated staff, including a CCO.

2. NBBO Information, Transaction Reports, and Last Sale Reports

In addition to receiving, consolidating, and retaining audit trail data reported pursuant to Rule 613(c), Rule 613(e)(5), as proposed, would have required the central repository to collect and retain, on a current and continuing basis and in a format compatible with the information collected pursuant to Rule 613(c)(7),[608] the NBBO information for each NMS security,[609] as well as transaction reports reported pursuant to an effective transaction reporting plan filed with the Commission pursuant to, and meeting the requirements of, Rule 601 of Regulation NMS under the Exchange Act.[610] In addition, last sale reports reported pursuant to the OPRA Plan filed with the Commission pursuant to, and meeting the requirements of, Rule 608 of Regulation NMS under the Exchange Act would have been required to be collected and retained.[611]

One commenter expressed its belief that, ''[a]s in the case of the current OATS system, execution data provided to the consolidated audit trail should identify where the trade was publicly reported and have a common identifier that links the audit trail execution reports for the buy and sell orders to the public trade report.'' [612] The Commission believes that the proposed requirement for the central repository to collect and retain NBBO information, as well as transaction reports and last sale reports,[613] would facilitate the ability of SRO and Commission staff to search across order, NBBO, and transaction databases. Moreover, inclusion of NBBO information would permit regulators to compare order execution information to the NBBO information readily as all of the information will be available in a compatible format in the same database. This information also would be available to the Commission to assist in its oversight efforts.

Additionally, requiring the central repository to collect and retain the NBBO and transaction information in a format compatible with the order execution information would aid in monitoring for regulatory compliance (*e.g.,* Rule 201 of Regulation SHO). Also, this information would be useful in conducting market analyses (*e.g.,* how order entry affects NBBO prices and depth). The Commission believes that the requirement that the central repository collect transaction reports reported pursuant to the CTA, UTP, and OPRA plans [614] would allow regulators to more efficiently evaluate certain

[601] *See* Section III.B.2.b., *infra;* Rule 613(e)(1).

[602] *See* Section III.B.2.e., *infra;* Rule 613(e)(4)(i).

[603] *See* proposed Rule 613(e)(1).

[604] *See* Sections III.B.1.d. and III.B.1.f., *supra.*

[605] *See* Rule 613(c)(2); *see* Section III.B.1.f., *supra.*

[606] *See* Proposing Release, *supra* note 4, at 32564. *See also* Section III.B.2.d., *infra.*

[607] *See* note 516, *supra.*

[608] *See* Section III.B.1.d., *supra.*

[609] *See* proposed Rule 613(e)(5)(i).

[610] The effective transaction reporting plans include the CTA Plan and the UTP Plan. *See* note 101, *supra;* proposed Rule 613(e)(5)(ii).

[611] *See* proposed Rule 613(e)(5)(iii).

[612] *See* Liquidnet Letter, p. 7. *See also* Section III.B.d.vii., *supra.*

[613] *See* proposed Rule 613(e)(5)(i) through (iii).

[614] *See* proposed Rule 613(e)(7)(i) through (iii).

trading activity. For example, a pattern of unreported trades may cause the staff of an SRO to make further inquiry into the nature of the trading to determine whether the public is receiving accurate and timely information regarding executions and that market participants are continuing to comply with the trade reporting obligations under SRO rules. Similarly, a pattern of unreported transactions could be indicia of market abuse, including failure to obtain best execution for customer orders or possible market manipulation. The Commission believes that having the quotation and transaction information currently collected with respect to NMS securities in the same data repository—and in a compatible format—as part of the consolidated audit trail would enhance regulatory efficiency when analyzing the data.

After considering the comment on this provision,[615] the Commission is adopting proposed Rule 613(e)(5)(ii) and (e)(5)(iii) (renumbered as Rule 613(e)(7)(ii) and (e)(7)(iii)), as proposed, and the requirement of proposed Rule 613(e)(5)(i) (renumbered as Rule 613(e)(7)(i)) for the NMS plan to require the central repository to collect and retain NBBO information for each NMS security substantially as proposed, but is clarifying that the NBBO information must include size and quote condition.[616] NBBO size information is integral to determining whether best execution and order handling requirements were satisfied for a particular order because these requirements depend on the relationship between the size of the order and the displayed size at the NBBO. NBBO quote condition information is integral to determining whether or not quotes are immediately accessible. For example, quote condition information that identifies whether the quote reflecting the NBBO was automated, and therefore subject to trade-through protection, or manual[617] may be an important consideration in determining whether the duty of best execution was satisfied. The NBBO price, size, and quote condition is used by regulators to evaluate members for compliance with regulatory requirements, such as the duty of best execution or Rule 611 of Regulation NMS.[618] The Commission acknowledges that there will be costs to the central repository to purchase and to retain NBBO information, transaction reports, and last sale reports. However, the Commission believes that the benefits associated with having such information included in the central repository justify the costs to the SROs of requiring that they include this in the NMS plan submitted to the Commission for its review.

3. Retention of Information

As proposed, Rule 613(e)(6) would have provided that the NMS plan require the central repository to retain the information collected pursuant to Rule 613(c)(7) and (e)(5) in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of not less than five years. The information would have been required to be available immediately, or, if immediate availability could not reasonably and practically be achieved, a search query would have been required to begin operating on the data not later than one hour after the search query is made.[619]

One commenter suggested that the Commission modify the time standard for the availability of older data to a next day (or later) standard, as the need for regulators to have immediate access to the data diminishes over time. The commenter stated that a requirement that the data be made available the next day, or after another longer period of time, would be less burdensome on the consolidated audit trail system and less costly, while still meeting the needs of regulators.[620] Another commenter believed that there could be difficulties in querying and analysis because the proposal did not specify how the data would be stored in the central repository.[621]

In response to the commenters' concerns, the Commission is modifying the proposed Rule. Specifically, Rule 613(e)(8) (renumbered from proposed Rule 613(e)(6)) provides that ''[t]he national market system plan submitted pursuant to this section shall require the central repository to retain the information collected pursuant to [Rules 613(c)(7) and (e)(7)] in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of not less than five years.'' The adopted Rule does not require, as was proposed, that the consolidated audit trail data be available immediately, or if immediate availability cannot reasonably and practically be achieved, any search query must begin operating on the data not later than one hour after the search query is made.[622]

The Commission believes that it is unnecessary for the Rule to require a timeframe within which consolidated audit trail data must be available or a timeframe for when a search must begin after the query is made because, as discussed below,[623] the Rule, as adopted, includes a provision that requires the NMS plan to specifically address the ''time and method by which the data in the central repository will be made available to regulators, in accordance with paragraph (e)(1) of this section, to perform surveillance or analyses, or for other purposes as part of their regulatory and oversight responsibilities.''[624] The Commission will consider the response to this provision contained in the NMS plan submitted by the plan sponsors to the Commission, regarding the time and method by which the data in the central repository can be accessed and used by regulators as part of their regulatory and oversight responsibilities—which would encompass queries—as it evaluates the NMS plan. The Commission believes this provision provides flexibility to the SROs to devise an access requirement that meets the needs of regulators in a cost-effective and timely manner,[625] rather than establishing a strict deadline for all data to be accessible from the central repository.

c. Timeliness, Accuracy, Integrity, and Completeness of the Consolidated Data

As proposed, Rule 613(e)(4)(ii) would have required the NMS plan to include policies and procedures, including standards, for the plan processor to ensure the timeliness, accuracy, and completeness of the data provided to the central repository. In addition, proposed Rule 613(e)(4)(iii) would have required that the NMS plan include policies and procedures, including standards for the plan processor to reject data provided to

[615] *See* Liquidnet Letter, p. 7.

[616] Quote condition is a field in the CQS feed that provides information on a quote, including whether such quote is an opening quote, closing quote, news pending, slow on ask side, slow on bid side, order imbalance or non-firm quote. *See* CQS Output Multicast Line Interface Specification, Version 48 (October 11, 2011), Appendix G.

[617] Manual quotes are not eligible for automatic execution and do not have trade through protection under Rule 611 of Regulation NMS. *See* 17 CFR 242.600(57) for a definition of a protected bid or protected offer.

[618] 17 CFR 242.611.

[619] *See* proposed Rule 613(e)(6).

[620] *See* Nasdaq Letter I, p. 10–11.

[621] *See* Ross Letter, p. 1.

[622] *See* proposed Rule 613(e)(6).

[623] *See* Section III.C.2.a.i., *infra.*

[624] *See* Rule 613(a)(1)(ii).

[625] The Commission acknowledges there would be costs to the central repository for retaining data received or collected by the central repository pursuant to Rule 613. As discussed in Section I., *supra,* the NMS plan submitted to the Commission for its consideration will include a detailed analysis of the costs of the Rule for the Commission and the public to consider after the NMS plan has been submitted.

the central repository that does not meet these validation parameters, and for SROs and members to re-transmit corrected data. Finally, proposed Rule 613(e)(4)(iv) would have required that the NMS plan include policies and procedures, including standards, to ensure the accuracy of the consolidation by the plan processor of the data provided to the central repository.

The Commission requested comment on these proposed requirements.[626] The Commission asked if this approach was practical to ensure the integrity of the data, and whether there were alternative methods that would achieve the same purpose that would be preferable. The Commission also requested comment on how much latency would result from a validation procedure.

The Commission received comments focusing concern on the potential for errors in the consolidated audit trail and the negative effects of errors in the consolidated audit trail.[627] One commenter stated that the ''key principles [that] best ensure that the regulatory goals of the consolidated audit trail are met in a cost efficient manner'' include a system that ''avoids data quality issues through data validation safeguards and a structure that reads data as close to the point of origin as possible to avoid data translation errors when data is processed through intermediary applications.'' [628] Another commenter stated that ''the CAT facility would also need a mechanism to identify and correct data that was inaccurate.'' [629] Another commenter noted that, ''if any other protocol [other than FIX] is used a translation is required to transform data into a different protocol. This introduces error and offers the potential for manipulation of the data. Using FIX means the SEC is looking at the original format of the data.'' [630]

As a point of reference, summary data about OATS provided by FINRA to Commission staff indicates that approximately 0.25% of the intra-firm data reported daily by members contains errors.[631] Additionally, according to FINRA, when errors relating to the linkage of order reports are detected, members have no obligation to correct the errors.[632] As a result, approximately 1–2% of each day's recorded events remain unmatched (i.e., multi-firm events, such as order routing, that cannot be reconciled).[633] This deficiency in the OATS process diminishes the completeness and overall usefulness of the audit trail OATS creates.

In a comment letter, FINRA discussed the challenge of obtaining accurate audit trail information if the data was required in real time, and it noted the actions it undertakes to ensure the accuracy and completeness of its audit trail data and minimize errors.[634] FINRA stated that, ''to ensure the integrity of OATS data submitted, FINRA performs over 152 separate OATS data validations on each order event, each of which can result in OATS data submissions being rejected and generating an error message.[635] As a result, FINRA performs over 40 billion separate checks each day to ensure OATS data conforms to all applicable specifications.[636] Members are then required by rule to repair and resubmit such data that did not meet OATS specifications.[637] Although members' OATS compliance rates are very high on average, almost 425,000 reports per day, on average, are rejected and must be corrected.[638] Accordingly, to use audit trail data before such validations have been performed may result in a severely distorted picture of trading and interfere with effective oversight.'' [639]

With respect to mechanisms to ensure compliance by SROs with the requirements of the plan, one commenter stated that ''Commission rules should focus on the reasonable design of systems, processes and procedures to fulfill their objectives and patterns and practice of non-compliance rather than looking to any failure as a rule violation. This is particularly important in the context of data errors or similar matters.'' [640]

Finally, another commenter believed that ''major market participants'' should retain ''detailed information of all network packets and trade data at both the ingress and egress of their infrastructure.'' [641] This commenter believed that this information would not need to be forwarded to ''any audit authority'' but explained that such information could be used by regulators in the event a ''denial of service'' attack were to occur at a network level to slow market activities or hinder the flow of market information. This commenter further explained that having this information would ''greatly improve confidence in the integrity of data and act as a further deterrence for fraudulent activity.'' [642]

After consideration of the comments received, the Commission is adopting Rule 613(e)(4)(ii) substantially as proposed. Thus, the NMS plan must have policies and procedures, including standards, to ensure the timeliness, accuracy, and completeness of the data received. The Commission believes that audit trail data that is timely, accurate, and complete is critical to the usefulness and effectiveness of Rule 613. However, the Commission is adding the term ''integrity'' to the list of items that the policies and procedures adopted by the plan sponsors, as set forth in Rule 613(e)(4)(ii), must address.[643] The addition of ''integrity'' is designed to help emphasize that data should not be subject to benign or malicious alteration, so that such data would be consistent and reliable at each point of transmission throughout its lifecycle (*i.e.,* transmission from the SRO or member to the central repository, data extraction, transformation and loading at the central repository, data maintenance and management at the central repository, and data access by regulators). The Commission believes that the integrity of the audit trail data is critical to the usefulness and effectiveness of the consolidated audit trail.

The Commission also is adopting Rule 613(e)(4)(iv), renumbered as Rule 613(e)(4)(iii), as proposed, which provides that the NMS plan submitted shall include policies and procedures, including standards, to be used by the

[626] *See* Proposing Release, *supra* note 4, at 32582.

[627] *See* Aditat Letter, p. 2; FIF Letter, p. 4; FINRA Letter, p. 11; Nasdaq Letter I, p. 8.

[628] *See* Nasdaq Letter I, p. 8.

[629] *See* FIF letter, p. 4.

[630] *See* Aditat Letter, p. 2.

[631] *See* Commission Staff Memorandum, *supra,* note 64.

[632] *Id.*

[633] *Id.*

[634] *See* FINRA Letter, p. 11.

[635] *Id.*

[636] *Id.*

[637] *Id.*

[638] *Id.*

[639] *Id.* FINRA also noted, however, that ''compliance rates for OATS steadily improved over time as members gained experience with the system. For example, when the OATS rules were first implemented, the match rate between executed orders and the related trade report submitted to an NASD transaction reporting system was only 76%. Currently, this match rate is consistently over 99%, which reflects the significant time and effort that has been expended by the industry to make their systems OATS compliant. FINRA believes that creation of a new system, rather than building off of an existing reporting infrastructure, will necessarily create a learning curve and lead to reduced compliance rates over the short-term.'' *Id.* The Commission acknowledges that there could be a learning curve for compliance with the NMS plan requirements for the reporting of data. The Commission, however, expects the NMS plan to minimize such reduced compliance rates to the extent reasonably practicable.

[640] *See* Nasdaq Letter I, p. 13.

[641] *See* Endace Letter, p. 2–3.

[642] *Id.* at p. 3.

[643] Rule 613(e)(4)(ii) provides that the NMS plan shall include policies and procedures, including standards, to ensure the timeliness, accuracy, integrity, and completeness of the data provided to the central repository.

plan processor to ensure the accuracy of the consolidation by the plan processor of the data reported to the central repository. The Commission believes that policies and procedures, including standards, to be used to ensure accuracy of the consolidated data are important and necessary because the benefits of ensuring that data is accurately reported to the central repository would be lost if the consolidation process is not as equally robust. The regulatory benefits of a consolidated audit trail are therefore based, in part, on the timeliness, accuracy, completeness, and integrity of the data ultimately available to regulators from the central repository.

As described above in Sections III.B.1.f. and III.B.1.d.iv., the adopted Rule provides the SROs with more flexibility than the proposed Rule in developing (a) the format(s) of data to be reported to the central repository, and (b) the methods by which order identifiers will be used to link reportable events. Accordingly, the Commission expects the policies and procedures included in the NMS plan submitted to the Commission for its consideration to apply to both the transmission of audit trail data from SROs and their members to the central repository, and the consolidation and retention of that data, and other information collected pursuant to the Rule, by the central repository, including, but not limited to, any normalization or conversion of the data to a uniform electronic format, and procedures for how reportable events are accurately linked. The Commission believes that it is critical to the usefulness of the consolidated audit trail that the SROs and their members report data in a manner that is accurate and complete, and that the central repository takes any and all appropriate measures to consolidate and retain that data in the same manner. To the extent the data is not accurate or complete, the ability of SRO and Commission staff to utilize the data to accomplish the goal of the consolidated audit trail will be compromised.[644]

In light of the comments the Commission received that noted the concern about the potential for errors in the consolidated audit trail, as well as the impact such errors may have on the consolidated audit trail,[645] the Commission is revising Rule 613(e)(4)(iii) as proposed (renumbered as Rule 613(e)(6)(i)). Specifically, Rule 613(e)(6)(i) requires the NMS plan submitted to the Commission for its consideration to ''[s]pecify a maximum error rate to be tolerated by the central repository for any data reported pursuant to Rule 613(c)(3) and (c)(4); describe the basis for selecting such maximum error rate; explain how the plan sponsors will seek to reduce the maximum error rate over time; describe how the plan will seek to ensure compliance with such maximum error rate and, in the event of noncompliance, will promptly remedy the causes thereof.'' [646] Rule 613(e)(6)(ii) states that the NMS plan shall ''[r]equire the central repository to measure the error rate each business day and promptly take appropriate remedial action, at a minimum, if the error rate exceeds the maximum error rate specified in the plan.'' Rule 613(e)(6)(iii) and (iv) provide that the NMS plan shall ''[s]pecify a process for identifying and correcting errors in the data reported to the central repository pursuant to [Rule 613(c)(3) and (c)(4)], including the process for notifying the national securities exchanges, national securities associations, and members who reported erroneous data to the central repository about such errors, to help ensure that such errors are promptly corrected by the reporting entity, and for disciplining those who repeatedly report erroneous data; and * * * [s]pecify the time by which data that has been corrected will be made available to regulators.'' [647]

As noted above, the Commission believes the availability of accurate consolidated data is a critical component of a useful and effective audit trail. Ideally, there would be no errors in the recording or reporting of any audit trail data element, and every data element of every reportable event would be accurately recorded by the SROs and their members, and then accurately reported to the central repository under Rule 613, resulting in a consolidated audit trail that reflects all actions relating to every order in the market for securities. However, because the Commission understands that, to some extent, errors in reporting audit trail data to the central repository will occur, the Commission believes it is appropriate to adopt a provision in Rule 613 that requires the NMS plan to set forth the maximum error rate to be tolerated by the central repository in the reporting of audit trail data, as well as to specify a process for identifying and correcting such errors.[648]

The Commission notes that the Rule leaves to the plan sponsors the ability to determine the acceptable maximum error rate, although the Rule does require that the NMS plan must explain the basis for selecting such rate. The Rule also requires the NMS plan submitted to the Commission for its consideration to set forth how the plan sponsors will seek to reduce such maximum error rate over time, thereby increasing the accuracy of audit trail data. Further, the Rule requires the NMS plan to have in place a means to ensure compliance with the maximum error rate so that SROs and their members are incentivized to comply with the maximum error rate, and to set forth a plan for promptly remedying the causes for any noncompliance.

Since the Rule leaves many of the specific details regarding error rates and error-correction processes for the plan sponsors to determine, and because the accuracy and completeness of data ultimately received by regulators is of such significance to the effective use of a consolidated audit trail, the Commission, as well as the public, would likely consider such details very important in their overall evaluation of the submitted plan. Furthermore, given that the approval of any plan by the Commission would, in part, be based on expectations of maximum error rates, the Commission believes it is equally important for objective measures to be reported that track how well the plan is meeting such expectations. Thus, to ensure the accuracy of the audit trail data generally meets these expectations, Rule 613(e)(6)(ii) also requires that the error rate identified in the NMS plan be measured each business day and that remedial action be taken if, on any given day, the error rate exceeds the maximum error rate set forth in the NMS plan.[649]

The Commission also believes it is appropriate to require the SROs to formulate a process for identifying and dealing with errors, and to require that the SROs or the members reporting erroneous data be notified that an error

[644] *See* Section II.A., *supra.*

[645] *See* Aditat Letter, p. 2; FIF Letter, p. 4; FINRA Letter, p. 11; Nasdaq Letter I, p. 8.

[646] *See* Rule 613(e)(6)(i). The term ''error rate'' is defined in Rule 613(j)(6) to mean ''[t]he percentage of reportable events collected by the central repository in which the data reported does not fully and accurately reflect the order event that occurred in the market.'' The SROs should consider calculating an aggregate error rate as well as error rates for subcategories such as trade reporting and quote reporting.

[647] *See* Rule 613(e)(6)(iii) through (iv).

[648] *See* Rule 613(e)(6).

[649] The Commission recognizes that in any complex system there is always a risk of occasional unexpected errors, or errors caused by rare and unexpected events. However, the Commission believes that, by tracking error rates on a daily basis, the SROs, and the Commission would be able to observe any repeated patterns or longer-term trends that suggest more systematic problems or concerns with data collection, reporting, or consolidation processes.

in reporting has occurred.[650] In addition, the Commission believes it is appropriate to require the SROs to develop a process to help ensure that errors are promptly corrected by the reporting SRO or member. The Commission understands that requirements similar to these are currently implemented by FINRA as part of their OATS process, though cross-firm errors, such as those leading to irreconcilable or unmatched routes, are not generally corrected under the OATS process.[651] The Commission further believes that disciplining SROs and members that repeatedly report erroneous audit trail data, as required by Rule 613(e)(6)(iii), is appropriate given the need to maintain an accurate consolidated audit trail for regulatory purposes. Finally, given that the NMS plan submitted to the Commission for its consideration is required to specify a process for correcting errors, the Commission also believes it is appropriate to require, pursuant to Rule 613(e)(6)(iv), that the NMS plan submitted to the Commission for its consideration specify the time by which data that has been corrected will be made available to regulators. In reviewing the NMS plan submitted for its consideration, the Commission will therefore be able to consider the time that uncorrected but consolidated data (which was reported to the central repository by 8:00 a.m. Eastern Time on the trading day following the day such information was recorded) would be available for use by regulators, the expected error rate of this data, and the time at which a corrected version of this data would be made available to regulators. These three parameters will help inform regulators as to the potential effectiveness of starting different types of surveillance and monitoring activities at different times.[652]

The Commission acknowledges there would be costs to the central repository associated with developing policies and procedures related to the timeliness, accuracy, integrity, and completeness of data, including, but not limited to, processes for identifying and correcting errors in the audit trail data received, and measuring the error rate on a daily basis. However, the size of these costs depends significantly on the specific details of the NMS plan submitted to the Commission for its consideration. Once the SROs submit the NMS plan to the Commission for its consideration specifying the details, parameters, and estimated costs of such processes, as well as the maximum error rate expected under such processes, the Commission and the public will be able to consider this information when determining whether to approve the NMS plan.

d. Access to the Central Repository and Consolidated Audit Trail Data for Regulatory and Oversight Purposes

As proposed, each national securities exchange and national securities association, as well as the Commission, would have had access to the central repository for the purposes of performing its respective regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations.[653] This access would have included all systems of the central repository, and the data reported to and consolidated by the central repository.[654] In addition, the Commission proposed to require that the NMS plan include a provision requiring the creation and maintenance by the central repository of a method of access to the consolidated data.[655] This method of access would have been required to be designed to include search and reporting functions to optimize the use of the consolidated data. The Commission requested comment on whether it should allow the consolidated audit trail data to be made available to third parties, such as for academic research.

One commenter supported limiting access to the consolidated audit trail data to the Commission and SROs for regulatory purposes, but suggested it would also be appropriate to share the data with the CFTC.[656] Other commenters supported the idea of providing ''anonymized'' data for academic use, as long as appropriate controls were established to assure regulators and market participants that confidential trading information could not be revealed.[657] Specifically, one commenter endorsed the use of the data ''with appropriate safeguards'' by academic researchers, explaining that it will ''promote understanding of the markets,'' and ''lead to better policy decisions and thus more fair and orderly markets.'' [658] Similarly, another commenter also supported the use of the data by certain third parties and stated that ''[a]ccess to real-world data can help research immensely.'' [659]

The Commission also received a comment that argued for extending access to the consolidated audit trail data to certain individuals who have a fiduciary responsibility to shareholders of a company. This commenter explained that such access would allow them to audit all trading activity in the equity or other derivative securities of that company.[660]

The Commission recognizes there may be certain benefits to the types of expanded access to data in the central repository that has been suggested by various commenters, but, for the reasons discussed below, it is adopting the provisions in Rule 613 regarding access by regulatory authorities at the SROs and the Commission to the systems operated by the central repository, and to the data received, consolidated, and retained by the central repository, substantively as proposed in Rule 613(e)(3), but with one clarification regarding the requirement for access by regulators.[661] Specifically, Rule 613(e)(3), as adopted, provides that ''[t]he national market system plan submitted pursuant to this section shall include a provision requiring the creation and maintenance by the plan processor of a method of access to the consolidated data stored in the central repository that includes the ability to run searches and generate reports.'' As proposed, Rule 613(e)(3) would have provided that the central repository must have a ''reporting function.'' The Commission believes that this language is ambiguous and may have implied that the central repository was required to do more than respond to search queries. Accordingly, the Commission is replacing the requirement in proposed Rule 613(e)(3) that the central repository provide ''search and reporting functions'' with the requirement that there be ''the ability to run searches and generate reports.'' The change in language from that contained in the Rule, as proposed, is not intended to

[650] *See* Rule 613(e)(6)(iii) through (iv).

[651] *See* Commission Staff Memorandum, *supra* note 64.

[652] *See* Rule 613(a)(1)(ii).

[653] *See* proposed Rule 613(e)(2).

[654] *Id.*

[655] *See* proposed Rule 613(e)(3).

[656] *See* Liquidnet Letter, p. 8–9. *See also* SIFMA Letter, p. 19.

[657] *See* Angel Letter, p. 3; Albany Letter, p.1–4; and TIAA–CREF Letter, p.4.

[658] *See* Angel Letter, p. 3.

[659] *See* Albany Letter, p. 1–3. This commenter acknowledged the privacy concerns involved in making the data available for academic research, but stated that researchers have faced similar challenges before and researchers are capable of developing a way to access and share information without the risk of divulging trading strategies or identities. The commenter also stated that data released after a delay would limit the data's usefulness.

[660] *See* Van Bokkelen Letter, p. 1.

[661] *See* Rule 613(e)(3). *See also* Rule 613(a)(1)(ii) (requiring the NMS plan to detail how readily the NMS plan will allow data in the central repository to be accessed by regulators, as well as the regulators' manner of access); *see also* Section III.C.2.a.i., *infra*.

change the substance of the requirement.

In response to the commenter who suggested sharing data with the CFTC, the Commission notes that it has shared information with the CFTC in the past and that it intends to continue sharing information when the situation so warrants. The Commission notes that, among other arrangements, it currently has information-sharing agreements with other regulators. The Commission also agrees with commenters that there may be benefits to allowing academics or other third parties to have access to data collected by the central repository. Academic and other third-party analyses are helpful to the Commission in performing its own evaluation of the economic costs and benefits of regulatory policy. The Commission also notes that one commenter believes that the ability of companies to detect manipulative trading activity in their securities could be enhanced if certain individuals, who have a fiduciary responsibility to shareholders, were given access to limited consolidated audit trail data. However, because the creation and implementation of the consolidated audit trail is in the formative stage, and in light of commenters' concerns about the privacy and security of the information, the Commission believes it is premature to require that the NMS plan require the provision of data to third parties.

Though the Commission is not specifying a particular process, or any details, regarding the mechanism(s) by which regulators will access data in the central repository, the Rule requires the SROs to provide such details and cost estimates in its NMS plan submitted to the Commission for its consideration.[662] Further, as discussed below in Section III.C.2.c., the Commission is providing the SROs with detailed regulator use cases for how regulators would likely make use of the data in the central repository. These regulator use cases are designed to help the SROs respond with sufficient details in the NMS plan submitted to the Commission for its consideration so that, along with associated cost estimates also required to be provided by the SROs, the Commission and the public will be able to fully consider the NMS plan submitted.

e. Confidentiality of Consolidated Data

Rule 613(e)(4)(i), as proposed, would have required that the NMS plan include policies and procedures, including standards, to be used by the plan processor to ensure the security and confidentiality of all information reported to, and maintained by, the central repository. The plan sponsors and employees of the plan sponsors and central repository would have been required to agree to use appropriate safeguards to ensure the confidentiality of such data, and not to use such data other than for surveillance and regulatory purposes.[663] As proposed, Rule 613 also would have required the NMS plan to include mechanisms to ensure compliance by the plan sponsors and their members with the requirements of the plan.[664]

In the Proposing Release, the Commission solicited comments regarding what steps should be taken to ensure appropriate safeguards with respect to the submission of customer information, as well as the receipt, consolidation, and maintenance of such information in the central repository. The Commission requested comment on the issue of appropriate safeguards to be put in place by the SROs and the central repository to help ensure confidentiality. The Commission also asked whether the proposed Rule should: (1) Require that SROs put in place specific information barriers or other protections to help ensure that data is used only for regulatory purposes; (2) provide for an audit trail of the SROs' personnel access to, and use of, information in the central repository to help monitor for compliance with appropriate usage of the data; and (3) include a requirement that the NMS plan include policies and procedures to be used by the plan processor to ensure the security and confidentiality of information reported to, and maintained by, the central repository be expanded to include the content of any searches or queries performed by the SROs or the Commission on the data.[665]

Several commenters expressed concern about how to best ensure the confidentiality of the data collected.[666] One commenter generally argued that safeguards for the audit trail data had not been sufficiently addressed in the Proposing Release.[667] Another commenter recommended that the operator of the central repository and the SROs be required to implement security policies, processes, and practices consistent with industry best practices for the protection of sensitive information and that such policies, processes, and practices be audited on an annual basis by a third-party expert.[668] Similarly, one commenter suggested that vendors also should implement best practices with regard to security, reliability, and integrity of data.[669] Another commenter stated that SROs should be subject to the same privacy and data protection standards as those to which broker-dealers are subject, and that SRO members should not be held responsible, and be indemnified by the SROs, for any breaches of customer or firm information.[670]

One commenter offered several specific recommendations for enhancing the security of audit trail information.[671] This commenter suggested that the Commission should expressly state who would have access to the data, when they could access it, and how they could use it, and further recommended that all data sent to the central repository be encrypted, and that certain fields be ''masked'' or be subject to delayed end-of-day reporting.[672] In addition, this commenter suggested that the Commission and each SRO should adopt a robust information security program, and that the Commission should explain how it intends to treat requests for audit trail data.[673]

Another commenter suggested that the Rule more explicitly enunciate permissible and impermissible uses of the consolidated audit trail and suggested including a requirement regarding the SROs' personnel access to and use of audit trail data, as well as a commitment by the Commission to review each SRO with respect to the adequacy of information barriers.[674] Similarly, a commenter suggested that access to audit trail data be limited to employees of regulators whose function is to monitor and surveil that market.[675] This commenter supported the restriction that consolidated audit trail

[662] *See* Sections III.C.2.a.i through ii., *infra;* Rule 613(a)(1)(ii) through (vii).

[663] *See* proposed Rule 613(e)(4)(i). However, a plan sponsor also would be permitted to use the data it submits to the central repository for commercial or other purposes as otherwise permitted by applicable law, rule or regulation. *Id.*

[664] *See* proposed Rule 613(h)(3), Rule 613(g)(4).

[665] *See* Proposing Release, *supra* note 4, at 32582.

[666] *See* Scottrade Letter, p. 2 (expressing concern that trading strategies and confidential customer information could be at risk from cyber-attacks or accidental data breaches); ICI Letter, p. 2–4; Ross Letter, p. 1; Liquidnet Letter, p. 4. *See also* Ameritrade Letter, p. 3; Thomson Reuters Letter, p. 4; BATS Letter, p. 3; Managed Funds Association Letter, p. 2–3.

[667] *See* Ameritrade Letter, p. 3–4.

[668] *See* Liquidnet Letter p. 4.

[669] *See* Thomson Reuters Letter, p. 4.

[670] *See* TIAA–CREF Letter, p. 4.

[671] *See* ICI Letter, p. 2–4.

[672] *Id.* at 3.

[673] *Id.*

[674] *See* BATS Letter, p. 3.

[675] *See* Managed Funds Association Letter, p. 2–3.

data only be used for regulatory purposes.[676]

One commenter asked how and at what level customer data would be encrypted.[677] This commenter listed specific aspects of data encryption that would need to be addressed, and noted that potential burdens could be associated with encryption.[678] Finally, one commenter recommended that the Commission express its intention to withhold audit trail data from the public pursuant to Freedom of Information Act (''FOIA'') [679] exemptions.[680]

The Commission considered the concerns expressed by commenters about the sensitivity of much of the information that will be consolidated by the central repository, and believes that maintaining the confidentiality of customer and other information reported to the central repository is essential. Without adequate protections, market participants would risk the exposure of highly-confidential information about their trading strategies and positions.

The Commission notes that it currently has controls and systems for its own use and handling of audit trail information. Nevertheless, given the sensitivity of certain information that will be produced by the consolidated audit trail—as well as the fact that such information should be more readily available and provided in a more usable format than existing audit trail information—the Commission intends to review the controls and systems that it currently has in place for the use and handling of audit trail information. The Commission further intends to evaluate whether any additional controls and systems may be required to adequately protect the sensitive information provided to it under the consolidated audit trail.[681]

In addition, adopted Rule 613(e)(4)(i) requires that the NMS plan include policies and procedures that are designed to ensure implementation of the privacy protections that are necessary to assure regulators and market participants that the NMS plan provides for rigorous protection of confidential information reported to the central repository. Specifically, adopted Rule 613(e)(4)(i)(A) requires that ''[a]ll plan sponsors and their employees, as well as all employees of the central repository, agree to use appropriate safeguards to ensure the confidentiality of such data and agree not to use such data for any purpose other than surveillance and regulatory purposes, provided that nothing in [Rule 613(e)(4)(i)(A)] shall be construed to prevent a plan sponsor from using the data that it submits to the central repository for regulatory, surveillance, commercial, or other purposes as otherwise permitted by applicable law, rule, or regulation.'' Further, in response to a comment,[682] adopted Rule 613(e)(4)(i)(B) adds the requirement to the Rule, as proposed, that the plan sponsors adopt and enforce rules that: (1) Require information barriers between regulatory staff and non-regulatory staff with regard to access and use of data in the central repository, and (2) permit only persons designated by plan sponsors to have access to the data in the central repository.[683] In addition, the Commission is modifying the Rule, as proposed, to require that the plan processor must: (1) develop and maintain a comprehensive information security program, with dedicated staff, that is subject to regular reviews by the central repository's CCO, (2) require the central repository to have a mechanism to confirm the identity of all persons permitted to access the data, and (3) maintain a record of all instances where such persons access the data.[684]

The Commission believes these provisions should create a framework for the SROs to establish a thorough and exacting process for helping ensure the continued effectiveness of the confidentiality safeguards. Further, the Commission believes these additional provisions are appropriate because they clarify the types of confidentiality safeguards that the NMS plan submitted to the Commission for its consideration must have to preserve the confidentiality of the information that is received, consolidated, and retained by the central repository. The provision requiring information barriers is designed to, for example, protect and prevent audit trail data, which are to be used only for regulatory purposes, from being communicated to any personnel at an SRO that are engaged in non-regulatory or business activities. Additionally, the Rule's requirement that policies and procedures submitted as part of the NMS plan provide that: (i) Only persons designated by the plan sponsors have access to the central repository data, (ii) the plan processor have a mechanism to confirm the identity of all persons permitted access to the data, and (iii) the plan processor maintain a record of all instances where such persons access the data. These provisions are designed to assure regulators and market participants that only designated persons are allowed access to the consolidated audit trail data, and that the central repository will have a method to track such access. With respect to the commenter that suggested the Commission more explicitly enunciate permissible and impermissible uses of the consolidated audit trail,[685] the Commission notes that any security and confidentiality provisions included in the NMS plan approved by the Commission will be subject to the Commission's inspection and examination program of SROs to ensure that they are implemented fairly in a manner consistent with the Exchange Act.[686]

The Commission believes that an outline or overview description of the policies and procedures that would be implemented under the NMS plan submitted to the Commission for its consideration would be sufficient to satisfy the requirement of the Rule. The Commission believes it is important for the NMS plan submitted to the Commission to establish the fundamental framework of these policies and procedures, but recognizes the utility of allowing the plan sponsors flexibility to subsequently delineate them in greater detail with the ability to make modifications as needed.

The Commission considered the comment that asked when and at what level customer information would be encrypted.[687] The Commission notes

[676] *Id.*

[677] *See* Ross Letter, p. 1.

[678] *Id.*

[679] 5 U.S.C. 552.

[680] *See* ICI Letter, p. 4.

[681] For example, appropriate confidentiality protections will need to be programmed in any Commission systems that collect, store, or access data collected from the central repository. In addition, it may be appropriate to establish multiple access levels for Commission staff so that staff members are allowed only as much access as is reasonably necessary in connection with their duties.

[682] *See* ICI Letter, p. 3

[683] Rule 613(e)(4)(i)(B); *see* ICI Letter, p. 3 (recommending that ''the confidential nature of the information supports limiting access to the CAT data to regulators and repository staff'').

[684] *See* Rule 613(e)(4)(i)(C). The Commission expects that the central repository's CCO would be responsible for determining the frequency of these regular reviews in the first instance, in accordance with industry standards for the review of information security, taking into account the sensitivity of the data stored in the central repository. *See* Rule 613(b)(5) for a description of the CCO.

[685] *See* BATS Letter, p. 3. *See also* Managed Funds Association Letter, p. 2–3.

[686] The Commission notes that, as part of its inspection and examination program, its staff has the authority to examine the application of any security and confidentiality provisions in the NMS plan to determine whether they have been applied fairly. In this manner, the Commission will be able to monitor how the plan sponsors have applied any such provisions set out in the NMS plan approved by the Commission, and whether their uses of the consolidated audit trail were consistent with the plan and the Exchange Act.

[687] *See* Ross Letter, p. 1.

that, while Rule 613 does not require that this information be encrypted, the Rule contains several safeguards, discussed in this section, to ensure the privacy and confidentiality of the audit trail data. Based on these provisions,[688] the Commission believes that plan sponsors would need to make sure customer information is protected, which could be accomplished by data encryption, if they so choose. Additionally, the Commission notes that the unique customer identifier is only reported once to the central repository—by the broker-dealer that is either originating the order or is the original recipient of the order. Because the unique customer identifier does not travel with the order as it is routed to other market participants, only the originating broker-dealer should be able to determine the identity of the customer of the order. The Commission considered the comment that recommended that the Commission express its intention to withhold audit trail data from the public pursuant to FOIA.[689] The adopted Rule places no affirmative obligations on the Commission to provide information to any third parties. Further, the Commission believes there are bases under FOIA to withhold customer information, including 5 U.S.C. 552(b)(4) (trade secrets, commercial or financial information), 5 U.S.C. 552(b)(6) (personal information affecting an individual's privacy), and 5 U.S.C. 552(b)(8) (records related to examinations of financial institutions). The Commission intends to assert all appropriate exemptions in response to a FOIA request for information related to the consolidated audit trail's customer information.

The Rule, as adopted, also states that the NMS plan must require the SROs to adopt penalties for non-compliance with any policies and procedures of the plan sponsors or central repository, described above, with respect to information security.[690] The Commission believes this provision is appropriate because it provides an incentive to SROs to comply with the central repository's information security program. The Commission encourages SROs to include in their comprehensive information security program developed and maintained by the plan processor provisions for notifying any customer or other market participant whose information may have been compromised by a security breach, so that appropriate remedial steps may be taken.

Additionally, given the importance of the security of data consolidated in the central repository, and in response to the commenter who recommended an annual third-party audit of the security of the central repository,[691] the Commission has added Rule 613(e)(5) to require the NMS plan submitted to the Commission for its consideration to address whether there will be an annual, independent evaluation of the security of the central repository and (1) if so, provide a description of the scope of such planned evaluation, and (2) if not, provide a detailed explanation of the alternative measures for evaluating the security of the central repository that are planned instead. As with most information technology systems, the central repository's system will include measures to assure regulators and market participants of the security of the system. An independent evaluation of the security of the central repository could aid the central repository in identifying and correcting potential areas of weakness or risk. While the Commission is leaving it to the plan sponsors to determine whether the NMS plan will require an annual audit, given the confidential nature of information that will be stored at the central repository, the Commission believes that the NMS plan submitted to the Commission for its consideration must, at a minimum, address whether such an audit is appropriate.

The Commission also notes that, as discussed below,[692] it is adding a specific provision that requires the NMS plan submitted to the Commission for its consideration to discuss the security and confidentiality of the information reported to the central repository.[693] With this information, the Commission, as well as the public, will be able review in detail how the NMS plan proposes to ensure the security and confidentiality of such information in deciding whether to approve the NMS plan.

The Commission believes that, collectively, these provisions are appropriate because of the confidential and commercially valuable information that the central repository will contain. The Commission believes that the purpose and efficacy of the consolidated audit trail would be compromised if the Commission, the SROs and their members could not rely on the confidentiality and security of the information stored in the central repository. The Commission acknowledges there would be costs associated with a comprehensive information security program, including, but not limited to, compensating a CCO and a dedicated staff, and establishing policies and procedures, as well as for an annual, independent evaluation of the central repository's security (if such an evaluation is required by the NMS plan submitted to the Commission for its consideration) or alternative measures (if such an evaluation is not). Once the SROs have submitted the NMS plan to the Commission that, as required, contains details about the security and confidentiality of the audit trail data, the Commission and the public will be able to consider this information when evaluating the NMS plan.

3. Other Required Provisions of the NMS Plan

a. Compliance With the NMS Plan

1. Exchanges and Associations

As proposed, Rule 613(h) would have provided that each plan sponsor shall comply with the provisions of an NMS plan submitted pursuant to the proposed Rule and approved by the Commission.[694] In addition, the proposed Rule would have provided that any failure by a plan sponsor to comply with the provisions of the NMS plan could be considered a violation of the proposed Rule.[695] The proposed Rule also would have required that the NMS plan include a mechanism to ensure compliance by the sponsors with the requirements of the plan.[696]

One commenter expressed concern that there would be competitive implications if the NMS plan were to include provisions that would permit SROs to assess penalties against one another for non-compliance.[697] This commenter recommended, instead, that the NMS plan include a ''fee recoupment'' provision so the plan administrator could recoup costs incurred as a result of an error by a particular SRO.[698] The commenter maintained that a ''fee recoupment'' provision, coupled with the risk of Commission disciplinary action for a ''pattern or practice'' of non-

[688] Specifically, adopted Rule 613(e)(4) requires the NMS plan to include policies and procedures, including standards, to be used by the plan processor to ensure the security and confidentiality of all information submitted to the central repository. In addition, one of the considerations the NMS plan must address is how the security and confidentiality of all information, including customer information, submitted to the central repository, will be ensured. *See* Rule 613(a)(1)(iv).

[689] *See* ICI Letter, p. 4.

[690] *See* Rule 613(e)(4)(i)(D).

[691] *See* Liquidnet Letter, p. 4.

[692] *See* Section III.C.2.a.i., *infra*.

[693] *See* Rule 613(a)(1)(iv).

[694] *See* proposed Rule 613(h)(1).

[695] *See* proposed Rule 613(h)(2).

[696] *See* proposed Rule 613(h)(3).

[697] *See* Nasdaq Letter I, p. 13.

[698] *Id*.

compliance, would be a sufficient penalty.[699]

After considering the comment received on the issue of compliance with the NMS plan by exchanges and associations,[700] the Commission is adopting Rule 613(h) substantially as proposed, with a modification to Rule 613(h)(3) to specify that a mechanism to ensure compliance by the sponsors of the NMS plan with the requirements of the plan ''may include penalties where appropriate'' and a technical modification to proposed Rule 613(h)(1) and (2).[701] The Commission believes that specifying that the mechanism to ensure compliance by the sponsors of the NMS plan *may* include a penalty provision where appropriate provides the plan sponsors with an appropriate tool—including potential disciplinary action—to help ensure compliance by SROs with the terms and provisions of the NMS plan.[702] The Commission notes that a penalty provision could provide an incentive for each SRO to comply with all the provisions of the NMS plan because each SRO will seek to avoid incurring any penalty under the Rule. The incentive to avoid a penalty could also reduce the risk of non-compliance with the Rule. The Commission notes, however, that the adopted Rule does not mandate that the NMS plan's enforcement mechanism include penalties, as there might be other mechanisms to enforce or encourage compliance with the Rule, and the Commission believes that the SROs, in the first instance, should design such mechanisms in their role as plan sponsors. However, the Commission expects that if the SROs design compliance mechanisms that do not incorporate penalties, they would explain in the NMS plan how such mechanisms are expected to help ensure compliance by SROs with the terms and provisions of the NMS plan.[703]

With respect to the comment concerning the potential competitive implications of allowing the plan sponsors to impose penalties against each other for non-compliance, the Commission notes that it will carefully review the NMS plan submitted for its consideration, including any proposed mechanisms to help ensure compliance with the NMS plan and the adopted Rule, to help ensure that penalty provisions, if any, are designed to be applied fairly and in a manner consistent with the Exchange Act.[704] As the central repository will be a facility[705] of the SROs, the rules governing it must be consistent with the Exchange Act. In addition, any future amendment to the penalty provisions applicable to the SROs would either be reviewed as an amendment to the NMS plan (effected through public notice and comment and taking into account the relevant considerations contemplated by Rule 613(a)(1)) or, because the central repository is a facility of the SROs, as a proposed rule change of the central repository under Section 19 of the Exchange Act.

The Commission notes that the Commission's examination authority under Section 17 of the Exchange Act[706] extends to the central repository because it is a facility of the SROs and, thus, the Commission will have the opportunity to inspect the central repository and its books and records for compliance with any penalty provisions set out in the NMS plan. Additionally, the Commission has the authority to review any actions taken under the NMS plan, pursuant to Rule 608(d)(1) of Regulation NMS,[707] for burdens on competition, among other matters.[708]

In response to the comment suggesting a ''fee recoupment'' provision in the NMS plan, the Commission notes that Rule 613(b)(4), as adopted, provides that ''[t]he national market system plan submitted pursuant to this section shall include a provision addressing the manner in which the costs of operating the central repository will be allocated among the national securities exchanges and national securities associations that are sponsors of the plan, including a provision addressing the manner in which costs will be allocated to new sponsors to the plan.'' In this regard, to the extent a ''fee recoupment'' is a method for recouping costs incurred by the central repository as a result of an error in reporting to the consolidated audit trail, as stated by a commenter,[709] the Commission notes that, pursuant to Rule 613(b)(4), the plan sponsors may, if they deem it appropriate, include a fee recoupment provision in the NMS plan submitted to the Commission for its consideration.[710]

2. Members

Proposed Rule 613(g) would have included provisions to subject members of each SRO to the requirements of Rule 613. Specifically, as proposed, the Rule would have required each SRO to file with the Commission, pursuant to Section 19(b)(2) of the Exchange Act[711] and Rule 19b-4 thereunder,[712] a proposed rule change to require its members to comply with the requirements of the proposed Rule and the NMS plan.[713] Further, the proposed Rule directly would have required each member to (1) collect and submit to the central repository the information required by the Rule, and (2) comply with the clock synchronization requirements of the proposed Rule.[714] The proposed Rule also would have required that the NMS plan include a provision that each SRO, by subscribing to and submitting the plan to the Commission, agrees to enforce compliance by its members with the provisions of the plan.[715] Finally, the proposed Rule would have required the NMS plan to include a mechanism to ensure compliance with the requirements of the plan by the members of each SRO that is a sponsor of the NMS plan submitted pursuant to this Rule and approved by the Commission.[716]

One commenter expressed the view that ''enforcement of [the consolidated audit trail] . . . should be accomplished through a policies and procedures rule framework—similar to that of Regulation NMS. To enforce the rule from a strict liability perspective would simply be the wrong approach and would result in thousands of technical

[699] *Id.*

[700] *Id.*

[701] This technical modification simplifies the language of Rule 613(h)(1) and (2) from the proposal. Adopted Rule 613(h)(1) and (2) deletes the language ''submitted pursuant to this section'' and ''of which it is a sponsor.'' Adopted Rule 613(h)(1) and (2), like the proposed Rule, requires each SRO to comply with the provisions of the NMS plan ''approved by the Commission.'' Because each SRO will be a member of the NMS plan approved by the Commission, it is not necessary to include the phrases not adopted.

[702] Any such provision would be subject to notice and comment pursuant to Rule 608 of Regulation NMS.

[703] The Commission notes that any failure by a national securities exchange or national securities association to comply with the provisions of the NMS plan approved by the Commission will be considered a violation of Rule 613, and that the Commission could take appropriate steps to address such a violation, including imposing penalties as appropriate. *See* Rule 613(h)(2).

[704] *See* Section III.B.2.a., *supra.*

[705] *See supra* note 581 (describing the nature of a ''facility'').

[706] 15 U.S.C. 78q.

[707] 17 CFR 242.608(d)(1).

[708] *Id.*

[709] *See* Nasdaq Letter I, p. 13.

[710] Any such provision would be subject to notice and comment pursuant to Rule 608 of Regulation NMS.

[711] 15 U.S.C. 78s(b)(2).

[712] 17 CFR 240.19b–4.

[713] *See* proposed Rule 613(g)(1). This provision in the proposed Rule echoes the requirement contained in Rule 608 that ''each self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members.'' 17 CFR 242.608(c).

[714] *See* proposed Rule 613(g)(2).

[715] *See* proposed Rule 613(g)(3).

[716] *See* proposed Rule 613(g)(4).

(non-material) violations, which is clearly not the intent of the rule.'' [717]

After considering the comment regarding Rule 613's provisions on compliance with the Rule by members of the SROs, the Commission is adopting Rule 613(g) substantially as proposed, with technical modifications to proposed Rule 613(g). These technical modifications simplify the language of Rule 613(g). Adopted Rule 613(g) does not include the phrase that applied the requirements therein to each member of an SRO ''that is a sponsor of the national market system plan submitted pursuant to this section and approved by the Commission.'' Because each SRO will be a member of the NMS plan approved by the Commission, it is not necessary to include the deleted language.

In addition, the Commission modified Rule 613(g)(2) as proposed to provide that, ''[e]ach member of a national securities exchange or national securities association shall comply with all the provisions of any approved national market system plan applicable to members.'' This change requires members to comply with all applicable provisions of the NMS plan as approved by the Commission instead of with the specific provisions contained in the Rule relating to recording and reporting data and clock synchronization since the requirements contained in the NMS plan may differ or be more specific than the requirements stated in the Rule.

To be in compliance with the NMS plan, members must record and report all data elements required by the NMS plan within the time specified in the plan. To this end, the plan sponsors must develop a way to ensure that each member that takes action with respect to an order (*e.g.,* originates, receives, routes, modifies, cancels or executes an order) records and reports all required elements associated with a reportable event, as the plan sponsors must also develop a mechanism to address any lapses in compliance with the NMS plan with a goal of ensuring the central repository is receiving a complete record of the life of an order.

The Commission does not agree with the commenter that believed that enforcement of the consolidated audit trail will necessarily ''result in thousands of technical (non-material) violations, which is clearly not the intent of the rule.'' [718] The Commission notes that the adopted Rule does not address the means of achieving compliance with the requirements of the consolidated audit trail. Rather, adopted Rule 613(g) simply provides that the SROs must submit proposed rule changes to require their members to comply with the requirements of an NMS plan approved by the Commission.

The Commission acknowledges there would be costs to the SROs for filing with the Commission proposed rule changes to require their members to comply with Rule 613 and the NMS plan approved pursuant thereto. The Commission, however, believes that the Rule should include these rule filing requirements for the reasons discussed above.

b. Operation and Administration of the NMS Plan

Proposed Rule 613(b) sets forth requirements concerning the operation and administration of the NMS plan. As proposed, Rule 613(b)(1) would have required that the NMS plan include a governance structure to ensure fair representation of the plan sponsors and provisions governing the administration of the central repository, including the selection of a plan processor. Rule 613(b)(2), as proposed, also would have required the plan sponsors to include in the NMS plan a provision addressing the requirements for the admission of new sponsors to the plan and the withdrawal of sponsors from the plan. In addition, proposed Rule 613(b)(3) would have required the NMS plan to include a provision addressing the percentage of votes required by the plan sponsors to effectuate amendments to the plan, and proposed Rule 613(b)(4) would have required that the plan sponsors develop a process for allocating among themselves the costs associated with creating and maintaining the central repository, including a provision addressing the manner in which such costs would be allocated to sponsors who join the plan after it has been approved.

Finally, proposed Rule 613(b)(5) would have required the NMS plan to require the appointment of a CCO to regularly review the operation of the central repository to assure its continued effectiveness in light of market and technological developments, and make any appropriate recommendations to the plan sponsors for enhancement to the nature of the information collected and the manner in which it is processed. In the Proposing Release, the Commission stated that it expected the CCO would establish the procedures necessary to ensure that the operations of the central repository keep pace with technical developments and to make any necessary upgrades or changes to the central repository to maintain its efficacy.[719]

The Commission received comments addressing the proposed requirements for operation and administration of the NMS plan.[720] One commenter suggested that the NMS plan should contain a voting mechanism that requires less than unanimity, and with an effective tie breaking mechanism.[721] This commenter also recommended that the governance structure ''limit the ability of individual SROs to make modifications on a unilateral basis that could escalate costs by forcing the operator and firms to absorb costs that do not advance the interests of investors.'' [722]

Two commenters expressed views on the selection and role of the plan processor.[723] One suggested that the SROs should select the processor through a ''request for proposal.'' [724] Another commenter generally believed that the allocation of plan processor costs warranted more consideration.[725] This commenter expressed concern with regard to the SROs owning the plan processor, noting in particular that unanimous consent would be required for all board actions.[726] This commenter stated that the plan processor alone should handle rulemaking and compliance, subject to oversight by an ''industry group.'' [727] Another commenter stated that, ''[r]egarding the governance of the national market system plan [contemplated] by the proposal, we wish to reiterate that the SEC should provide the broker-dealer industry with an official 'seat at the table' alongside the SROs, so that [the broker-dealers] can review and comment on system requirements as they are being developed and vote on plan amendments going forward.'' [728]

After considering these comments, for the reasons discussed below, the Commission is adopting Rule 613(b) as proposed, but with the addition of two new requirements. Specifically, in addition to the provisions included in the proposed rule,[729] Rule 613(b), as

[717] *See* Knight Letter, p. 3.

[718] *See* Knight Letter, p. 3.

[719] *See* Proposing Release, *supra* note 4, at 32585.

[720] *See* Nasdaq Letter I, p. 3, 13; Direct Edge Letter, p. 5; FIF Letter, p. 1, 8; FINRA Letter, p. 15; SIFMA February 2012 Letter, p. 1.

[721] *See* Nasdaq Letter I, p. 3, 13.

[722] *Id.* at p. 3.

[723] *See* FIF Letter, p. 1; Direct Edge Letter, p. 5.

[724] *See* FIF Letter, p. 8.

[725] *See* Direct Edge Letter, p. 4–5.

[726] *Id.* at p. 5.

[727] *Id.*

[728] *See* SIFMA February 2012 Letter, p. 1.

[729] Proposed Rule 613(b) required that the NMS plan include ''a governance structure to ensure fair representation of the plan sponsors, and administration of the central repository, including

Continued

adopted, provides that the national market system plan submitted shall include: ''a provision requiring the plan sponsors to provide to the Commission, at least every two years after effectiveness of the national market system plan, a written assessment of the operation of the consolidated audit trail * * *, [and] an Advisory Committee * * * includ[ing] representatives of the member firms of the plan sponsors.''[730]

The requirement that the NMS plan require the appointment of a CCO to regularly review the operation of the central repository and make any appropriate recommendations for enhancements[731] is one method to facilitate the consolidated audit trail's ability to evolve over time in terms of technology, functionality, and accuracy. Adopted Rule 613(b)(6) supplements this requirement by now requiring that the NMS plan ''include a provision requiring the plan sponsors to provide to the Commission, at least every two years after effectiveness of the national market system plan, a written assessment of the operation of the consolidated audit trail. Such document shall include, at a minimum: (i) [a]n evaluation of the performance of the consolidated audit trail including, at a minimum, with respect to data accuracy (consistent with [Rule 613(e)(6)]), timeliness of reporting, comprehensiveness of data elements, efficiency of regulatory access, system speed, system downtime, system security (consistent with [Rule 613 (e)(4)]), and other performance metrics to be determined by the Chief Compliance Officer, along with a description of such metrics; (ii) [a] detailed plan, based on such evaluation, for any potential improvements to the performance of the consolidated audit trail with respect to any of the following: improving data accuracy; shortening reporting timeframes; expanding data elements; adding granularity and details regarding the scope and nature of Customer-IDs; expanding the scope of the NMS plan to include new instruments, and new types of trading and order activities; improving the efficiency of regulatory access; increasing system speed; reducing system downtime; and improving performance under other metrics to be determined by the Chief Compliance Officer; (iii) [a]n estimate of the costs associated with any such potential improvements to the performance of the consolidated audit trail, including an assessment of the potential impact on competition, efficiency, and capital formation; and (iv) [a]n estimated implementation timeline for any such potential improvements, if applicable.''[732] The Commission believes these provisions will help plan sponsors understand and evaluate any deficiencies in the operation of the consolidated audit trail and to propose potential enhancements to the NMS plan, as appropriate, taking cost effectiveness into consideration. These provisions also will allow the Commission to assess any such potential improvements, accounting for the considerations contemplated by Rule 613(a)(1), the specific requirements of the approved NMS plan, and any changes or additions to these requirements that the Advisory Committee, the SROs, or the Commission may wish to consider in the future. The Commission believes that such enhancements, if any, to the consolidated audit trail could improve the ability of the SROs and the Commission to conduct effective market oversight by keeping up with continually-changing technologies and markets, by, for example, allowing the SROs and the Commission to conduct their market oversight more quickly, accurately, and/or comprehensively, as well as possibly at lower costs. Similarly, the Commission believes that adding granularity and details regarding the scope and nature of Customer-IDs, adding new instruments, or including new trading or order activities could allow regulators to have a more complete picture of the markets and market participants, which could also lead to more effective market oversight. The Commission believes that performing this assessment no later than every two years is reasonable given the rapid speed at which the markets and related technologies are evolving. The Commission also believes that the written assessment, required by Rule 613(b)(6), will help inform the Commission about the likely feasibility, costs, and impact of, and the plan sponsors' approach to, the consolidated audit trail evolving over time. The Commission would expect to make the document publicly available on its Web site.

In response to the comment requesting that the broker-dealer industry receive a ''seat at the table'' regarding governance of the NMS plan,[733] the adopted Rule requires that the NMS plan submitted to the Commission for its consideration include a provision requiring the creation of an Advisory Committee, composed at least in part by representatives of the members of the plan sponsors, ''to advise the plan sponsors on the implementation, operation and administration of the central repository.''[734] Further, the adopted Rule requires that the NMS plan submitted to the Commission for its consideration require that ''[m]embers of the Advisory Committee shall have the right to attend any meetings of the plan sponsors, to receive information concerning the operation of the central repository, and to provide their views to the plan sponsors.''[735] Pursuant to the Rule, the NMS plan also shall set forth the term and composition of the Advisory Committee, which composition shall include representatives of the member firms of the plan sponsor.[736] The Rule further provides that the plan sponsors may meet without the Advisory Committee members in executive session if, by affirmative vote of a majority of the plan sponsors, the plan sponsors determine that such an executive session is required.[737] The Commission believes that, given the scope of the Rule, both in terms of the market participants that may be affected by the Rule and the breadth of the audit trail information that will be collected, it is important that the plan sponsors solicit input from their members because this could help inform the plan sponsors of any expected or unexpected operational or technical issues that may arise in the implementation of the Rule and/or the operation of the central repository, and help assure the Commission and market participants that any requirements imposed on SRO members will be

the selection of the plan processor, * * * [a] provision addressing the requirements for the admission of new sponsors of the plan and the withdrawal of existing sponsors from the plan, * * * [a] provision addressing the percentage of votes required by the plan sponsors to effectuate amendments to the plan, * * * [a] provision addressing the manner in which the costs of operating the central repository will be allocated among the national securities exchanges and national securities associations that are sponsors of the plan, including a provision addressing the manner in which costs will be allocated to new sponsors to the plan* * * [and the] appointment of a Chief Compliance Officer to regularly review the operation of the central repository to assure its continued effectiveness in light of market and technological developments, and make any appropriate recommendations for enhancements to the nature of the information collected and the manner in which it is processed.''

[730] *See* Rule 613(b)(6); Rule 613(b)(7).

[731] *See* Rule 613(b)(5).

[732] *See* Rule 613(b)(6). The written assessment could also further inform the extent to which it could be appropriate to share certain information collected by the consolidated audit trail with third parties. *See* Section III.B.2.d.

[733] *See* SIFMA February 2012 Letter, p. 1.

[734] *See* Rule 613(b)(7)(i).

[735] *See* Rule 613(b)(7)(ii).

[736] *See* Rule 613(b)(7)(i).

[737] *See* Rule 613(b)(7)(ii).

accomplished in a manner that takes into account the burdens on SRO members. The Commission believes that the Advisory Committee could provide members of the SROs with a forum for informing the plan sponsors of any potential implementation or operational issues faced by them in connection with the consolidated audit trail. Plan sponsors also will be able to draw on the knowledge and experience of these members to help assure the Commission and market participants that any requirements imposed on SRO members will be accomplished in a manner that takes into account the costs to SRO members. The Commission also believes that an Advisory Committee could help foster industry consensus on how to approach and resolve possible issues that may be disputed, and approaches that may conflict, regarding operation of the consolidated audit trail. In this regard, the Commission encourages the plan sponsors to, in the NMS plan, provide for an Advisory Committee whose composition includes SRO members from a cross-section of the industry, including representatives of small-, medium- and large-sized broker-dealers.

The Commission believes the requirement for the NMS plan to create the Advisory Committee, as well as the requirement in Rule 613(a)(1)(xi), discussed below, that requires the NMS plan to require a discussion of the process by which the plan sponsors solicited the views of their members on the creation, implementation, and maintenance of the consolidated audit trail, a summary of those views, and how the plan sponsors took those views into account when preparing the NMS plan, are responsive to commenters' views that more input by industry representatives, such as members of the SROs who are subject to the requirements of Rule 613, would be advantageous to the creation, implementation, and maintenance of the consolidated audit trail.[738]

In addition, because the members of the Advisory Committee will have the right to attend all meetings of the plan sponsors (with the exception of executive sessions), to receive information concerning the operation of the central repository, and to provide their views to the plan sponsors, the governance process of the central repository will be more transparent to all market participants that will be affected by Rule 613. Further, the Commission believes the inclusion of SRO members on the Advisory Committee will increase the efficacy of the central repository. These market participants will have first-hand experience with the operation of the central repository, as they are required to report data to the facility, allowing them to provide informed input on any problems currently facing the central repository of which they are aware, and on any future actions that the central repository might or should take to address such problems. Finally, the Commission believes that an Advisory Committee structure that also permits the plan sponsors to meet in executive session without members of the Advisory Committee appropriately balances the need to provide a mechanism for industry input into the operation of the central repository, against the regulatory imperative that the operations and decisions regarding the consolidated audit trail be made by SROs who have a statutory obligation to regulate the securities markets, rather than by members of the SROs, who have no corresponding statutory obligation to oversee the securities markets.

The Commission also considered the comment that provided other suggestions on the governance of the NMS plan and believes that the commenter's concerns regarding a unanimity requirement in the NMS plan have merit.[739] Accordingly, the Commission urges the SROs to take into account the need for efficient and fair operation of the NMS plan governing the consolidated audit trail, and consider the appropriateness of a unanimity requirement and the possibility of a governance requirement other than unanimity, or even super-majority approval, for all but the most important decisions. The Commission believes that an alternate approach may be appropriate to avoid a situation where a significant majority of plan sponsors—or even all but one plan sponsor—supports an initiative but, due to a unanimous voting requirement, action cannot be undertaken.[740] Therefore, the Commission believes the SROs should consider alternative governance structures that would ensure that decisions made by the SROs are both achieved and implemented efficiently, in the interest of advancing the Commission's mission. The Commission notes that the NMS plan submitted to the Commission for its consideration will be published for public comment, and industry participants will have an opportunity at that time to submit comments on the governance structures proposed by the plan sponsors. Further, the Commission believes, as discussed above, that unanimity need not be the standard for decision-making with regard to matters relating to the operation of the consolidated audit trail. Thus, the plan sponsors have flexibility under the Rule to determine the governance structures that will facilitate the effective and efficient oversight of the plan processor.

In response to the comments regarding the selection and role of the plan processor,[741] the Commission believes that the SROs, as the plan sponsors of the NMS plan governing the operation of the consolidated audit trail, should retain the authority to select and oversee the plan processor. The Commission believes that the SROs are in the best position to understand how the plan processor should operate and to address the need for changes when necessary. The SROs also have the flexibility under the Rule to consult the Advisory Committee, for example, to assist the SROs in their selection process and in their determination of whether modifications are necessary to address innovations in the industry if they believe that such participation is needed.

The Commission acknowledges that, in addition to the many costs and burdens associated with the creation, implementation, and maintenance of a consolidated audit trail, with regards to the specific requirements discussed in this section, there would be costs to the SROs for appointing a CCO to the central repository, providing the Commission with the written assessment of the operation of the consolidated audit trail, and creating an Advisory Committee.[742] For the reasons discussed above, the Commission believes these requirements are important to the efficient operation and practical evolution of the consolidated audit trail, and are responsive to many commenters' concerns about governance structure, cost allocations, and the inclusion of SRO members as part of the planning process. The Commission is therefore requiring the SROs to include these requirements in the NMS plan submitted to the Commission for its consideration. After the SROs submit

[738] *See* Rule 613(a)(1)(xi); Section III.C.2.a.iii.c., *infra,* for a discussion of the tenth consideration.

[739] *See* Nasdaq Letter I, p. 3, 13.

[740] *See, e.g.,* Options Order Protection and Locked/Crossed Market (Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009)) (including a unanimous voting requirement).

[741] *See* FIF Letter, p. 1; Direct Edge Letter, p. 5.

[742] As discussed and for the reasons set forth in Section I., *supra,* in light of the multi-step process for developing and approving an NMS plan that will govern the creation, implementation, and maintenance of a consolidated audit trail, the Commission is deferring a detailed analysis of costs and benefits of this requirement of the Rule until after the NMS plan has been submitted.

the NMS plan, the Commission and the public will have more detailed information in evaluating the NMS plan.

c. Surveillance

As proposed, Rule 613(f) would have required each SRO subject to the Rule to develop and implement a surveillance system, or enhance existing surveillance systems, reasonably designed to make use of the consolidated audit trail data. The Rule, as proposed, also would have required each SRO to implement its new or enhanced surveillance system within fourteen months after the effectiveness of the NMS plan.[743]

Commenters generally expressed support for the proposal's requirement that SROs implement surveillance systems that make use of the consolidated information.[744] One commenter stated that the enhanced surveillance that could be achieved with the audit trail would likely attract additional trading volume to the U.S. markets and that the consolidated audit trail would benefit the SROs by permitting them to conduct surveillance themselves, thus ''reducing their risks and their costs.'' [745] Another commenter noted that the proposed consolidated audit trail would be a ''critical first step toward consolidated market surveillance,'' and would lower costs for markets and their participants through economies of scale.[746] A third commenter opined that a centralized database such as the consolidated audit trail is necessary to bring together data from exchanges, ECNs, and dark pools to properly regulate trading.[747] However, one commenter maintained that a ''Commission-mandated market regulator'' would be costly for the securities industry and create the potential for a lack of surveillance innovation.[748] A commenter recommended that the Commission monitor the surveillance systems and provide guidance to the SROs in establishing their surveillances.[749] Finally, one commenter suggested that outsourcing surveillance to regulators could result in lower costs for markets, and recommended several specific security and analytical features for such a surveillance system.[750]

After considering the comments, for the reasons discussed below, the Commission is adopting Rule 613(f) as proposed. Specifically, the Rule requires that each SRO develop and implement a surveillance system, or enhance existing surveillance systems, reasonably designed to make use of the consolidated information contained in the consolidated audit trail.[751] The Commission believes that it is appropriate to require SROs to enhance their surveillance programs to make full use of the increased functionalities and the timeliness of the consolidated audit trail. Additionally, because trading and potentially manipulative activities could take place across multiple markets, the Commission supports efforts to coordinate surveillance among the SROs, such as through a plan approved pursuant to Rule 17d–2 under the Exchange Act,[752] or through regulatory services agreements between SROs. In this regard, as commenters have noted, SROs could ''outsource'' surveillance efforts to another SRO, if there are efficiencies to be gained. With respect to the comment regarding the benefits to be gained by creating a ''single market regulator,'' the Commission believes that mandating such an entity or structure goes beyond the scope of the Rule.[753]

The Commission notes that it intends to review its own surveillance activities in light of the consolidated audit trail and intends to take steps to enhance its surveillance capabilities to take advantage of consolidated audit trail data. The Commission anticipates that such steps will be informed by—and may in turn help inform—the surveillance enhancement measures required to be taken by the SROs under adopted Rule 613(f).

The Commission also is adopting Rule 613(a)(3)(iv) as proposed, which requires the NMS plan to require each SRO to implement its new or enhanced surveillance system within fourteen months after the effectiveness of the NMS plan. Since Rule 613(a)(3)(iii) will require the NMS plan to require SROs to begin reporting to the central repository within one year after effectiveness of the NMS plan, the Commission believes the two additional months provided by this timeframe is reasonable and sufficient to allow SROs to update their surveillance systems and allow for testing of new surveillances.

The Commission acknowledges there would be costs to the SROs for developing and implementing surveillance systems, or enhancing existing surveillance systems, reasonably designed to make use of the consolidated audit trail. However, the Commission believes it may be possible for SROs to retire some of their existing, and perhaps less-efficient, audit trail and surveillance systems once the consolidated audit trail is operational. As discussed in Section III.C.a.iv. below, the adopted Rule requires the SROs to consider and discuss the potential for costs savings if other SRO systems, and their associated surveillances, were migrated to the consolidated audit trail.[754] Once such information is submitted in the NMS plan submitted to the Commission for its consideration, the Commission and the public will be able to consider the information in evaluating the NMS plan.

C. NMS Plan Process

As proposed, Rule 613(a)(1) would have required each SRO to jointly file on or before 90 days from approval of the Rule an NMS plan to govern the creation, implementation, and maintenance of a consolidated audit trail and a central repository. Section III.A. above discusses the use of an NMS plan to create, implement, and maintain a consolidated audit trail. This Section focuses on the process the SROs must follow when submitting to the Commission the NMS plan that satisfies the requirements discussed in Section III.B. above and the process the Commission will undergo when evaluating whether to approve the NMS plan.

1. Comments on the NMS Plan Process

The Commission received several comments regarding how best to develop an NMS plan that will govern the creation and implementation of a consolidated audit trail, as well as the time needed to do so. Several commenters suggested that the Commission undergo a RFP or RFI process to create a consolidated audit trail.[755] Specifically, one commenter suggested that the Commission outline a set of goals it intends to achieve through creation of a consolidated audit trail and allow an industry working group to

[743] *See* proposed Rule 613(a)(3)(iv).

[744] *See* Nasdaq Letter I, p. 10; Thomson Reuters Letter, p. 4.

[745] *See* Thomson Reuters Letter, p. 4.

[746] *See* FINRA/NYSE Euronext Letter, p. 3–4. *See also* Nasdaq Letter I, p. 8.

[747] *See* IAG Letter, p. 2.

[748] *See* BATS Letter, p. 2–3.

[749] *See* Nasdaq Letter I, p. 10.

[750] *See* iSys Letter, p. 2–3.

[751] *See* Rule 613(f).

[752] 17 CFR 240.17d–2.

[753] The Commission has examined the issue of a single market regulator in the past, specifically in the Intermarket Trading Concept Release (*see* Securities Exchange Act Release No. 47849 (May 14, 2003), 68 FR 27722 (May 20, 2003)); however, a single regulator structure is not suggested by the adopted Rule.

[754] These cost savings may accrue to any SRO that would no longer need to operate a retired system, as well as to any SRO members that would no longer be required to report to such systems.

[755] *See* FIF Letter, p. 1, 9; FIF Letter II, p. 1–2; STA Letter, p. 2; Direct Edge Letter, p. 2–3, 5. *See also* Section II.C.3.

determine the data elements that must be reported and other technical requirements.[756] Another commenter opined that an RFP process would facilitate the identification of the costs and benefits of the audit trail, as well as the consideration of a wider range of technological solutions.[757] Further, some commenters requested more specific information about the audit trail system to determine the best approach for implementing the consolidated audit trail.[758]

Some of these commenters stressed that more time should be allotted for the planning and design of the NMS plan due to the comprehensive business analysis that would be needed in the initial stages of the consolidated audit trail.[759] Commenters recommended extensive, ''up-front business analysis,'' [760] explaining that if conducted ''during the CAT plan development process, [they] are confident that issues would emerge earlier in the process, leading to more efficient and cost-effective solutions.'' [761] The commenters believed that the business analysis would require many discussions involving the Commission, the SROs and teams comprising members of the securities industry.[762] The commenters also suggested that the business analysis could include an RFI ''to engage potential solution providers early in the process,'' [763] and stated that the time needed to perform the analysis to produce a ''detailed blueprint for CAT'' [764] would be closer to six months,[765] rather than the proposed 90 days.[766] As a basis for their suggestions, one of the commenters provided a breakdown of the time and the types of work needed for FINRA's expansion of OATS to all NMS securities.[767] This commenter noted that over one-third of the time required for the project was spent on conducting business analysis, and that one-third of the time was spent on project development.[768]

In addition, some commenters noted that a consolidated audit trail could be implemented in a number of ways, and thus recommended that the Commission replace the specific system requirements of the proposed Rule with more general ''end-user'' requirements, perform an analysis of how existing audit trail systems do and do not meet the needs of regulators, and perhaps even engage in a formal RFP process.[769]

2. Adopted Rule

After considering the comments regarding the NMS plan process, the Commission is adopting proposed Rule 613(a)(1) with modifications. First, the Rule now requires the SROs to provide much more information and analysis to the Commission as part of their NMS plan submission. These requirements have been incorporated into the adopted Rule as ''considerations'' that the SROs must address, and generally mandate that the NMS plan discuss: (1) The specific features and details of the NMS plan (*e.g.,* how data will be transmitted to the central repository, and when linked data will be available to regulators); (2) the SROs' analysis of NMS plan costs and impact on efficiency, competition, and capital formation; (3) the process followed by the SROs in developing the NMS plan (*e.g.,* solicitation of input from members of the SROs); and (4) the information about the implementation and milestones of the consolidated audit trail. Second, the Commission is furnishing further details about how it envisions regulators would use, access, and analyze consolidated audit trail data through a number of ''use cases.'' Third, the Commission is extending the amount of time allowed for the SROs to submit the NMS plan from 90 days from the date of approval of Rule 613 to 270 days from the date of publication of the Adopting Release in the **Federal Register**. A discussion of these modifications and the ''use cases'' follows.

a. NMS Plan Considerations

As noted above,[770] the Commission believes that the collective effect of the modifications and additions described above will be to significantly expand the solution set that could be considered by the SROs for creating, implementing, and maintaining the consolidated audit trail and provide the SROs with increased flexibility in how they choose to meet the requirements of the adopted Rule. Further, given these changes to the Rule discussed above and the wide array of commenter's views on how to best implement a consolidated audit trail,[771] the Commission expects that the SROs will seriously consider various options as they develop the NMS plan to be submitted to the Commission for its consideration. The costs and benefits of the consolidated audit trail are highly dependent on the specific solutions proposed by SROs.

Accordingly, as part of the multi-step process for developing and approving an NMS plan that will govern the creation, implementation, and maintenance of a consolidated audit trail, the Commission is deferring its economic analysis of the actual creation, implementation, and maintenance of a consolidated audit trail itself (in contrast to the costs of the actions the SROs are required to take upon approval of the adopted Rule [772]) until such time as it may approve the NMS plan submitted to the Commission for its consideration. In light of the expanded set of solutions that should be available as a result of the changes described above and to facilitate a more robust economic analysis, the adopted Rule now requires the SROs to provide much more information and analysis to the Commission as part of their NMS plan submission. The Commission is therefore requiring the SROs to discuss, as part of their NMS plan ''considerations'' that detail how the SROs propose to implement the requirements of the plan, cost estimates for the proposed solution, and a discussion of the costs and benefits of alternate solutions considered but not proposed.

This additional information and analysis are intended to ensure that the Commission and the SROs have sufficiently detailed information to carefully consider all aspects of the NMS plan ultimately submitted by the SROs, facilitating an analysis of the extent to which the NMS plan would allow regulators to effectively and

[756] *See* FIF Letter II, p. 2.

[757] *Id.* at p. 3.

[758] *See* Broadridge Letter, p. 2; FIF Letter, p. 8. *See also* Ross Letter, p. 1 (discussing examples of information security details to consider); Nasdaq Letter I, p. 6 (stating that the proposed Rule provided ''incomplete technical information on which design and features make the most sense'').

[759] *See* FIF Letter II, p. 2–3; STA Letter, p. 2. *See also* Nasdaq Letter I, p. 6.

[760] *See* FIF Letter II, p. 1, 3; STA Letter, p. 1, 3. *See also* Nasdaq Letter I, p. 6.

[761] *See* FIF Letter II, p. 2; STA Letter, p. 1.

[762] *See* FIF Letter II, p. 1; STA Letter, p. 1–2.

[763] *See* FIF Letter II, p. 2; STA Letter, p. 2.

[764] *See* FIF Letter II, p. 1–2; STA Letter, p. 2.

[765] *See* FIF Letter II, p. 2; STA Letter, p. 2–3.

[766] *See* proposed Rule 613(a)(1).

[767] *See* FIF Letter II, p. 3. The commenter also provided the cost to the industry for the expansion of OATS to all NMS stocks—$48 million. The Commission notes that this is the cost for the project as a whole, not solely for the planning phase, and therefore is not entirely attributable to the cost of the creation and filing of the NMS plan required by Rule 613.

[768] The time remaining was spent on ''testing and other activities.'' *See* FIF Letter II, p. 3.

[769] *See* Nasdaq Letter I, p. 12; FIF Letter II, p. 2–3; STA Letter, p. 1–3; Direct Edge Letter, p. 2–3, 5.

[770] *See* Section I., *supra.*

[771] *See, e.g.,* FINRA Letter, p. 14 (advocating that SROs build off existing audit trails to develop a consolidated audit trail) and Nasdaq Letter I, p. 11–12 (arguing against building off existing audit trail systems and supporting the development of new system to establish a consolidated audit trail). *See also* Section II.C.4., *supra.*

[772] These actions include the requirement that the SROs develop an NMS plan, utilizing their own resources and undertaking their own research that addresses the specific details, cost estimates, considerations, and other requirements of the Rule.

efficiently carry out their responsibilities. The NMS plan submitted by the SROs will be published for public comment and reviewed by the Commission for consistency with the Exchange Act and the rules thereunder. As a result, all interested persons, including market participants, regulatory authorities, and the general public, will have an opportunity to provide meaningful comments on the details and costs of the NMS plan submitted, which the Commission will review and consider.

i. Features and Details of the NMS Plan

The first six considerations the Rule requires the SROs to address in the NMS plan relate to the features and details of the NMS plan. These six considerations require the NMS plan to specify and explain the choices made by the SROs to meet the requirements specified in the Rule for the consolidated audit trail. The Commission intends to use the discussion of these considerations to evaluate the NMS plan submitted for its consideration and how well it meets the objectives described in Section II.B.2.

• *Rule 613(a)(1)(i)*

Rule 613(a)(1)(i) requires the NMS plan submitted to discuss ''[t]he method(s) by which data is reported to the central repository, including, but not limited to, the sources of such data and the manner in which the central repository will receive, extract, transform, load and retain such data. * * *'' The Rule also requires the NMS plan to discuss the basis for selecting such method(s).

The Commission believes that requiring that the NMS plan discuss the method(s) by which data is reported to the central repository is important because the method for reporting data and the source of the data are significant to the effectiveness of the consolidated audit trail and could affect, and potentially enhance, the reliability and the accuracy of the data that is reported to the central repository.[773] Discussing such method(s), as well as the basis for selecting such method(s), should help assure the Commission that the plan sponsors have considered the various alternatives and selected the method(s) that best achieves the objectives of the consolidated audit trail in a cost-effective manner.[774] In addition, Rule 613(a)(1)(i) requires that the NMS plan describe how the central repository will receive, extract, transform, load, and retain data because the Commission believes that this information is integral to a comprehensive understanding of the operation of the central repository proposed in the NMS plan.

• *Rule 613(a)(1)(ii)*

Rule 613(a)(1)(ii) requires the NMS plan to address ''[t]he time and method by which the data in the central repository will be made available to regulators, in accordance with [Rule 613(e)(1)] to perform surveillance or analyses, or for other purposes as part of their regulatory and oversight responsibilities.''

The time and method by which data will be made available to regulators are fundamental to the utility of the consolidated audit trail because the purpose of the consolidated audit trail is to assist regulators in fulfilling their responsibilities to oversee the securities markets and market participants.[775] The NMS plan submitted should discuss these issues in detail, guided, in particular, by the issues and questions raised in the ''Regulator Use Cases'' described in Section III.C.2.b., below.

The importance of this consideration was discussed in the Proposing Release.[776] The Commission emphasized the necessity of the data being in a uniform electronic format so that regulators would be able, among other things, to effectively and efficiently detect and investigate illegal trading across markets, without having to spend valuable time and resources reconciling audit trail formatting differences in the data.[777] In addition, the Proposing Release noted that requiring the order and trade data to be collected in one location in a single format would allow regulators ready access to the data for use in market reconstructions, market analyses, surveillance and investigations,[778] as regulators could then retrieve the information that they need much faster than the current process of requesting data from multiple parties without having to reconcile disparate audit trail information. Also, in the Proposing Release, the Commission noted the importance of SRO regulatory staff having direct access to consolidated audit trail data.[779] The Commission continues to believe that it is vital that regulators have ready access to the consolidated audit trail data in the central repository so that this information can be effectively and efficiently used in fulfilling their regulatory responsibilities.

• *Rule 613(a)(1)(iii)*

Rule 613(a)(1)(iii) requires the NMS plan to address ''[t]he reliability and accuracy of the data reported to and maintained by the central repository throughout its lifecycle, including transmission and receipt from market participants; data extraction, transformation and loading at the central repository; data maintenance and management at the central repository; and data access by regulators.''

The Commission believes the reliability and accuracy of the data is a critical aspect of the consolidated audit trail, because the usefulness of the data to regulators would be significantly impaired if it is unreliable or inaccurate. If the reliability and accuracy of reported data is not maintained by the central repository during the period it is required to be retained and throughout the various uses to which it may be put by regulators, then its value to regulators will be substantially diminished.

Accordingly, the NMS plan submitted should discuss in detail, among other things, how the consolidated audit trail envisioned by the sponsors would be designed, tested, and monitored to ensure the reliability and accuracy of the data collected and maintained by the central repository (*e.g.,* during transmission from the SRO or member to receipt by the central repository,[780] data extraction, transformation and loading at the central repository,[781] data maintenance and management at the central repository,[782] and data access by regulators[783]).

[773] *See* Section III.B.2.c., *supra.*

[774] The Commission notes that another related consideration that must be discussed by the NMS plan includes the alternative approaches to creating the consolidated audit trail that the plan sponsors considered. *See* Rule 613(a)(1)(xii).

[775] *See* Section II.A., *supra,* for additional discussion of the timeliness of access to current audit trail data.

[776] *See* Proposing Release, *supra* note 4, at 32564.

[777] *Id.* at 32564–32565 and 32594. Differences in audit trail data requirements between markets can hinder the ability of regulators to piece together related illegal trading activity occurring across several markets.

[778] *Id.* at 32594.

[779] *Id.* at 32567.

[780] ''Transmission from the SRO or member to receipt by the central repository'' refers to the process through which SROs and their members report data to the central repository.

[781] ''Data extraction, transformation and loading at the central repository'' is the process during which the central repository accepts data reported by the SROs and their members, converts it into a uniform electronic format, if necessary, and receives it into the central repository's internal systems.

[782] ''Data maintenance and management at the central repository'' refers to the process for storing data at the central repository, indexing the data for linkages, searches, and retrieval, dividing the data into logical partitions when necessary to optimize access and retrieval, and the creation and storage of data backups.

[783] As noted in Section III.B.1.d.iv., *supra,* for example, regardless of whether the NMS plan elects

The Commission notes that, when proposing Rule 613, it highlighted the importance of this consideration by emphasizing that the reliability and accuracy of the data are critical to the integrity and effectiveness of the consolidated audit trail.[784] Indeed, Rule 613(e)(4)(ii), like the proposed Rule, specifically requires the plan sponsors to establish policies and procedures for the plan processor to ensure the timeliness, accuracy, and completeness of the audit trail data reported to the central repository.

• *Rule 613(a)(1)(iv)*

Rule 613(a)(1)(iv) requires the NMS plan to discuss ''[t]he security and confidentiality of the information reported to the central repository.''

The Commission is including this consideration because it believes that keeping the data secure and confidential is crucial to the efficacy of the consolidated audit trail and the confidence of market participants. Exposure of highly-confidential information about the trading strategies and positions of market participants through a security breach, for example, could impact the confidence of the public in the central repository and in trading on the U.S. markets. The Commission understood the importance of security and confidentiality provisions when it proposed Rule 613(e)(4) to require the NMS plan to include policies and procedures, including standards, to be used by the plan processor to ensure the security and confidentiality of all information reported to, and maintained by, the central repository.[785] Numerous commenters also noted the importance of maintaining the security and the confidentiality of the data collected pursuant to the proposed Rule.[786]

• *Rule 613(a)(1)(v)*

Rule 613(a)(1)(v) requires the NMS plan to address ''[t]he flexibility and scalability of the systems used by the central repository to collect, consolidate and store consolidated audit trail data, including the capacity of the consolidated audit trail to efficiently incorporate, in a cost-effective manner, improvements in technology, additional capacity, additional order data, information about additional securities or transactions, changes in regulatory requirements, and other developments.''

The Commission believes that the flexibility and scalability of the systems used by the central repository are important to the effectiveness of the consolidated audit trail, and, accordingly, the Commission believes the NMS plan under Rule 613 should address potential ''built-in'' obsolescence that may arise as a result of the SROs' choice of systems or technology. For this reason, the NMS plan should address how, taking into consideration the costs and benefits, including the potential impact on competition, efficiency, and capital formation, the consolidated audit trail systems might be designed to accommodate: (1) Potential growth in the trading volume or message traffic relating to NMS securities; (2) possible expansion to include other non-NMS securities;[787] (3) additional data fields that the SROs or the Commission might determine to require in the future (such as new order characteristics); and (4) potential technological developments that might allow the consolidated audit trail to be operated in a more timely, reliable, and cost-effective manner.

As noted in the Commission's Concept Release on equity market structure,[788] the market for trading securities has changed dramatically in recent years and, as technology advances, trading systems and trading strategies also change. The Commission believes that it is important for the consolidated audit trail to keep pace with market developments. It must be designed in a way that allows it to do so efficiently and in a cost-effective manner to assure regulators of its continued usefulness. Thus, the Commission has identified the flexibility and scalability of the systems used by the central repository to collect, consolidate, and store audit trail data as a consideration that must be discussed in the NMS plan submitted to the Commission for its consideration. To sufficiently address this consideration, the Commission expects the NMS plan to describe in detail how the consolidated audit trail envisioned by the sponsors would be designed to accommodate additional message traffic for orders in NMS securities, how readily capacity could be expanded, and the existence of any capacity limits. The Commission also would expect the NMS plan to discuss in detail the extent to which the proposed consolidated audit trail could accommodate potential additional data elements, order characteristics, and other types of securities such as non-NMS securities, debt securities, primary market transactions in equity securities that are non-NMS securities, and primary market transactions in debt securities, how quickly this could be done, and whether any limits exist on the ability of the proposed system to accommodate these types of changes. Additionally, the Commission would expect the NMS plan to further discuss whether and how the consolidated audit trail could be upgraded to keep pace with improvements in technology, such as improvements to the speed of systems processing.

The Commission believes these descriptions are important because, otherwise, what initially appears to be an effective and cost-effective NMS plan could become significantly less so over time as markets evolve and if, for example, order volumes increase, new order types are developed, and additional data elements or other types of securities, such as non-NMS securities, debt securities, primary market transactions in equity securities that are non-NMS securities, and primary market transactions in debt securities, are potentially incorporated into the consolidated audit trail.

The Commission notes that issues relating to the potential flexibility and scalability of the consolidated audit trail were raised in the Proposing Release. For example, the Commission stated that, while the proposal was limited to NMS securities, the Commission ultimately intended the consolidated

to use a series of order identifiers or a unique order identifier, it will be very important to demonstrate how the approach selected in the NMS plan will ensure that information about all events pertaining to an order will be reliably and accurately linked together in a manner that allows regulators efficient access to complete order information.

[784] *See* Proposing Release, *supra* note 4, at 32582, 32596.

[785] In addition, proposed Rule 613(e)(4)(i) required plan sponsors, and employees of the plan sponsors and central repository to agree to use appropriate safeguards to ensure the confidentiality of such data, and not to use such data other than for surveillance and regulatory purposes.

[786] *See* Scottrade Letter, p. 2; ICI Letter, p. 2–4; Liquidnet Letter, p. 4; Ameritrade Letter, p. 3; Thomson Reuters Letter, p. 4; BATS Letter, p. 3; Managed Funds Association Letter, p. 2–3; Ross Letter, p. 1. The Commission notes that it is adopting Rule 613(e)(4) with modifications—the Commission has added provisions to the Rule to help ensure the confidentiality of the data submitted to and retained by the central repository. *See* Section III.B.2.e., *supra.*

[787] Rule 613(i) requires the NMS plan to include a provision requiring each SRO to jointly provide to the Commission a document outlining how the consolidated audit trail could be expanded to products other than NMS securities. *See also* Section III.B.1.a., *supra.* The consideration of flexibility and scalability of the systems requires the SROs to address whether the system proposed in the SRO's NMS plan submission can accommodate the expansion, while the document required by Rule 613(i) will discuss more broadly how the SROs could incorporate into the consolidated audit trail information with respect to equity securities that are not NMS securities, debt securities, primary market transactions in equity securities that are not NMS securities, and primary market transactions in debt securities, including details for each order and reportable event that may be required to be provided, which market participants may be required to provide the data, an implementation timeline, and a cost estimate.

[788] *See* Concept Release on Equity Market Structure, *supra* note 87.

audit trail to cover secondary market transactions in other securities and information on primary market transactions.[789] In fact, as discussed above, the Commission specifically proposed that the NMS plan contain provisions relating to the possible expansion of the consolidated audit trail to products other than NMS securities.[790] In addition, in the Proposing Release, the Commission specifically noted its concerns with the lack of scalability of the existing EBS system and the fact that the volume of transaction data subject to reporting under the EBS system can be significantly greater than the system was intended to accommodate in a typical request for data.[791]

• *Rule 613(a)(1)(vi)*

Rule 613(a)(1)(vi) requires the NMS plan to address ''[t]he feasibility, benefits, and costs of broker-dealers reporting to the consolidated audit trail in a timely manner: (A) [t]he identity of all market participants (including broker-dealers and customers) that are allocated NMS securities, directly or indirectly, in a primary market transaction; (B) [t]he number of such securities each such market participant is allocated; and (C) [t]he identity of the broker-dealer making each such allocation.''

In the Proposing Release, the Commission stated that ''it would be beneficial to provide for the possible expansion of the consolidated audit trail to include information on primary market transactions in NMS stocks'' and required in proposed Rule 613 that the plan sponsors address such expansion in a document provided to the Commission within two months after effectiveness of the NMS plan.[792] The Commission continues to believe, for the reasons set forth below, that a potential expansion of the consolidated audit trail to cover primary market transactions would be beneficial. Specifically, the Commission believes that the SROs should address—at the time of the submission of the NMS plan to the Commission, rather than as part of a later expansion plan—the feasibility, benefits, and costs of recording and reporting information about allocations of NMS securities in primary market transactions as part of the consolidated audit trail.

As with the data sources discussed in Section II.A, the sources of information currently available to the Commission regarding allocations of NMS securities in primary market transactions are each limited in their ability to provide accurate, complete, accessible, and timely information.[793] For example, while the Commission and FINRA can request information about allocations from the books and records of broker-dealers, such requests are unduly cumbersome for both regulators and market participants, potentially involving multiple time-consuming individual requests.[794] Other sources of information about allocations of NMS securities in primary market transactions—including public sources [795]—are also limited in certain respects.[796]

In light of these limitations, data about the allocations of NMS securities in primary market transactions could also improve market analysis by the Commission and the SROs, which could in turn help better inform rulemaking and other policy decisions. Specifically, such data might aid the Commission and the SROs in better understanding the role of such allocations in the capital formation process. Combining this data with the secondary market data to be collected by the consolidated audit trail could allow regulators to calculate investor positions and when and how the investors receiving allocations sell their securities. Such data could also facilitate a better understanding of how securities are allocated in a primary market transaction, how allocations differ across broker-dealers and investors, and what types of investors are allocated securities. This analysis is virtually infeasible on a market-wide basis today because the data collection process using current sources of information is so cumbersome.

In addition, if the consolidated audit trail included data regarding the allocations of NMS securities in primary market transactions, SROs could be better able to monitor for compliance with their rules related to such transactions.[797] The data also could more broadly assist SROs in their examinations and investigations related to allocations in initial public offerings (''IPOs'') and other primary market transactions by providing a richer data set for evaluating possible compliance issues. For example, the SROs could use IPO allocation information, combined with the secondary market transaction information in a consolidated audit trail, to run surveillance on whether sales in the IPO auction were marked accurately (*i.e.,* ''long'' or ''short'') and in compliance with applicable requirements.[798] Allocation data could also allow SROs to conduct surveillance for ''red flags'' they might develop regarding potential suitability issues related to customer allocations, as well as potentially improper allocations to customers (such as kickbacks).

The Commission could also enhance its own examination and investigation processes if data regarding the allocations of NMS securities in primary market transactions were included in the consolidated audit trail. Without access to a single centralized database of allocations, Commission staff must rely on more limited data sources that generally enable only either broad-based sweeps or one-off investigations based on particularized suspicion of wrongdoing. Because the relevant data would be readily available for analysis, including information about allocations as part of the consolidated audit trail could facilitate the Commission's identification of particular risks and exam candidates. Other examinations

[789] *See* Proposing Release, *supra* note 4, at 32568–32569.

[790] *Id.* at 32569–70.

[791] *Id.* at 32567.

[792] *See* Proposing Release, *supra* note 4, at 32569 and 32610. The Commission noted in the Proposing Release that a ''primary market transaction is any transaction other than a secondary market transaction and refers to any transaction where a person purchases securities in an offering.'' Proposing Release at n. 167.

[793] *See* Section II.A. for a discussion of these four qualities.

[794] *See, e.g.,* Exchange Act Rules 17a–3 and 17a–4 (requiring broker-dealers to make and keep ''records of purchases and sales of securities'').

[795] Regulation S–K requires registrants to provide information related to the number of offered securities that are underwritten by each syndicate member in an effort to describe the nature of the obligation of the syndicate members with respect to the offered securities. *See* 17 CFR 229.508(a). This information comprises investor-focused disclosures, rather than information that may be needed by regulators for investigative and other purposes, such as the information contemplated by Rule 613(a)(1)(vi).

[796] For example, FINRA rules require the lead underwriters of an IPO to collect and provide issuers—but not the public, FINRA, or the Commission—with names of institutional investors who received allocations and aggregated information regarding the allocation to retail investors. *See* FINRA Rule 5131(d).

The Depository Trust Company (''DTC'') also collects information on some IPO allocations in its IPO Tracking System at the discretion of the lead underwriter. *See* 61 FR 25253 (May 20, 1996). However, as well as being discretionary and therefore only addressing a subset of primary market transactions, the IPO Tracking System only includes allocations to persons with DTC accounts, which generally excludes retail investors.

[797] *See, e.g.,* FINRA Rules 5130 and 5131. FINRA Rule 5130 imposes certain restrictions on primary market transactions. FINRA Rule 5131 prohibits certain allocation practices such as ''spinning,'' which refers to an underwriter's allocation of IPO shares to directors or executives of investment banking clients in exchange for receipt of investment banking business. *See* Securities Exchange Act Release No. 64521 (May 18, 2011), 76 FR 29808 (May 23, 2011) (Order Approving SR–FINRA–2011–017). Certain ''quid pro quo'' practices are also addressed by FINRA Rule 5131.

[798] Currently, SROs must request customer account information during examinations of broker-dealers to check for compliance with order marking rules.

undertaken by the Commission staff address whether employees of a regulated entity are in compliance with the rules applicable to their transactions related to primary market transactions. Having allocation information available before such an examination commences could allow staff to enhance their pre-examination research, better focus on the sources of potential violations, and ultimately foster more effective and efficient examinations.

In investigations related to primary market transactions, the Commission staff generally must obtain data from underwriters post-transaction, which can take considerable time owing to the limitations on current sources of data noted above.[799] Including data about the allocations of NMS securities in primary market transactions in the consolidated audit trail could enable investigations to proceed more efficiently and to more quickly assess whether alleged violations of various rules under the Exchange Act, such as Regulation M and Rule 10b–5, warrant investigation.[800] In addition, the Commission believes that information about allocations could help the SROs and Commission investigate allegations of improper allocations, such as allocations subject to ''spinning'' [801] or ''laddering.'' [802] Currently, these types of investigations would require requesting data from underwriters, and in some cases, other parties (such as investment advisors) involved in the primary market transaction.

Given these potential benefits, the Commission believes that it is important—consistent with its view in the Proposing Release—for the SROs to address the feasibility, benefits, and costs of recording and reporting information about allocations of NMS securities in primary market transactions as part of the consolidated audit trail. However, unlike other potential additions to the consolidated audit trail—*e.g.,* the inclusion of debt securities—that will be contemplated later in expansion plans, allocations of NMS securities in primary market transactions are uniquely tied to the central element of the NMS plan—the reporting of data regarding trading in NMS securities. For example, allocations in primary market transactions may have a significant impact on trading and other activity in the secondary market, and behavior in the primary market may influence behavior in the secondary market through initial pricing and other mechanisms. More broadly, IPOs and other primary market transactions continue to be a source of particular interest for market participants and observers because of, among other things, their role in the capital formation process. In light of these considerations, the Commission believes it is appropriate to require the SROs to address allocations of NMS securities in primary market transactions at the time that the NMS plan is submitted under adopted Rule 613(a)(1), rather than as part of an expansion plan under adopted Rule 613(i).

At the same time, the Commission recognizes that firms may use systems and methods to handle information regarding allocations of NMS securities in primary market transactions that differ from those used to handle information regarding secondary market transactions in such securities. Such differences may affect the extent to which information regarding allocations may be readily incorporated into the consolidated audit trail described by the NMS plan mandated by Rule 613. For example, the unique features of allocations of NMS securities in primary market transactions may require different reporting timeframes, different information security controls, or additional data elements that would not be required for other information being reported to the central repository and that are not contemplated by Rule 613. Because of these potential differences, the Commission believes it is appropriate to require the SROs to address the feasibility, costs, and benefits of their members reporting information regarding allocations of NMS securities in primary market transactions, rather than require the NMS plan to require such reporting at the outset.

The Commission acknowledges that plan sponsors nevertheless will incur costs to address the feasibility, benefits, and costs of incorporating information about allocations of NMS securities in primary market transactions into the consolidated audit trail. Among other things, the plan sponsors will need to undertake an analysis of technological and computer system acquisitions and upgrades that would be required to include information about such allocations. However, given the potential benefits described above of including such information in the consolidated audit trail, the Commission believes these costs are justified.

ii. Analysis of the NMS Plan

As noted above, in consideration of the views expressed, suggestions for alternatives, and other information provided by those commenting on the proposed Rule, the Commission is adopting Rule 613 with significant modifications to a number of the proposed requirements. In certain instances these modifications alter the data and collection requirements of the proposed Rule. In other instances, the adopted Rule has been altered to be less prescriptive, and hence less limiting, in the means the SROs may use to meet certain requirements. These modifications significantly expand the solution set that could be considered by the SROs for creating, implementing, and maintaining a consolidated audit trail and thus provide the SROs with increased flexibility in how they choose to meet the requirements of the adopted Rule, relative to the solution set that would have been available under the requirements of the proposed Rule.

Because these modifications permit a wider array of solutions to be considered by the SROs, including solutions that could capitalize on existing systems and standards,[803] the assumptions underlying the Commission's cost estimate in the Proposing Release that new, large-scale market systems would need to be developed from scratch may no longer be valid.[804] Thus, as part of the multi-step process for developing and approving an NMS plan that will govern the creation, implementation, and maintenance of a consolidated audit trail, the Commission is deferring its economic analysis of the actual creation, implementation, and maintenance of a consolidated audit trail itself (in contrast to the costs of the actions the SROs are required to take upon approval of the adopted Rule) [805] until such time

[799] This approach also may unduly burden the lead underwriter as the ''gatekeeper'' of such information and prevents the Commission and SROs from pursuing investigative techniques that may rely on reaching out to individual market participants for preliminary information without using the underwriter.

[800] *See* note 242, *supra.*

[801] *See* note 795, *supra.*

[802] ''Laddering'' is a practice that generally refers to inducing investors to give orders to purchase shares in the aftermarket at particular prices in exchange for receiving IPO allocations. *See* NYSE/NASD IPO Advisory Committee report and Recommendations (May 2003), at 6, *available at http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p010373.pdf.*

[803] *See, e.g.,* FINRA Letter, p. 14; SIFMA Letter, p. 16–18.

[804] The methodology in the Proposing Release assumed that the scope of the required systems changes would be comparable to those made in connection with Regulation NMS. *See* Proposing Release, *supra* note 4, at 32597 n. 352. *See also* Section I., *supra.*

[805] These actions include the requirement that the SROs develop an NMS plan, utilizing their own resources and undertaking their own research that

Continued

as it may approve any NMS plan submitted to the Commission for its consideration—that is, after the NMS plan, together with its detailed information, including cost estimates for the creation, implementation, and maintenance of the consolidated audit trail, and analysis, has been submitted by the SROs to the Commission and there has been an opportunity for public comment. The Commission believes that the information and analyses will help inform public comment regarding the NMS plan and will help inform the Commission as it evaluates whether to approve the NMS plan. In this way, the Commission can be better informed about the costs for the development, implementation, and maintenance of the consolidated audit trail that benefit from cost data and information provided by the SROs in conjunction with—and guided by—their development of an NMS plan that complies with the requirements of the adopted Rule. In addition, as noted above,[806] the Rule includes a mandate that in determining whether to approve the plan and whether the plan is in the public interest, the Commission must consider the impact of the NMS plan on efficiency, competition, and capital formation.

• *Rule 613(a)(1)(vii)*

Rule 613(a)(1)(vii) requires the NMS plan to include ''[t]he detailed estimated costs for creating, implementing, and maintaining the consolidated audit trail as contemplated by the national market system plan, which estimated costs should specify: (A) [a]n estimate of the costs to the plan sponsors for creating and maintaining the central repository; (B) [a]n estimate of the costs to members of the plan sponsors, initially and on an ongoing basis, for reporting the data required by the national market system plan; (C) [a]n estimate of the costs to the plan sponsors, initially and on an ongoing basis, for reporting the data required by the national market system plan; and (D) [h]ow the plan sponsors propose to fund the creation, implementation, and maintenance of the consolidated audit trail, including the proposed allocation of such estimated costs among the plan sponsors, and between the plan sponsors and members of the plan sponsors.'' [807]

Commenters opined on the costs of funding the consolidated audit trail in general.[808] One commenter stated that the Commission should give ''important consideration to alternative means to help fund the creation of what is essentially a public utility in [the consolidated audit trail],'' suggesting the Commission ''should itself pay user fees to help build and run the [consolidated audit trail],'' or that the government should underwrite low-cost loans for market participants aimed to pay the costs of the consolidated audit trail.[809] Another commenter suggested that the cost of creating and maintaining the central repository should be shared among all market participants, including broker-dealers, ATSs, and exchanges.[810] Another commenter stated that, if the Commission requires the SROs to fund the creation of the consolidated audit trail (*i.e.,* the central repository), SROs may be forced to raise transaction fees, which would ''resurrect the distortions caused by high transaction fees, potentially increase the use of flash orders, if allowed, and discourage trading activity.'' [811]

The Commission also received comments regarding the allocation of the costs of the consolidated audit trail.[812] One commenter emphasized that the NMS plan must provide for an equitable allocation of costs, including the sharing of expansion costs by the parties that benefit from any new products added to the consolidated audit trail.[813] One commenter suggested that the Commission should require trading venues to allocate system costs for the consolidated audit trail ''at least partially based on message traffic * * *.'' [814] Similarly, another commenter, opining that exchanges currently bear a disproportionate amount of the costs for market surveillance and noting that exchanges would also be forced to shoulder the costs of the consolidated audit trail, suggested that other venues, such as ATSs and internal broker-dealer platforms, should bear a proportionate share of the costs of creating, implementing, and maintaining the consolidated audit trail.[815] This commenter also suggested that the Commission fund the audit trail using fees assessed on high frequency traders who cancel a ''disproportionately high'' percentage of their orders,[816] arguing that this ''would have the added benefit of deterring a practice that, at best, adds little value in the price discovery process and, at worst, is potentially manipulative or even fraudulent.'' [817]

The Commission believes that the issues surrounding how the consolidated audit trail should be funded, and how costs in creating, implementing, and maintaining the consolidated audit trail should be allocated, are important, and the Rule requires information about those issues to be provided by the SROs in the NMS plan submitted to the Commission for its consideration. In response to comments and in recognition that an initiative of the size and scope of the consolidated audit trail necessarily will require substantial expenditures by the SROs and their members, the Commission is requiring, pursuant to Rule 613(a)(1)(vii), the SROs to include in the NMS plan, a discussion of costs and how such costs will be allocated. As discussed above, the Commission believes that the SROs will incur costs to create and maintain the central repository.[818] Also, as discussed above, SROs and their members may need to make systems changes or to purchase new systems to record and report the data required by the NMS plan to the central repository.[819] SROs and their members will incur upfront costs, as well as ongoing costs to record and report such information. Because, as noted above, these costs can only be analyzed once the SROs narrow the array of choices they have and develop a detailed NMS plan,[820] the Commission believes that the most robust approach for estimating these costs is for the SROs to provide such cost estimates in conjunction with, and guided by, their development of the NMS plan. The Commission believes that a fulsome discussion in the NMS plan of the estimated costs to SROs and their members will aid commenters in providing useful comments that will further the Commission's understanding of the cost implications of the consolidated audit trail. In addition, a fulsome discussion will aid the Commission in its evaluation of whether to approve the NMS plan and in conducting its own analysis of the costs and benefits of the NMS plan.

There also would be costs associated with establishing and operating the central repository that will be jointly owned by the plan sponsors. The Commission believes it is important to understand how the plan sponsors plan

addresses the specific details, cost estimates, considerations, and other requirements of the Rule.

[806] *See* Section I., *supra.*

[807] *See* Rule 613(a)(1)(vii).

[808] *See* Wells Fargo Letter, p. 4; SIFMA Letter, p. 22.

[809] *See* Wells Fargo Letter, p. 4.

[810] *See* Liquidnet Letter, p. 9.

[811] *See* SIFMA Letter, p. 22.

[812] *See* Nasdaq Letter I, p. 13–14; BOX Letter, p. 3; Liquidnet Letter, p. 9; Kaufman Letter, attachment p. 3.

[813] *See* Nasdaq Letter I, p. 13–14.

[814] *See* Kaufman Letter, attachment p. 3.

[815] *See* Schumer Letter, p. 1.

[816] *Id.* at p. 1–2.

[817] *Id.* at p. 2.

[818] *See* Section III.B.2., *supra.*

[819] *See* Section III.B.1., *supra.*

[820] *See* Section I., *supra.*

to allocate such costs among themselves to help inform the Commission's decision regarding the possible economic or competitive impact of the NMS plan amongst the SROs. In addition, although the plan sponsors likely would initially incur the costs to establish and fund the central repository directly, they may seek to recover some or all of these costs from their members. If the plan sponsors seek to recover costs from their members, the Commission believes that it is important to understand the plan sponsors' plans to allocate costs between themselves and their members, to help inform the Commission's decision regarding the possible economic or competitive impact of the NMS plan.

• *Rule 613(a)(1)(viii)*

Rule 613(a)(1)(viii) requires the NMS plan to include ''[a]n analysis of the impact on competition, efficiency, and capital formation of creating, implementing, and maintaining the national market system plan.''

Rule 608(a)(4)(ii)(C) under Regulation NMS already requires every NMS plan submitted to the Commission to be accompanied by an analysis of the impact on competition of implementation of the plan.[821] This requirement is designed to help inform the Commission's evaluation of whether the NMS plan will impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Rule re-states the application of the Rule 608(a)(4)(ii)(C) requirement to provide an analysis of the NMS plan's impact on competition and imposes a requirement that the NMS plan also include an analysis of the impact on efficiency and capital formation.[822]

These requirements are designed to help inform the Commission's understanding of whether the NMS plan may promote efficiency and capital formation. As an initial matter, the SROs will be providing an analysis of the economic consequences of the NMS plan they develop and propose. As noted above, because the specific requirements of the NMS plan will not be known until the NMS plan is submitted, and the SROs will be providing that analysis, the Commission will consider the impact of the proposed consolidated audit trail on efficiency, competition, and capital formation in deciding whether to approve the NMS plan. The Commission, however, will consider such analysis in determining whether to approve the NMS plan and whether the plan is in the public interest under Rule 608(b)(2). [823]

iii. Process Followed To Develop the NMS Plan

The following two considerations require the NMS plan to address how the SROs solicited the input of their members and other appropriate parties in their design of the NMS plan, and to detail the alternative consolidated audit trail designs considered and rejected by the SROs. These considerations will inform the Commission's evaluation of the NMS plan submitted for its consideration.

• *Rule 613(a)(1)(xi)*

Rule 613(a)(1)(xi) requires the NMS plan to discuss ''[t]he process by which the plan sponsors solicited views of their members and other appropriate parties regarding the creation, implementation, and maintenance of the consolidated audit trail, a summary of the views of such members and other parties, and how the plan sponsors took such views into account in preparing the national market system plan.''

The Commission believes that the SROs' consideration of the views of their members is important because, given the scope of the Rule, it will affect many market participants and will require them to report a broad range of audit trail information. Ensuring that market participants with varied perspectives have a role in developing the NMS plan submitted to the Commission for its consideration could help inform the plan sponsors of operational or technical issues that may arise in the implementation of the NMS plan, and help assure the Commission and market participants that the requirements imposed on members are done so in an efficient and cost-effective manner.[824] Similarly, the Commission believes it is important that the SROs consider the views of other parties—such as back office service providers, market operations specialists, and technology and data firms—as may be appropriate in light of the Rule's goal of creating, implementing, and maintaining a complex system that may entail changes to multiple other systems and functionalities involved across the lifecycle of an order. Such parties could offer operational and technical expertise to the SROs, including, among other things, by identifying issues that may arise in the interface between legacy and new systems. In addition, the inclusion of such parties in the deliberative process could also result in the introduction of additional alternative approaches.

The Commission also believes that it is appropriate to require the SROs to set out in the NMS plan a summary of the views expressed by such members and other parties and how the SROs took those views into account in developing the NMS plan. This requirement is designed to inform the Commission about the extent to which the SROs considered the views of their members and other appropriate parties as they undertook the complex task of developing the NMS plan for a consolidated audit trail, to facilitate a cost estimate by the SROs that takes into account the costs members will incur in creating, implementing, and maintaining the consolidated audit trail, as well as to encourage the consideration of reasonable alternative approaches contemplated by Rule 613(a)(1)(xii) in the plan formulation process.

The Commission received several comments advocating inclusion of the broker-dealer community and other appropriate parties in the planning of the consolidated audit trail.[825] One commenter, with respect to NMS plan governance, urged the inclusion of ''an official 'seat at the table' alongside the SROs'' for members of the broker-dealer industry.[826] Another commenter recommended that the Commission seek greater SRO and broker-dealer involvement in the front-end planning before adopting a final rule to make all parties aware of potential design tradeoffs, and establish appropriate timelines for implementation and compliance.[827] A further commenter advocated allowing working groups to engage in dialogue with the Commission, broker-dealers and the SROs to effectively conduct the business analysis needed to build the consolidated audit trail.[828] Additionally, one commenter suggested that the Commission staff should form and engage working groups comprised of representatives from the ''affected constituents,'' specifically brokers and ''key technology vendors,'' [829] and that such working groups could work with the Commission to develop a request for proposal.'' [830] Similarly, another commenter urged the Commission to require an industry working group of

[821] *See* 17 CFR 242.608(a)(4)(ii)(C).

[822] *See* Rule 613(a)(1)(viii).

[823] *See* Rule 613(a)(5).

[824] *See* Section II.C.3., *supra,* for a summary of comments suggesting wider involvement in the development of the consolidated audit trail.

[825] *See* FIF Letter II, p. 2; SIFMA February 2012 Letter, p. 1; STA Letter, p. 1–2.

[826] *See* SIFMA February 2012 Letter, p. 1.

[827] *See* Broadridge Letter, p. 2.

[828] *See* FIF Letter II, p. 2, STA Letter, p. 1–2.

[829] *See* Direct Edge Letter, p. 2.

[830] *See* Direct Edge Letter, p. 2.

SROs and a representative group of broker-dealers to address the ''complexities involved in developing such a system.'' [831] One commenter suggested encouraging the participation of issuers and other market participants in the creation of the consolidated audit trail,[832] and another commenter advocated the inclusion of ''broad industry participation from the SEC, FINRA, exchange, broker dealer and vendor communities.'' [833]

The Commission considered the comments recommending wider industry involvement in the creation of the consolidated audit trail and believes that, since the consolidated audit trail will be a regulatory tool used by the SROs and the Commission, it is appropriate for the SROs, when developing the NMS plan, to request input from the securities industry as well as technological advice. The Commission believes that this input should be sought during the preparation of the NMS plan submitted to the Commission for its consideration,[834] during the comment process,[835] and subsequent to the approval of an NMS plan.[836]

- *Rule 613(a)(1)(xii)*

Rule 613(a)(1)(xii) requires the NMS plan to discuss ''[a]ny reasonable alternative approaches to creating a consolidated audit trail that the plan sponsors considered in developing the national market system plan, including, but not limited to, a description of any such alternative approach; the relative advantages and disadvantages of each such alternative, including an assessment of the alternative's costs and benefits; and the basis upon which the plan sponsors selected the approach reflected in the national market system plan.'' [837] The Commission believes this consideration is appropriate because it reflects the view, supported by commenters, that there are alternative approaches to creating, implementing, and maintaining the consolidated audit trail. The Commission believes that requiring the SROs to discuss alternatives considered helps ensure that the plan sponsors have appropriately weighed the merits of the various approaches that might be considered to create, implement, and maintain the consolidated audit trail, by requiring the NMS plan to describe the alternatives that the plan sponsors considered before making any significant decision with respect to the consolidated audit trail, and the relative advantages and disadvantages, including costs and benefits, of such alternatives. The Commission also believes that requiring transparency with respect to alternative approaches and the decisionmaking process of the SROs will facilitate public comment on the NMS plan and the wisdom of the approach selected by the plan sponsors. Similarly, such transparency should provide the Commission with useful insights into the rationale for the approach chosen by the plan sponsors as it considers whether to approve the NMS plan submitted to the Commission. The Commission also notes that this consideration complements Rule 613(a)(1)(vii), discussed above, which requires that the NMS plan discuss the detailed estimated costs to the plan sponsors for creating, implementing, and maintaining the consolidated audit trail, because this consideration requires the NMS plan to provide the costs of the alternatives that were not adopted by the plan sponsors in the NMS plan submitted to the Commission.

iv. Implementation and Milestones of the Consolidated Audit Trail

The following two considerations are designed to elicit additional information from the plan sponsors about the implementation and milestones of the consolidated audit trail. These will inform the Commission's evaluation of the NMS plan submitted to the Commission for its consideration, particularly in the degree to which the consolidated audit trail can replace existing data sources and in how effectively the proposed plan will meet the objectives discussed in Section II.B.2.

- *Rule 613(a)(1)(ix)*

Rule 613(a)(1)(ix) requires the NMS plan to discuss ''[a] plan to eliminate existing rules and systems (or components thereof) that will be rendered duplicative by the consolidated audit trail, including identification of such rules and systems (or components thereof); to the extent that any existing rules or systems related to monitoring quotes, orders, and executions provide information that is not rendered duplicative by the consolidated audit trail, an analysis of: (A) [w]hether collection of such information remains appropriate; (B) [i]f still appropriate, whether such information should continue to be separately collected or should instead be incorporated into the consolidated audit trail; and (C) [i]f no longer appropriate, how the collection of such information could be efficiently terminated; the steps the plan sponsors propose to take to seek Commission approval for the elimination of such rules and systems (or components thereof); and a timetable for such elimination, including a description of the phasing-in of the consolidated audit trail and phasing-out of such existing rules and systems (or components thereof).'' [838]

As noted in the Proposing Release and above, many exchanges and FINRA each have their own disparate audit trail rules.[839] Thus, a member of the various exchanges and FINRA could be subject to the audit trail rules of, and be required to submit different information to, more than one exchange and FINRA. In addition, several commenters discussed the potential reduction in costs for the creation, implementation, and maintenance of a consolidated audit trail if existing SRO audit trail requirements were eliminated. In particular, one commenter stated that, ''over the long-term, the costs of developing a carefully designed and appropriately scaled consolidated audit trail could be offset in part by eliminating the individual SRO reporting requirements imposed under existing audit trail systems.'' [840] This commenter also urged the SROs and the Commission ''to rely to the fullest extent possible on the consolidated audit trail data for market reconstructions, investigations, and analysis, rather than requesting data from broker-dealers. This would be more efficient for both firms and regulators and would help maximize the utility of the consolidated audit trail.'' [841]

[831] *See* Ameritrade Letter, p. 2.

[832] *See* IAG Letter, p. 3 (also recommending that the consolidated audit trail, in general, should involve a reduction in its size and scope, as well as a review of the capabilities of existing systems).

[833] *See* FIF Letter II, p. 1–3. *See also* STA Letter, p. 1–3 (recommending the same, but with the inclusion of the investor community and institutional asset managers).

[834] *See also* Rules 613(a)(1)(vii)(A) and (D), respectively requiring ''[a]n estimate of the costs to the plan sponsors for establishing and maintaining the central repository'' and an explanation of ''[h]ow the plan sponsors propose to fund the creation, implementation, and maintenance of the consolidated audit trail, including the proposed allocation of such estimated costs among the plan sponsors, and between the plan sponsors and members of the plan sponsors.''

[835] The Commission notes that any NMS plan submitted and any amendment to the plan would be subject to notice and public comment, during which members of the industry and other interested persons may provide comments on the NMS plan. 17 CFR 242.608(b)(1).

[836] *See* Rule 613(b)(7). *See also* Section III.B.3.b., *supra.*

[837] *See* Rule 613(a)(1)(xii).

[838] *See* Rule 613(a)(1)(ix).

[839] *See* Proposing Release, *supra* note 4, at 32595.

[840] *See* SIFMA Letter, p. 2.

[841] *Id.*

Another commenter similarly stated that ''a consolidated trail and consolidated market surveillance should achieve economies of scale that ultimately lower costs for both the markets themselves and the market participants.'' [842] This commenter further reasoned that, ''[r]ather than each SRO separately maintaining its own surveillance staff and surveillance programs that are searching for the same behavior, and thus creating redundancies, certain technology and staff resources can be consolidated into a single enterprise with costs equitably allocated across all SROs.'' [843] However, the commenter also pointed out that ''[s]uch consolidation, of course, would not preclude individual SROs from conducting surveillance for unique attributes and rules of its marketplace, ensuring that specialized market expertise continues to inform surveillance and oversight of trading on that market.'' [844]

Many other commenters shared similar opinions with regards to the efficiency effects that a consolidated audit trail would have on market participants and their requirements to provide data to regulators. One commenter, for example, listed as one of seven benefits of a consolidated audit trail that ''it would reduce the time and resources required by market participants to respond to case-by-case requests from regulators.'' [845] Another commenter stated that it ''agrees with the Commission that the implementation of the proposed consolidated audit trail would likely render unnecessary existing audit trails and data obtained through the equity blue sheets system.'' [846] Similarly, another commenter also ''agree[d] with the Commission that in calculating the total cost to the industry of the audit trail it is important to consider offsetting savings from the retirement of redundant data feeds such as OATS, OTS, COATS, ISG Equity Audit Trail, and EBS. In addition, the industry may be able to avoid the cost of compliance with the Commission's proposed Large Trader Reporting System if the consolidated audit trail contains sufficient information to meet those requirements.'' [847]

The Commission recognizes that the creation of a consolidated audit trail could result in efficiency gains for market participants with respect to their regulatory data reporting requirements and for regulators with respect to their surveillance activities. The Commission also recognizes that the consolidated audit trail could render existing rules and systems that contain the same requirements as the consolidated audit trail redundant. While the Commission is not at this time requiring that existing rules and systems be eliminated, the Rule requires that the NMS plan provide a plan to eliminate existing rules and systems (or components thereof), including identification of such rules and systems (or components thereof). Further, to the extent that any existing rules or systems related to monitoring quotes, orders, and executions provide information that is not rendered duplicative by the consolidated audit trail, such plan must also include an analysis of (1) whether the collection of such information remains appropriate, (2) if still appropriate, whether such information should continue to be separately collected or should instead be incorporated into the consolidated audit trail, and (3) if no longer appropriate, how the collection of such information could be efficiently terminated. Finally, such plan must also provide the steps the plan sponsors propose to take to seek Commission approval for the elimination of such rules and systems (or components thereof); and a timetable for such elimination, including a description of how the plan sponsors propose to phase in the consolidated audit trail and phase out such existing rules and systems (or components thereof).

The Commission believes that the implementation of a plan to eliminate duplicative existing rules, systems, and/or components of such rules and systems, will result in increased efficiency to market participants who need to comply with the disparate reporting requirements for orders and with repeated requests for data by regulators who cannot obtain the data they need from existing sources of information.

- *Rule 613(a)(1)(x)*

Rule 613(a)(1)(x) requires the NMS plan to include ''[o]bjective milestones to assess progress toward the implementation of the national market system plan.''

The creation of a consolidated audit trail is crucial to the effective oversight of the U.S. securities markets, but at the same time is an initiative of substantial scope and complexity. Accordingly, to ensure that the consolidated audit trail is established in a timely and logical manner, and that the SROs can be held accountable for maintaining a workable implementation schedule, the NMS plan submitted is required to set forth a series of detailed objective milestones, with projected completion dates, toward implementation of the consolidated audit trail. In addition to being useful for the Commission in its evaluation of the NMS plan, the milestones will be used by the Commission in its supervision of the implementation of the consolidated audit trail. Such milestones could include, but are not limited to: publication and implementation of the methods for obtaining a CAT-Reporter-ID and the Customer-ID database, testing of the collection of order and execution data from a representative subset of broker-dealers, initial access to the central repository for regulators, demonstration of linking the full lifecycle of events for select test orders, cancels, modifications, and executions, and integration of trade and quote data as currently reported by trading venues into the central repository.

v. Commission Review

The Commission believes these considerations represent fundamental characteristics of a meaningful plan to establish an effective and efficient consolidated audit trail. The Commission will assess the NMS plan's discussion of the considerations described as part of its evaluation of the NMS plan.[848] The Commission notes that, if the NMS plan submitted does not comply with the requirements of the Rule, or if the Commission determines changes are necessary or appropriate, the Commission may amend the NMS plan pursuant to Rule 608(b)(2) of Regulation NMS with such changes or subject to such conditions as the Commission may deem necessary or appropriate, taking into account the considerations contemplated in Rule 613(a)(1).[849] In addition, should the NMS plan and the consolidated audit trail not keep pace with market or technological developments, such that its efficiency or effectiveness becomes

[842] *See* FINRA Letter, p. 2.

[843] *Id.* at p. 2–3.

[844] *See* FINRA/NYSE Euronext Letter, p. 4.

[845] *See* Liquidnet Letter, p. 1.

[846] *See* BATS Letter, p. 4. *See also* FIA Letter, p. 1; FIF Letter II, p. 2.

[847] *See* Nasdaq Letter I, p. 11. The Commission notes that this comment letter was submitted prior to the adoption of the Large Trader Reporting Rule. *See* note 1, *supra,* and accompanying text.

[848] To further facilitate this review, the Commission expects that the plan sponsors would keep minutes of their meetings to formulate the NMS plan, and that such minutes would be readily reviewable by the Commission.

[849] 17 CFR 242.608(b)(2). To approve such a plan, the Commission must find that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act.

impaired,[850] the Commission itself may, pursuant to Rule 608(b), propose an amendment to the NMS plan.[851]

b. Regulator Use Cases

In light of the comments recommending that the Commission undertake an RFP process and provide more ''business requirements''[852] the Commission believes that it is useful to provide further details about how it envisions regulators would use, access, and analyze consolidated audit trail data through a number of ''use cases,'' as might typically be found in an RFP. These ''use cases'' and accompanying questions set forth below are derived directly from the considerations described in adopted Rule 613(a)(1), which, as discussed in Section III.C.2.a., originated from key principles of the consolidated audit trail that had been highlighted by the Commission in the Proposing Release. Specifically, these ''use cases'' describe the various ways in which, and purposes for which, regulators would likely use, access, and analyze consolidated audit trail data. By describing how regulators would use the consolidated audit trail data, the ''use cases'' and the related questions are meant to elicit a level of detail about the considerations that should help the SROs prepare an NMS plan that better addresses the requirements of the adopted Rule. They should also aid the Commission and the public in gauging how well the NMS plan will address the need for a consolidated audit trail. In particular, the ''use cases'' will assist in gauging how well the NMS plan will specifically address the needs outlined in this Rule, by describing the features, functions, costs, benefits, and implementation times of the plan.

The Commission notes that it is not including these ''use cases'' and accompanying questions to endorse a particular technology or approach to the consolidated audit trail; rather, these ''use cases'' and accompanying questions are designed to aid the SROs' understanding of the types of useful specific information that the NMS plan could contain that would assist the Commission in its evaluation of the NMS plan. The Commission also notes that its description of ''use cases'' includes a non-exclusive list of factors that SROs could consider when developing the NMS plan. The SROs also may include in the NMS plan submitted to the Commission for its consideration any other information regarding how data would be stored or accessed that the SROs believe the Commission or the public may find useful in evaluating the NMS plan submitted.

1. Analyses Related to Investigations and Examinations

The Commission expects that the consolidated audit trail will provide regulators the ability to more efficiently conduct targeted investigations and examinations. These generally require being able to conduct several types of queries on large amounts of data and extract targeted segments of such data. These targeted segments are likely to be much smaller than the bulk extractions discussed in Section III.C.2.b.2., below.

Off-Line Analysis. Regulators are likely to frequently require the extraction of relatively small amounts of select data from the consolidated audit trail database at the central repository for their own ''off-line'' analyses.[853] For example, a regulator may need to extract data on all orders in a particular stock, by a particular customer, on a particular day, or based on any other combination of fixed search criteria.[854] Though the total data extracted may be small, the number of records that need to be searched to find such data may be enormous.

i. What technical or procedural mechanisms will regulators be required to use to request data extractions? Does the NMS plan provide for a front-end user interface to perform search and extractions? If not, what types of tools or technologies would regulators need to implement to send search and extract requests to the database? Would regulators be permitted to write and submit their own queries (*e.g.,* Structure Query Language or ''SQL'') to the database directly? Would the central repository write and submit queries on behalf of a regulator at the regulator's request?

ii. What response times should regulators expect from search and extract requests? Would a search for all trades in a given security by a given customer over a specified period of time return a response with all requested data in one minute? One hour? Overnight? How would this response time scale with the amount of data requested? With the amount of data being searched?

iii. How would the database effectively process simultaneous requests by multiple users at one or more regulators? Will each request be queued serially? Can they be processed in parallel? What is the effect of simultaneous requests on response times? Would there be limits to the number of search queries that can be performed at the same time? Would there be limitations on the size of the extractions from such queries?

iv. A wide range of users at regulators may need to search and extract data for analysis. How are users to be administered? If the NMS plan contemplates a front-end user interface, what validation and security mechanisms will ensure that only permitted users will have access to such data? If the plan contemplates direct access through a means other than a front-end user interface, what security and validation mechanisms would regulators need to deploy to interact with the database?

Dynamic Search and Extraction. At times, regulators may need to identify and extract small amounts of data from the database based on dynamic search criteria that might require the database to perform calculations on stored data to meet the specified criteria. A few examples of dynamic criteria are: searching for trades with trade sizes above a certain threshold, searching for trades in securities with execution prices that change more than a certain percentage in a given period of time, and searching for orders that are canceled within a certain period of time.

i. Does the NMS plan contemplate allowing for dynamic search criteria to operate directly on the database? If so, how would the dynamic search criteria

[850] *See* Rules 613(a)(1)(v), (b)(6), (d)(2). *See also* Sections III.B. and III.C.2.a.i., *supra* (discussing the consideration of flexibility and scalability of the systems used by the central repository; the requirement that the NMS plan require the plan sponsors to provide a written assessment with an evaluation of, and a detailed plan to improve, the performance of the consolidated audit trail at least every two years; and the requirement to annually evaluate the clock synchronization and time stamp standards).

[851] 17 CFR 242.608(a)(2). For example, if the requirements of the plan are not amended after the annual evaluation of the clock synchronization and time stamp standards to be consistent with changes in the industry standards, the Commission has the authority and means to propose an amendment to those requirements of the plan. The Commission can approve an amendment to an effective national market system plan that was initiated by the Commission, by rule. 17 CFR 242.608(b)(2).

[852] *See* FIF Letter, p. 1, 9; FIF Letter II, p. 1–2; Direct Edge Letter, p. 2–3, 5; Section III.C.1.a., *supra.*

[853] For purposes of these use-cases, an ''off-line'' analysis is defined to be any analysis performed by a regulator based on data that is extracted from the consolidated audit trail database, but that uses the regulator's own analytical tools, software, and hardware.

[854] Fixed search criteria are those that are based on specific pre-defined data elements that are stored in the consolidated audit trail database. In contrast, dynamic search criteria are those that are based on numerical levels, thresholds, or other combinations of mathematical formula or logic that would require some amount of additional calculations to be performed on, and derived from, pre-defined data elements already stored in the database to complete the search operation and return to the user the data that meets the requested criteria.

be specified and run? What, if any, limitations would there be on the types of search criteria that can be requested? What are the implications for response times? If the plan contemplates a front-end user interface, will dynamic search criteria be included? If the plan allows for dynamic search criteria through a means other than a front-end user interface, what types of tools or technologies would regulators need to implement to request dynamic searches? Have the plan sponsors considered whether such tools or technologies and the personnel to use them are currently available to the regulators?

ii. If the NMS plan does not contemplate dynamic search criteria, please explain how regulators would be able to use the consolidated audit trail data to perform such searches. Would data need to be downloaded in bulk by the regulators to accomplish these types of searches off-line (see below for related questions)?

2. Analyses Related to Monitoring, Surveillance, and Reconstruction

In addition to targeted analysis of select data from the consolidated audit trail database, regulators will also require the analysis of data in bulk form. For example, the Commission is likely to use consolidated audit trail data to calculate detailed statistics on order flow, order sizes, market depth and rates of cancellation, to monitor trends and inform SRO and Commission rulemaking. To satisfy the surveillance requirements of Rule 613(f), regulators may want the ability to feed consolidated audit trail data into analytical ''alert'' programs designed to screen for potential illegal activities such as insider trading or spoofing. Surveillances might also benefit if regulators are able to link consolidated audit trail data with databases on certain types of material news events or market participants. This would allow regulators to isolate and aggregate data on trading in advance of those news events or by those participants. If preliminary analyses showed problems, the regulators could then request significant amounts of data for a more thorough and detailed follow-up analysis. In the event of a large scale market event like the May 6, 2010 ''flash crash,'' regulators are likely to use consolidated audit trail data to reconstruct market events on the day of the event, including but not limited to reconstructing entire order books and trading sequences.

i. What, if any, SRO surveillance data could be replaced by the consolidated audit trail while still improving SROs' ability to surveil?

ii. How will the NMS plan allow regulators to address these types of large-scale, on-going data analyses?

iii. In addition to providing regulators with the ability to search and extract data, will the NMS plan provide regulators with access to any plan-hosted applications or interfaces (*i.e.,* those that operate on plan-based systems and resources) that would enable users to perform data analyses on, or create reports or graphs from, data stored in the database (such application or interfaces collectively known as ''hosted analytical tools'')? If so, how would regulators use and access such tools? What are the limitations of such tools? Would the tools allow regulators to perform the analyses discussed in the examples presented above?

iv. If the NMS plan does not provide regulators with hosted analytical tools, how would regulators be expected to use their own resources, software, and hardware to perform such analyses? Would the plan provide regulators with an application programming interface (''API'') that allows regulators to develop their own tools that interact directly with the consolidated audit trail database? If so, what will the form of such API be? Are there limitations to the number of systems that could connect to the database? How will the plan negotiate priorities for connectivity, searches and queries done via the API? Will there be limitations to the types of queries that could be performed through the API? What types of in-house technologies and systems would be required for regulators to connect to the consolidated audit trail in this fashion?

v. If the NMS plan does not provide regulators with analytical tools and services and does not provide an API for regulators to connect their own analytics systems to the database, what mechanism would the plan provide to regulators for accessing bulk data in a way that allows for large-scale analyses? Would the plan allow for end-of-day downloads of an entire day's activity so that regulators could load this information into their own systems for such analysis? If so, how is access to such a download to be controlled and implemented? How long would it take to transmit an entire day's worth of consolidated audit trail data to each of the regulators that requires such access? 10 minutes? One hour? Multiple hours? Longer than overnight? Do these time estimates reflect that multiple regulators are likely to simultaneously download consolidated audit trail data each night? What types of technologies or systems would be required for regulators to download this data? What are the expected sizes of such a data download? What type of systems would each regulator need to deploy to store and analyze this data? Have the plan sponsors considered whether such systems and the personnel to operate them are currently available to the regulators?

vi. Does the plan contemplate data streaming as a method of transmitting bulk data to each regulator? If so, what is the form and mechanism of such data streaming? Would the streaming occur intraday as data is reported to, and processed by, the database, or would the streaming occur after all (or a majority of, or such other criteria) data was reported to, and processed by the database (*e.g.* overnight streaming)? How would intraday streaming impact the accuracy or completeness of the data received by regulators? Would data be transmitted through different methods or with varying delays by different SROs?

vii. If the plan does not contemplate any bulk data analyses or means of transmitting data to regulators on a bulk overnight basis or in an intraday or overnight streaming fashion, describe what alternative mechanisms, if any, could be used to enable regulators to perform the types of analyses described at the beginning of the section (b), as well as the various examples described throughout this document of how regulators would make use of consolidated audit trail data.

3. Order Tracking and Time Sequencing

As discussed in detail throughout this Release, one of the key requirements of the consolidated audit trail is to provide regulators with a complete record of all of the events that stem from a particular order, from routing to modification, cancellation, or execution. In addition, these events must be stored by the central repository in a linked manner—using either a unique order identifier or a series of unique order identifiers, as discussed in Section III.B.1.d.iv.—so that regulators can quickly and accurately extract a time-sequenced history of each event related to an order.

i. What methods will the plan use to create the linkages for order events as described above? How will regulators access and search on data in a linked fashion?

ii. What is the technical form of the order identifier(s) that broker-dealers will be required to send to the consolidated audit trail database so that these linkages can be created? To what extent will broker-dealers be able to generate such identifier(s) using their current systems? To what extent will broker-dealers need to collect or track

new data, or modify their systems, to generate such identifier(s)?

iii. Will the transmission of economic data (such as a price) be sent separately, or via a different technical mechanism, from noneconomic data (such as the identity of a customer)?

iv. What other changes, if any, will be required of systems typically in use by broker-dealers to provide such data? To what extent can existing broker-dealer systems be employed? What modifications will be necessary? What are the costs and technological ramifications of such changes?

v. What changes, if any, will be required of the systems currently in use by regulators to receive such data? To what extent can existing regulatory systems be employed? What modifications will be necessary? What are the costs and technological ramifications of such changes?

vi. If data reformatting is required, how much must be done by each broker-dealer using its own systems and resources prior to sending data to the central repository, versus being done on the receiving end by the central repository using plan-based systems and resources?

vii. If multiple methods for collecting and aggregating are contemplated by the NMS plan, what are the pros and cons of each method?

viii. How will the plan ensure orders and subsequent events are properly time-sequenced? At what level of granularity will time stamps be stored for each event? Milliseconds? Microseconds? Picoseconds? Describe any differences in the accuracy at which events originating in the same broker-dealer system can be sequenced versus events across different systems at the same broker-dealer, or systems at different broker-dealers. What type of synchronization of clocks will be employed to minimize inter-system timing inaccuracies?

ix. If time stamps are not stored at a sufficient level of granularity to properly sequence events, what other data or mechanisms will the NMS plan provide to meet the requirement that regulators be able to time-sequence events?

x. Even if time stamps are sufficiently granular to meet the time-sequencing requirements of today, how would the plan contemplate increasing that granularity as the speed of trading increases?

4. Database Security, Contingency Planning, and Prospects for Growth

The data stored in the consolidated audit trail database will contain confidential detailed records of trade and order flow by customer.

i. How will the plan ensure the security of the database in a way that provides for flexible access by permitted users at multiple regulators (*i.e.,* the Commission and the SROs), but denies access to all other non-permitted users?

ii. What are the plan's policies and procedures with regards to security? Will the plan make use of any specific national or international security standards? If so, which ones? Will the plan make use of third-party reviews of its security procedures?

iii. What types of contingency and backup plans will be employed by the plan to safeguard against the loss of data due to technical failures? Will the plan make use of live failover mechanisms so that data being sent to the database is not inadvertently lost in the event of a failure? Will contingency plans provide regulators with uninterrupted access to the database? If not, what are the expectations for recovery times under different failure scenarios?

iv. As order and trade volumes increase, how does the plan contemplate handling the need for increased capacity and throughput? Would the plan be able to accommodate a doubling in daily volume without materially altering the basic technologies and architecture? A ten-time increase? A 100-times increase?

5. Database Access

As part of an investigation or examination, regulators may need to analyze historical trades and orders in the database maintained by the central repository (though not trade and order events occurring prior to the implementation of the consolidated audit trail).

i. How much historical data will be stored ''on-line'' in the database and be available for immediate search and extraction?

ii. How will data be archived if it is no longer stored on-line? How will regulators access and search data that has been archived?

iii. Will third parties have access to historical data? How will this access differ from the regulatory access?

c. Extension of Time for Submission of NMS plan

Proposed Rule 613 required the SROs to jointly file the NMS plan within 90 days from approval of Rule 613. The Commission received a comment letter specifically suggesting that a six-month period, rather than the 90-day period originally proposed, would be more appropriate for the submission of the NMS plan to ensure that the NMS plan is drafted with an informed understanding of how order and trade processing works so that the consolidated audit trail systems are capable of achieving the Commission's objectives.[855] To this end the commenter recommended that the Rule mandate the formation of cross-market participant working groups; outline the objectives of consolidated audit trail rather than identify technical requirements; and allow six months for the cross-participant working groups to perform a requirements analysis as part of the development of the NMS plan.[856]

In response to this commenter and other commenters that suggested that the Commission rely on an industry working group to create the consolidated audit trail[857] and to provide sufficient time for the SROs to draft the additional provisions required by the Rule[858] and to prepare responses to the considerations and the use cases for inclusion in the NMS plan,[859] the Commission is extending the timeframe for the submission of the NMS plan from 90 days from approval of Rule 613 to 270 days from the date of publication of the Adopting Release in the **Federal Register**.[860]

3. NMS Plan Costs

a. NMS Plan Cost Estimates

This section sets forth the Commission's estimates of the costs to prepare and file the NMS plan. As noted above, as part of the multi-step process for developing and approving an NMS plan that will govern the creation, implementation, and maintenance of a consolidated audit trail, the Commission is deferring its economic analysis of the consolidated audit trail (other than with respect to the NMS plan) until after the NMS plan, together with its detailed information and analysis, has been submitted by the

[855] *See* FIF Letter II, p. 2. *See also* STA Letter, p. 2 (stating ''[t]he SEC should allow six months for the CAT selection process rather than the two months currently identified in the proposed release'').

[856] *See* FIF Letter II, p. 3.

[857] *See* Direct Edge Letter, p. 2–3, 5. *See also* STA Letter, p. 1–3.

[858] These additional provisions relate to: (1) The security and confidentiality of the central repository (*see* Rule 613(e)(4)(i)(A) through (D) and Section III.B.2.e., *supra*); (2) error rates (*see* Rule 613(e)(6) and Section III.B.2.c., *supra*); (3) an Advisory Committee (*see* Rule 613(b)(7) and Section III.B.3.b., *supra*); (4) a retrospective assessment of the performance of the consolidated audit trail, as well as a plan to improve its performance (*see* Rule 613(b)(6)(i) through (iv) and Section III.B.3.b., *supra*); and (5) potential penalties (*see* Rule 613(h)(3) and Section III.B.3.a.1., *supra*).

[859] *See* Sections III.C.2.a. and c., *supra.*

[860] *See* Section I., *supra. See also* Section III.D., *infra,* for a discussion of the timelines pertaining to the implementation of the consolidated audit trail.

SROs to the Commission for its consideration and there has been an opportunity for public comment.[861] The Commission believes that an economic analysis of the consolidated audit trail is more appropriately performed once the SROs narrow the expanded array of choices they have and developed a detailed NMS plan.[862] At that time, the Commission will have available to it detailed information provided by the SROs, and any additional information provided by commenters once the NMS plan is published for comment. The cost estimates set forth below, therefore, only reflect the Commission's estimates as to the costs to the SROs for developing an NMS plan to be submitted to the Commission. These cost estimates do not reflect the much more significant initial and ongoing costs that would be incurred if such NMS plan were approved by the Commission and the implementation of the consolidated audit trail begins.

The Commission notes that the requirement to develop and submit the NMS plan also is a collection of information within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[863] Section IV. below describes in detail the burdens associated with the requirement that the SROs develop and submit an NMS plan.

i. Preliminary Cost Estimates from Proposing Release

In the Proposing Release, the Commission estimated that each SRO, on average, would incur an aggregate one-time cost of approximately $234,000 [864] to prepare and file the NMS plan, for an estimated aggregate cost of about $3.5 million.[865]

In making these estimates, the Commission assumed that the cost of developing and filing the NMS plan pursuant to the proposed Rule would be comparable to the cost to create other existing NMS plans.[866] Underlying the Commission's estimates were estimates of the amount of time the Commission believed would likely be spent by Programmer Analysts, Business Analysts, Attorneys, and Compliance Managers. The Commission did not receive any comments on these specific cost estimates.

ii. Revised Cost Estimates

As noted above, the Commission based its original estimates of the cost to prepare and file the NMS plan on the costs incurred with existing NMS plans. The adopted Rule, however, has been modified from the proposed Rule in several significant ways that differentiate the costs to prepare the NMS plan from all other existing NMS plans. These modifications require the SROs to: (1) Provide additional information and analysis while addressing the considerations that are set forth in Rule 613(a)(1); [867] (2) include additional provisions that were not required by the proposed Rule relating to enforcement mechanisms,[868] security and confidentiality,[869] and the preparation of a document every two years that contains a retrospective assessment of the performance of the consolidated audit trail, as well as a plan to improve its performance; [870] (3) address error rates; [871] and (4) provide for the creation of an Advisory Committee.[872]

(A) Revised Initial Costs To Create and File the NMS Plan

In light of these modifications to the proposed Rule, the Commission no longer believes that the cost of developing and filing the NMS plan pursuant to the proposed Rule would be sufficiently comparable to the cost to create other existing NMS plans to use those costs as a basis for developing a cost estimate for the NMS plan required by Rule 613. Instead, as discussed in more detail below, the Commission is increasing its estimated costs for the development and filing of the NMS plan due to the increases in the hours that likely would be spent to create the NMS plan by the SROs.[873] The Commission also is adjusting its preliminary cost estimate for the creation and filing of an NMS plan to reflect updated 2011 wage figures, as well as the registration of two additional SROs, since the preliminary estimates were developed.[874] Specifically, the Commission now estimates that the aggregate one-time cost for creating and filing an NMS plan would be approximately $718,000 per SRO,[875] or approximately $12.2 million

[861] *See* Section I., *supra. See also* Rule 613(a)(5) (providing, in part, that the Commission ''shall consider the impact of the national market system plan, or amendment, as applicable, on efficiency, competition, and capital formation'').

[862] *See* Section I., *supra.*

[863] 44 U.S.C. 3501 *et. seq.*

[864] Commission staff estimated that each SRO would expend (400 Attorney hours × $305 per hour) + (100 Compliance Manager hours × $258 per hour) + (220 Programmer Analyst hours × $193 per hour) + (120 Business Analyst hours × $194 per hour) = $213,540 per SRO to prepare and file the NMS plan. Commission staff also estimated that each SRO would outsource, on average, 50 hours of legal work, at an average hourly rate of $400, for a total of $20,000 per SRO, for an aggregate one-time cost to prepare and file an NMS plan of $233,540 per SRO. *See* Proposing Release, *supra* note 4, at 32596.

The $305 per hour figure for an Attorney; the $258 per hour figure for a Compliance Manager; the $193 per hour figure for a Programmer Analyst; and the $194 per hour figure for a Business Analysis (Intermediate) were from SIFMA's *Management & Professional Earnings in the Securities Industry 2008,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. Based on industry sources, the Commission estimated that the hourly rate for outsourced legal services in the securities industry is $400 per hour.

[865] Commission staff estimated that the SROs would incur an aggregate one-time cost of ($233,540 per SRO) × (15 SROs) = $3,518,100 to prepare and file an NMS plan.

[866] *See* Proposing Release, *supra* note 4, at note 299.

[867] *See* Rule 613(a)(1)(i) through (xii); Section III.C.2.a., *supra.*

[868] *See* Rule 613(h)(3); Section III.B.3.a.1., *supra.*

[869] *See, e.g.,* Rule 613(e)(4)(i)(A) through (D). For example, Rule 613(e)(4)(i)(A) requires that the NMS plan require that all plan sponsors and their employees, as well as all employees of the central repository, agree to use appropriate safeguards to ensure the confidentiality of such data and not use such data for purposes other than surveillance or regulatory purposes. Additionally, Rule 613(e)(4)(i)(B) requires the NMS plan to require that each SRO adopt and enforce rules that: (1) Require information barriers between regulatory staff and non-regulatory staff with regard to access and use of data in the central repository and (2) permit only persons designated by plan sponsors to have access to the data in the central repository. *See* Section III.B.2.e., *supra.*

[870] *See* Rule 613(b)(6)(i) through (iv). *See* Section III.B.3.b., *supra.*

[871] *See* Rule 613(e)(6)(i) through (ii). *See* Section III.B.2.c., *supra. See also* Rule 613(e)(6)(iii) through (iv).

[872] *See* Rule 613(b)(7).

[873] Commission staff now estimates that each SRO would expend 700 Attorney hours, 300 Compliance Manager hours, 880 Programmer Analyst hours, and 880 Business Analyst hours.

[874] The $378 per-hour figure for an Attorney; the $279 per hour figure for a Compliance Manager; the $196 per hour figure for a Programmer Analyst; and the $201 per hour figure for a Business Analyst (Intermediate) are from SIFMA's *Management & Professional Earnings in the Securities Industry 2011,* modified by Commission staff to account for an 1800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead. At the time the Proposing Release was published, there were 14 national securities exchanges. On August 13, 2010, the Commission granted the application of BATS–Y Exchange for registration as a national securities exchange. *See* Securities Exchange Act Release No. 62719, 75 FR 51295 (August 19, 2010). Additionally, on April 27, 2012, the Commission granted the application of BOX Options Exchange for registration as a national securities exchange. *See* Securities Exchange Act Release No. 66871, 77 FR 26323 (May 3, 2012).

[875] Commission staff estimates that each SRO would incur an aggregate one-time cost of (700 Attorney hours × $378 per hour) + (300 Compliance Manager hours × $279 per hour) + (880 Programmer Analyst hours × $196 per hour) + (880 Business Analyst hours × $201 per hour) = $697,660 per SRO to prepare and file an NMS plan. In addition, Commission staff estimates that each SRO would incur a one-time external cost of (50 legal hours × $400 per hour) = $20,000. As a result, the Commission staff estimates that the aggregate one-time cost to each SRO to prepare and file an NMS plan, including external costs, would be ($20,000 in external costs) + ($697,660 in aggregate internal costs) = $717,660 per SRO to prepare and file an NMS plan.

in the aggregate,[876] compared to an initial estimate of $234,000 per SRO, or approximately $3.5 million in the aggregate, to prepare and file an NMS plan.[877]

The Commission believes that these revised estimates, which include internal SRO personnel time and external legal costs, are appropriate based on the impact of the modifications to the proposed Rule on each of the job categories underlying the estimates. The Commission believes that the modifications to the proposed Rule will require SRO Programmer Analysts, Business Analysts, Attorneys, and Compliance Managers to expend additional time to address the requirements of the Rule. As discussed in more detail below, the Commission anticipates that the SROs will spend additional time on many activities, including: (1) Research; (2) discussions with members, committees and with industry associations; (3) vendor negotiations; (4) making decisions regarding the various options and increased flexibility provided by the adopted Rule;[878] (5) reviewing alternative NMS plans; (6) choosing between alternative plans and negotiating to reach a consensus on a single NMS plan; (7) providing a detailed estimate of the costs associated with that NMS plan; and (8) drafting the NMS plan. The Commission also believes that these increased estimates are appropriate in light of the comments, including the comment that the Commission underestimated the time the SROs would spend on business analyses to be performed in designing the NMS plan based on the experience of broker-dealers, vendors and SROs when OATS was expanded to all NMS stocks.[879] In response, as discussed below, the Commission is increasing its estimated Programmer Analyst, Business Analyst, Attorney, and Compliance Manager hours.

The Commission notes that the average hourly and cost estimates per SRO for creating and filing the NMS plan likely overestimated the costs for some of SROs and underestimated the costs for other SROs. The Commission also believes that certain SROs, particularly those SROs under the same holding company, may decide to collaborate and realize some cost savings on a per SRO basis. On balance, however, the Commission believes that, these hours and cost estimates are reasonable on average even if they may not be precise for any specific SRO.

(i) Programmer Analyst

The Commission is increasing its Programmer Analyst hour estimates from 220 hours to 880 hours per SRO. As discussed in more detail below in Section IV.D.2.a.i., the Commission anticipates that a Programmer Analyst would need to spend substantially more time to address the considerations included in the Rule and the ''use cases.'' Programmer Analysts may be involved in the NMS plan research, any industry discussions, negotiations with vendors and SROs, and in developing cost estimates for the consolidated audit trail. Thus, for these reasons, the Commission believes it appropriate to increase substantially its estimate of the number of hours expended by Programmer Analysts in the creation and filing of the NMS plan.

(ii) Business Analyst

The Commission is increasing its Business Analyst hour estimates from 360 hours to 880 hours per SRO. As discussed in more detail below in Section IV.D.2.a.ii., the Commission anticipates that a Business Analyst would spend substantially more time to address the considerations and the ''use cases,'' and overall, an amount of time that is comparable to the time that would likely be spent by Programmer Analysts because Business Analysts will likely be involved in many of the same tasks as Programmer Analysts, but have separate responsibilities as well.

(iii) Attorney

The Commission is increasing its estimates for the hours an Attorney would likely spend to prepare and file an NMS plan from 400 hours to 700 hours per SRO. As discussed in more detail in Section IV.D.2.a.iii. below, the Commission anticipates that an Attorney would spend substantially more time than previously estimated to draft the NMS plan.

(iv) Compliance Manager

The Commission is increasing its Compliance Manager hour estimate from 100 hours to 300 hours per SRO. As discussed in more detail below in Section IV.D.2.a.iv., the Commission anticipates that a Compliance Manager would spend substantially more time than previously estimated to draft the NMS plan.

4. Consideration of Burden on Competition and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to also consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition. Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission has focused its economic analysis in this Release on the requirement that the SROs develop an NMS plan, rather than on the actual creation, implementation, and maintenance of a consolidated audit trail itself, and is deferring its economic analysis of the actual creation, implementation, and maintenance of a consolidated audit trail itself until such time as it may approve the NMS plan submitted to the Commission for its consideration. The Commission's consideration of the Rule's impact on efficiency, competition, and capital formation is consistent with this approach. Because the Rule focuses only on the process and the requirement of the development of an NMS plan, the Commission believes that the adopted Rule will have minimal, if any, impact on efficiency, competition, and capital formation.

The Commission regards the adopted Rule as only a step in the multi-step process of developing and approving an NMS plan that will govern the creation, implementation, and maintenance of a consolidated audit trail and the Commission recognizes that the creation, implementation, and maintenance of a consolidated audit trail itself could potentially have effects on efficiency, competition, and capital formation. Therefore, Rule 613(a)(5) specifically provides that the Commission will consider the impact of the NMS plan submitted to the Commission for its consideration on efficiency, competition, and capital formation in determining whether to approve the plan or any amendment thereto. A complete consideration of the impact of the NMS plan, or any amendment thereto, on efficiency,

[876] Commission staff estimates that the SROs would incur an aggregate one-time cost of ($717,660 per SRO) × (17 SROs) = $12,200,200 to prepare and file an NMS plan.

[877] *See* Proposing Release, *supra* note 4, at 32596.

[878] *See* Section I., *supra.*

[879] *See* FIF Letter II, p. 2–3. *See also* STA Letter, p. 2–3.

competition, and capital formation, however, requires information that will not be known until the SROs submit their NMS plan or any amendment thereto. Accordingly, the Commission is deferring this analysis until such time as it may approve the NMS plan, or any amendment thereto, submitted by the SROs. To facilitate the consideration of such possible impacts, the Rule requires SROs to provide their own analysis of the plan's potential impact on efficiency, competition, and capital formation.

D. Implementation of Rule 613 After Approval of the NMS Plan

Proposed Rule 613(a)(3) sets forth a timetable for the implementation of the consolidated audit trail once the Commission has approved an NMS plan. The Commission proposed that the data collection and submission requirements would have applied first to the national securities exchanges and FINRA, and then to their individual members.[880] Specifically, proposed Rule 613(a)(3)(iii) would have required the plan sponsors to provide to the central repository the data to be required by the Rule within one year after effectiveness of the NMS plan. Members of the exchanges and FINRA would have been required to begin providing to the central repository the data required by the proposed Rule two years after the effectiveness of the NMS plan.[881] This phased approach was intended to allow members additional time to implement the systems changes necessary to begin providing the information to the central repository, including developing procedures to capture any new information required, such as the unique customer and order identifiers.

Additionally, proposed Rule 613(g)(1) would have required each SRO to file a proposed rule change with the Commission on or before 120 days from approval of Rule 613 to require its members to comply with Rule 613. Further, proposed Rule 613(i) would have required the plan sponsors to jointly provide to the Commission, within two months after effectiveness of the NMS plan, a document outlining how the plan sponsors would propose to incorporate into the consolidated audit trail information with respect to equity securities that are not NMS securities, debt securities, primary market transactions in NMS stocks, primary market transactions in equity securities that are not NMS securities, and primary market transactions in debt securities, including details for each order and reportable event that would be required to be provided, which market participants would be required to provide the data, an implementation timeline, and a cost estimate.

Although one commenter agreed that the consolidated audit trail could be implemented according to the timeline originally proposed,[882] and another urged the Commission to expedite implementation of Rule 613,[883] several commenters stated that more time would be necessary to develop and implement the NMS plan.[884] Many commenters suggested extended timelines for various aspects of the consolidated audit trail.[885] Two commenters, however, argued that the timetable for implementation should be shortened,[886] and one of the commenters suggested that the Commission use existing infrastructure, naming OATS as an example, as the basis of the audit trail to save implementation time.[887] Another commenter requested that the Commission move the deadline for submission of the joint document from the SROs outlining a proposal of how an expansion could occur from two months, as proposed, to one year after approval of the NMS plan, to allow time to choose a technology provider and build the infrastructure of the system, stating that ''[i]t would be far better to develop the design for the initial products and leverage this knowledge to later phases.'' [888]

The Commission also received two comment letters recommending that the Rule contain an exemption to accommodate the business model of small broker-dealers.[889]

After considering the comments regarding the proposed timeline for implementation of the Rule, the Commission is adopting Rule 613 with changes to the proposed Rule. First, the Commission is adopting a deadline of 60 days from effectiveness of the NMS plan (rather than 120 days from approval of the Rule, as originally proposed) by when each SRO must file with the Commission proposed rule changes to require its members to comply with the requirements of the Rule and the adopted NMS plan,[890] so that SROs can sequence their efforts by acting first on developing the NMS plan to be submitted to the Commission for its consideration, and then on proposed rules requiring compliance by their members. Second, in response to the commenter that advocated extending the deadline for the plan sponsors for submission of the joint document outlining how an expansion could occur from two months, as proposed, to one year after effectiveness of the approved NMS plan, the Commission is modifying the proposed Rule so that the document will be due to the Commission within six months (rather than two months as proposed) after the approval of the NMS plan. The Commission believes that this additional four months will provide the time necessary after the submission of the NMS plan to the Commission for the SROs to plan how to expand the consolidated audit trail to capture orders and trading in these additional securities.[891]

The Commission has considered the comment letters that requested an exemption from the proposed Rule for small broker-dealers,[892] but, as discussed above,[893] does not believe that it is appropriate to completely exempt smaller broker-dealers from the requirements of the consolidated audit trail. While the Commission does not believe that it is appropriate to completely exempt smaller broker-dealers from the Rule, the Commission, in response to commenters' concerns regarding the potential difficulties for small broker-dealers, is modifying the time by when the NMS plan may require small broker-dealers to comply with Rule 613. The Commission is permitting the SROs in the NMS plan to allow small broker-dealers up to three years after effectiveness, rather than two years as proposed, to begin reporting data to the central repository in recognition that some of these firms may still be handling orders manually and thus will need additional time to upgrade to an electronic method.[894]

[880] *See* proposed Rule 613(a)(3)(iii).

[881] *See* proposed Rule 613(a)(3)(v).

[882] *See* Nasdaq Letter I, p. 3.

[883] *See* Bean Letter, p. 1.

[884] *See* FINRA/NYSE Euronext Letter, p. 8; FINRA Letter, p. 15; Scottrade Letter, p. 1; CBOE Letter, p. 7; FIF Letter, p. 8; FIF Letter II, p. 2–3; STA Letter, p. 2–3; Nasdaq Letter I, p. 6–7; Wells Fargo Letter, p. 2–3; Direct Edge Letter, p. 2–3.

[885] *See* CBOE Letter, p. 6; Thomson Reuters Letter, p. 3; Liquidnet Letter, p. 2–3, 9; Ameritrade Letter, p. 3; Nasdaq Letter I, p. 7–9; Scottrade Letter, p. 1; SIFMA Letter, p. 13. *See also* FIF Letter, p. 8; FIF Letter II, p. 2–3; STA Letter, p. 2–3; Wells Fargo Letter, p. 2–3; FINRA/NYSE Euronext Letter, p. 8; FINRA Letter, p. 15.

[886] *See* Kaufman Letter, Attachment p. 1; Schumer Letter, p. 1.

[887] *See* Schumer Letter, p. 1.

[888] *See* Nasdaq Letter I, p. 7.

[889] *See* FINRA Proposal Letter, p. 5–6; and Wachtel Letter, p. 1.

[890] *See* Rule 613(g)(1).

[891] The Commission notes that the SROs could begin drafting the document even before an NMS plan is approved by the Commission.

[892] *See* FINRA Proposal Letter, p. 5–6; Wachtel Letter, p. 1.

[893] *See* Section III.B.1.c., *supra.*

[894] *See* Rule 613(a)(3)(vi); *see also* Rule 613(a)(3)(v).

Additionally, because many of these broker-dealers may have limited resources, the Commission encourages plan sponsors to propose in the NMS plan a requirement that small broker-dealers report data to the central repository within three years after effectiveness of the NMS plan, as the Commission believes that providing small broker-dealers a longer implementation time should assist such broker-dealers in identifying the most cost-effective and the most efficient manner in which to procure third-party software or make any systems modifications or other changes to comply with Rule 613.

Rule 613(a)(3)(vi) uses the definition of ''small broker-dealer'' contained in Exchange Act Rule 0–10: ''Small entities under the Securities Exchange Act for purposes of the Regulatory Flexibility Act.'' [895] Rule 0–10(c) defines a ''small broker-dealer'' as a broker or dealer that: (1) Had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 240.17a5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section.[896] The Commission believes that applying this definition is appropriate because it is an existing regulatory standard that is an indication of small entities for which regulators should be sensitive when imposing regulatory burdens.

The Commission notes that not all of the timeframes for implementation are being revised.[897] As discussed in Section III.B.1.f., above, the Commission has learned through the comment process that technology exists today to ''normalize'' information collected for the consolidated audit trail into a uniform electronic format, which will allow the required data to be captured and reported to the central repository more readily than the Commission originally anticipated. Accordingly, the Commission believes the remaining proposed implementation timeframes are reasonable and is adopting them as proposed.

IV. Paperwork Reduction Act

Certain provisions of the Rule contain ''collection of information requirements'' within the meaning of the PRA. The Commission published notice requesting comment on the collection of information requirements in the Proposing Release and submitted the proposed collection to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507 and 5 CFR 1320.11. 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 control number for Rule 613 is OMB Control No. 3235–0671 and the title of the new collection of information is ''Creation of a Consolidated Audit Trail Pursuant to Section 11A of the Securities Exchange Act of 1934 and Rules thereunder.''

This Release includes the Commission's estimates of the costs to create and file the NMS plan.[898] As noted above, the Commission is deferring its economic analysis of the consolidated audit trail (other than with respect to the NMS plan) until after the NMS plan, including the detailed information and analysis, has been submitted by the SROs and there has been an opportunity for public comment.[899] Similarly, the Commission is discussing below its estimates of the burden hours associated with the development and filing of the NMS plan but is deferring its discussion of the much more significant burden hours associated with the other paperwork requirements of the consolidated audit trail. The Commission also is deferring its discussion of the ongoing burden hours associated with the NMS plan because such ongoing burdens would only be incurred if the Commission approves the NMS plan. Instead, the Commission will defer these discussions until after the NMS plan, including the detailed information and analysis, has been submitted by the SROs and there has been an opportunity for public comment.

A. Summary of Collection of Information Under Rule 613

Rule 613 requires the SROs to develop and file an NMS plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository for the collection of information for NMS securities.[900] The NMS plan must require each SRO and its respective members to provide certain data to the central repository in compliance with Rule 613.[901] The NMS plan also must include a discussion of specified considerations,[902] and certain provisions related to administration and operation of the plan [903] and the operation of the central repository.[904]

[895] 17 CFR 240.0–10.

[896] 17 CFR 240.0–10(c).

[897] Pursuant to Rules 613(a)(3)(i) through (vi), the NMS plan must require the SROs to meet the following implementation deadlines: (1) Within two months after effectiveness of the national market system plan jointly (or under the governance structure described in the plan) select a person to be the plan processor; (2) within four months after effectiveness of the national market system plan synchronize their business clocks and require members of each such exchange and association to synchronize their business clocks in accordance with Rule 613(d); (3) within one year after effectiveness of the national market system plan provide to the central repository the data specified in Rule 613(c); (4) within fourteen months after effectiveness of the national market system plan implement a new or enhanced surveillance system(s) as required by Rule 613(f); (5) within two years after effectiveness of the NMS plan, require members of each such exchange and association (except those that qualify as small broker-dealers as defined in § 240.0–10(c)) to provide to the central repository the data specified in Rule 613(c); and (6) within three years after effectiveness of the national market system plan require members of each such exchange and association that qualify as small broker-dealers as defined in § 240.0–10(c) to provide to the central repository the data specified in Rule 613(c).

[898] *See* Section III.C.3., *supra.*

[899] *See* Rule 613(a)(5) (providing, in part, that the Commission ''shall consider the impact of the national market system plan on efficiency, competition, and capital formation''). *See also* Section I., *supra.*

[900] *See* Rule 613(a)(1).

[901] *See* Rule 613(c).

[902] *See* Rule 613(a)(1)(i) through (xii).

[903] For example, the NMS plan must include provisions: (1) To ensure fair representation of the plan sponsors; (2) for administration of the central repository, including selection of the plan processor; (3) addressing the requirements for admission of new plan sponsors and withdrawal of existing plan sponsors; (4) addressing the percentage of votes required by the plan sponsors to effectuate amendments to the plan; (5) addressing the manner in which the costs of operating the central repository would be allocated among the SROs that are sponsors of the plan, including a provision addressing the manner in which costs would be allocated to new sponsors to the plan; (6) requiring the appointment of a Chief Compliance Officer to regularly review the operation of the central repository to assure its continued effectiveness, and make any appropriate recommendations for enhancements to the nature of the information collected and the manner in which it is processed; and (7) including an enforcement mechanism to ensure that each SRO and member is collecting and providing to the central repository the information required. *See* Rule 613(b), 613(g)(4), and 613(h)(3).

[904] For example, the NMS plan must include a provision requiring the creation and maintenance by the plan processor of a method of access to the data stored in the central repository, that includes the ability to run searches and generate reports. *See* Rule 613(e)(3). Additionally, the NMS plan is required to include policies and procedures, including standards, to be used by the plan processor to: (1) Ensure the security and confidentiality of all information submitted to the central repository; (2) ensure the timeliness, accuracy, integrity and completeness of the data provided to the central repository; (and (3) ensure the accuracy of the consolidation by the plan processor of the data provided to the central repository. *See* Rule 613(e)(4). The NMS plan also

Further, the NMS plan is required to include certain provisions related to compliance by the SROs and their members with the requirements of the Rule and the NMS plan.[905]

The Commission believes that requiring an NMS plan imposes a paperwork burden on the SROs associated with preparing and filing the joint NMS plan.

B. Use of Information

The information contained in the NMS plan submitted to the Commission for its consideration will provide the Commission and the public with detailed information regarding how the consolidated audit trail will be created, implemented, and maintained in order for the Commission and the public to be able to carefully consider all aspects of the NMS plan. Further, the information contained in the NMS plan should facilitate an analysis of how well the NMS plan will allow regulators to effectively and efficiently carry out their responsibilities.

C. Respondents

Rule 613 applies to the 16 national securities exchanges and to one national securities association (FINRA) currently registered with the Commission.[906]

D. Total Annual Reporting and Recordkeeping Burden for the Creation and Filing of the NMS Plan

1. Preliminary Burden Hour Estimates from Proposing Release

In the Proposing Release, the Commission estimated that each SRO, on average, would spend approximately 840 hours of legal, compliance, information technology, and business operations time to prepare and file the NMS plan. All together the SROs would spend an estimated 12,600 hours.[907] The Commission's 840 hour estimate included internal personnel time and external legal costs—400 Attorney hours, 100 Compliance Manager hours, 220 Programmer Analyst hours, and 120 Business Analyst hours. Commission staff also estimated that each SRO would outsource, on average, 50 hours of legal time to develop and draft the NMS plan, at an average hourly rate of $400, for a total external cost of $20,000 per SRO.[908] All together, the SROs would spend an estimated $300,000 in external costs.[909]

In making these estimates, the Commission assumed that the burden hours necessary for preparing and filing the NMS plan pursuant to the proposed Rule would be comparable to the burden hours needed to create other existing NMS plans.[910] The Commission's estimates included anticipated work hours for Programmer Analysts, Business Analysts, Attorneys and Compliance Managers. The Commission did not receive comments on any of these burden estimates.

2. Revised Burden Hour Estimates

As noted above, the Commission based its original estimates of SRO burden hours to prepare and file the NMS plan on the burden hours spent for existing NMS plans. The Commission, however, has modified the proposed Rule in several significant ways that differentiate the burden hours to prepare the NMS plan from all other existing NMS plans. These modifications require the SROs to expand the NMS plan in the following four ways: (1) Provide additional information and analysis to address the considerations that are set forth in Rule 613(a)(1);[911] (2) include additional provisions that were not required by the proposed Rule relating to enforcement mechanisms,[912] security and confidentiality,[913] and the preparation of a document every two years that contains a retrospective assessment of the performance of the consolidated audit trail, as well as a plan to improve its performance;[914] (3) address error rates;[915] and (4) provide for the creation of an Advisory Committee.[916]

a. Revised Initial Burden Hours Needed To Prepare and File the NMS Plan

In light of these modifications to the proposed Rule, the Commission is increasing substantially its estimated burden hours needed for the development and filing of the NMS plan. The Commission also is adjusting its preliminary burden hour estimates for the preparation and filing of an NMS plan to reflect the registration of two additional SROs after it issued the preliminary estimates.[917] The Commission now estimates that the aggregate one-time burden hour amount for preparing and filing an NMS plan would be approximately 2,760 burden hours with $20,000 in external costs per SRO,[918] or approximately 46,920 burden hours and $340,000 in external costs in the aggregate,[919] compared to an

must include a provision requiring the plan sponsors to provide to the Commission, at least every two years after effectiveness of the national market system plan, a written assessment of the operation of the consolidated audit trail. *See* Rule 613(b)(6). The NMS plan is also required to include an Advisory Committee to advise the plan sponsors on the implementation, operation and administration of the central repository. *See* Rule 613(b)(7). Further, the NMS plan must specify a maximum error rate to be tolerated by the central repository for the data it collects, and processes for identifying and correcting errors in the data, for notifying the entities responsible for the reporting of the erroneous data, and for disciplining those who repeatedly report erroneous data. See Rule 613(e)(6)(i) through(iv). The NMS plan must also specify as a time by which the corrected data will be available to regulators. *See* Rule 613(e)(6)(iv).

[905] The NMS plan must include: (1) A provision that makes each SRO that sponsors the plan responsible for enforcing compliance by its members with the provisions of the plan; and (2) mechanisms to ensure that plan sponsors and their members comply with the requirements of the plan. *See* Rules 613(g)(3), 613(g)(4), and 613(h)(3).

[906] At the time the Proposing Release was published, there were 14 national securities exchanges. On August 13, 2010, the Commission granted the application of BATS–Y Exchange for registration as a national securities exchange. *See* Securities Exchange Act Release No. 62719, 75 FR 51295 (August 19, 2010). Additionally, on April 27, 2012, the Commission granted the application of BOX Options Exchange for registration as a national securities exchange. *See* Securities Exchange Act Release No. 66871, 77 FR 26323 (May 3, 2012).

[907] Commission staff estimated that each SRO would spend an aggregate one-time amount of (400 Attorney hours) + (100 Compliance Manager hours) + (220 Programmer Analyst hours) + (120 Business Analyst hours) × (15 SROs) = 12,600 burden hours to prepare and file the NMS plan.

[908] Based on industry sources, the Commission estimated that the hourly rate for outsourced legal services in the securities industry is $400 per hour.

[909] Commission staff estimated that the SROs would spend ($20,000 per SRO) × (15 SROs) = $300,000 in external costs to develop and draft the NMS plan.

[910] *See* Proposing Release, *supra* note 4, at 32596.

[911] *See* Rule 613(a)(1)(i) through (xii); Section III.C.2.a., *supra.*

[912] *See* Rule 613(h)(3); Section III.B.3.a.1., *supra.*

[913] *See, e.g.,* Rule 613(e)(4)(i)(A) through (D). For example, Rule 613(e)(4)(i)(A) requires that the NMS plan require that all plan sponsors and their employees, as well as all employees of the central repository, agree to use appropriate safeguards to ensure the confidentiality of such data and not use such data for purposes other than surveillance or regulatory purposes. Additionally, Rule 613(e)(4)(i)(B) requires the NMS plan to require that each SRO adopt and enforce rules that: (1) Require information barriers between regulatory staff and non-regulatory staff with regard to access and use of data in the central repository and (2) permit only persons designated by plan sponsors to have access to the data in the central repository. *See* Section III.B.2.e., *supra.*

[914] *See* Rule 613(b)(6)(i) through (iv). *See* Section III.B.3.b., *supra.*

[915] *See* Rule 613(e)(6)(i) through (ii). *See* Section III.B.2.c., *supra. See* Rule 613(e)(6)(iii) through (iv).

[916] *See* Rule 613(b)(7).

[917] *See* note 906, *supra.*

[918] Commission staff estimates that each SRO would spend an aggregate one-time amount of (700 Attorney hours) + (300 Compliance Manager hours) + (880 Programmer Analyst hours) + (880 Business Analyst hours) = 2,760 burden hours per SRO to prepare and file an NMS plan. In addition, Commission staff estimates that each SRO would incur a one-time external cost of (50 legal hours × $400 per hour) = $20,000.

[919] Commission staff estimates that the SROs would incur an aggregate one-time amount of (2,760 burden hours per SRO) × (17 SROs) = 46,920

Continued

initial estimate of 840 burden hours per SRO with $20,000 in external costs, or approximately 12,600 burden hours in the aggregate and $300,000 in external costs, to prepare and file an NMS plan.[920]

The Commission believes that these revised estimates, which include internal SRO personnel time and external legal costs, are appropriate based on the Commission's analysis, set forth below, of the impact of the modifications to the proposed Rule on each of the job categories underlying the estimates. The Commission believes that the modifications to the proposed Rule will require SRO Programmer Analysts, Business Analysts, Attorneys, and Compliance Managers to expend additional time to address the requirements of the Rule. As discussed in more detail below, the Commission anticipates that the SROs will spend additional time on many activities, including: (1) Research; (2) discussions with members, committees and with industry associations; (3) vendor negotiations; (4) making decisions regarding the various options and increased flexibility provided by the adopted Rule;[921] (5) reviewing alternative NMS plans; (6) choosing between alternative plans and negotiating to reach a consensus on a single NMS plan; (7) providing a detailed estimate of the costs associated with that NMS plan; and (8) drafting the NMS plan. The Commission also believes that these increased estimates are appropriate in light of the comments, including the comment that asserted that the Commission underestimated the time the SROs would spend on the business analyses to be performed in designing the NMS plan, based on the experience of broker-dealers, vendors and SROs when OATS was expanded to all NMS stocks.[922] In response, as discussed in more detail below, the Commission is increasing its estimated Programmer Analyst, Business Analyst, Attorney and Compliance Manager hours.

The Commission notes that these revised average hourly and cost estimates per SRO for creating and filing the NMS plan likely overestimated the costs for some of SROs and underestimated the costs for other SROs. The Commission also believes that certain SROs, particularly those SROs under the same holding company, may decide to collaborate and realize some cost savings on a per SRO basis. On balance, however, the Commission believes that, these revised hours and cost estimates are reasonable on average even if they may not be precise for any specific SRO.

(i) Programmer Analyst

The Commission is increasing its estimates for the hours a Programmer Analyst would likely spend with respect to the preparation and filing of the NMS plan from 220 hours, as originally estimated, to 880 hours per SRO. The Commission anticipates that a Programmer Analyst would need to spend substantially more time to address the considerations included in the Rule and the ''use cases.'' Specifically, the SROs will need to rely on Programmer Analysts to help address many of the considerations, as many of those are of a technical nature. For example, several of the considerations relate to the specific features and details of the NMS plan. Programmer Analysts likely will be consulted when the SROs are considering the specific features and details of the NMS plan. The Programmer Analysts likely will provide guidance and information regarding whether a particular feature or detail is technologically possible. The SROs also likely will consult Programmer Analysts when drafting the additional provisions required by the Rule. For example, in drafting the security and confidentiality provisions, Programmer Analysts, who may have knowledge about the information security practices and issues, may be consulted to provide input on a draft provisions in light of technologies with respect to security and confidentiality. Programmer Analysts also may be consulted with respect to addressing errors rates because such analysts may have a technical understanding of trading and reporting systems and be able to provide recommendations on how errors that are introduced can be addressed. In each of these instances, Programmer Analysts may be involved in the NMS plan research, any industry discussions, negotiations with vendors and SROs, and in developing cost estimates for the consolidated audit trail. Thus, for these reasons, the Commission believes it appropriate to increase its estimate of the number of hours expended by Programmer Analysts in the creation and filing of the NMS plan.

(ii) Business Analyst

The Commission is increasing its estimates for the hours a Business Analyst would likely spend with respect to the preparation and filing of an NMS plan from 360 hours per SRO, as originally estimated, to 880 hours per SRO. The Commission anticipates that a Business Analyst would spend substantially more time to address the considerations and the ''use cases.'' Overall, the Commission anticipates that this amount of additional time will be comparable to the additional time that would likely be spent by Programmer Analysts for the same reasons because Business Analysts will likely be involved in many of the same tasks as Programmer Analysts, albeit with separate responsibilities. The SROs will need to rely on Business Analysts to help address many technical considerations that have relevance to the business and operations of SROs. The Commission also believes that the SROs will need to rely on Business Analysts to work with the Programmer Analysts and the Compliance Managers to analyze the business impact of particular features and details of the NMS plan. Because Rule 613 is less prescriptive than the proposed Rule, Business Analysts may have a larger role in helping to determine which option the NMS plan will propose. Business Analysts also will likely be involved in determining the cost estimates and in analyzing the NMS plan's impact on efficiency, competition, and capital formation. The SROs also likely will consult with Business Analysts when drafting the responses to the considerations and the ''use cases,'' as well as the additional provisions required by the Rule. For example, the SROs likely will consult with Business Analysts on the feasibility, benefits, and costs of any technological upgrades that may be required in order to provide the allocation information described in Rule 613(a)(1)(vi). Further, in drafting the security and confidentiality provisions, Business Analysts may have knowledge about the costs and the business risks of certain security and confidentiality decisions. Business Analysts also may be consulted with respect to addressing error rates because any decisions made may impact business operations and the cost estimates. Further, Business Analysts may likely be consulted by Attorneys with respect to the performance assessment and improvement plan. In each of these instances, Business Analysts may be involved in the NMS plan research, any industry discussions (particularly with members and other SROs), negotiations with vendors and SROs, and in developing cost estimates for the

burden hours to prepare and file an NMS plan. Commission staff estimates that ($20,000 per SRO) × (17 SROs) = $340,000 in external costs to prepare and file the NMS plan.

[920] *See* Proposing Release, *supra* note 4, at 32596.

[921] *See* Section I., *supra.*

[922] *See* FIF Letter II, p. 2–3. *See also* STA Letter, p. 2–3.

consolidated audit trail. Thus, for these reasons, the Commission believes it is appropriate to increase its estimate of the number of hours expended by Business Analysts in the creation and filing of the NMS plan.

(iii) Attorney

The Commission is increasing its Attorney hour estimates from 400 hours to 700 hours per SRO. The Commission now anticipates that an Attorney would spend substantially more time than the Commission had previously estimated to draft the NMS plan. The NMS plan that Attorneys would draft must now include a discussion of the considerations and the additional provisions required by the Rule, and must reflect additional consultations with Programmer Analysts, Business Analysts and Compliance Managers. Further, the NMS plan drafted also would likely reflect additional consultation on the ''use cases.'' The NMS plan proposal would also likely require Attorney work on the Advisory Committee requirement and on the NMS plan policies and procedures to be used by the plan processor [923] to ensure the security and confidentiality and accuracy of the information submitted to the central repository.[924] Attorney work would also be required on the mechanism to enforce compliance by plan sponsors with the NMS plan, as required by Rule 613(h)(3), including penalty provisions, if the plan sponsors deem appropriate. The Commission believes that an Attorney would also be involved in the NMS plan research, any industry discussions, negotiations with vendors, negotiations with SROs (in particular, to reach consensus on an NMS plan), and in developing cost estimates for the consolidated audit trail. Thus, for these reasons, the Commission believes it appropriate to increase its estimate of the number of hours expended by Attorneys in the creation and filing of the NMS plan.

(iv) Compliance Manager

The Commission is increasing its Compliance Manager hour estimates from 100 hours to 300 hours per SRO. The Commission now anticipates that a Compliance Manager would spend substantially more time than the Commission had previously estimated to draft the NMS plan. Compliance Managers likely will help shape provisions of the NMS plan that deal with monitoring member and SRO compliance with the NMS plan's requirements. Compliance Managers likely will also be involved in the Advisory Committee requirement. They likely will also work on NMS plan policies and procedures to be used by the plan processor to ensure the security and confidentiality and accuracy of the information submitted to the central repository, and to ensure that these policies and procedures are feasible for SRO compliance and for member compliance.[925] They will likely also work on the mechanism to enforce compliance by plan sponsors with the NMS plan, as required by Rule 613(h)(3), including penalty provisions, if the plan sponsors deem appropriate. Further, Compliance Managers will also work on NMS plan provisions that address error rates and performance assessment and improvement. The Commission believes that Compliance Managers may also be involved in the NMS plan research and industry discussions (particularly with regard to SRO and member compliance issues). Thus, for these reasons, the Commission believes it is appropriate to increase its estimate of the number of hours expended by Compliance Managers in the creation and filing of the NMS plan.

E. Collection of Information Is Mandatory

The collection of information discussed above is a mandatory collection of information.

F. Confidentiality

The Rule requires that the data to be recorded and reported to the central repository will only be available to the SROs and the Commission for the purpose of performing their respective regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations.[926] Further, the NMS plan submitted to the Commission for its consideration pursuant to the adopted Rule is required to include policies and procedures to ensure the security and confidentiality of all information submitted to the central repository, and to ensure that all plan sponsors and their employees, as well as all employees of the central repository, use appropriate safeguards to ensure the confidentiality of such data and shall agree not to use such data for any purpose other than surveillance and regulatory purposes.[927]

G. Retention Period of Recordkeeping Requirements

The SROs are required to retain records and information pursuant to Rule 17a–1 under the Exchange Act.[928] Members are required to retain records and information in accordance with Rule 17a–4 under the Exchange Act.[929]

V. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act (''RFA'') [930] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the Administrative Procedure Act, as amended by RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.'' [931] Rule 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment, which if adopted, would not ''have a significant economic impact on a substantial number of small entities.''[932]

In the Proposing Release, the Commission requested comment on whether proposed Rule 613 would have a significant economic impact on a substantial number of small entities, and, if so, what would be the nature of any impact on small entities.[933] The Commission also requested that commenters provide empirical data to support the extent of such impact.[934] The Commission received two comments on the general anticipated effect of the proposed Rule on small-broker dealers; FINRA and a small broker-dealer that solely handles orders manually requested that an exemption from the proposed Rule be adopted to accommodate the business model of

[923] *See* Rule 613(e)(4). The Commission believes that an outline or overview description of the policies and procedures, including standards, to be used by the plan processor that would be implemented under the NMS plan submitted to the Commission for its consideration would be sufficient to satisfy the requirement of the Rule. The Commission believes it is important for the NMS plan to establish the fundamental framework of these policies and procedures, but recognizes the utility of allowing the plan sponsors flexibility to subsequently delineate them in greater detail with the ability to make modifications as needed. *See* Section III.B.2.e., *supra.*

[924] *See* Rule 613(e)(4)(i)(A) through (D).

[925] *See* Rule 613(e)(4)(i)(A) through (D).

[926] *See* Rule 613(e)(2).

[927] *See* proposed Rule 613(e)(4)(i).

[928] 17 CFR 240.17a–1.

[929] 17 CFR 240.17a–4.

[930] 5 U.S.C. 601 *et seq.*

[931] Although Section 601(6) of the RFA defines the term ''small entity,'' the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term ''small entity'' for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10. *See* Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS–305).

[932] 5 U.S.C. 605(b).

[933] *See* Proposing Release, *supra* note 4, at 32607.

[934] *Id.*

small broker-dealers.[935] In response to the commenters, the Commission amended the Rule as proposed to provide additional time for small broker-dealers to comply with the reporting requirements of Rule 613.[936] The Commission notes that none of the comment letters received specifically responded to the Commission's initial regulatory flexibility analysis.

As proposed and as adopted, Rule 613 requires the SROs to file an NMS plan to create, implement, and maintain the consolidated audit trail. In response to commenters and as discussed in this release, the Commission has modified the proposed Rule to provide the SROs with a range of options and greater flexibility for how they choose to meet the requirements of the Rule. As a result, the Commission will not know the specific requirements of the NMS plan until it is filed with the Commission, and cannot analyze how the NMS plan will impact small entities until then. At this time, there are no small entities ''subject to the requirements'' of Rule 613.[937]

However, because Rule 613 requires that the national securities exchanges and national securities associations (*i.e.,* FINRA) file an NMS plan with the Commission, for purposes of the RFA, the Commission is undertaking an analysis of how the NMS plan filing requirement will impact the exchanges and FINRA to ascertain whether the exchanges and FINRA are ''small businesses.'' Paragraph (e) of Rule 0–10 provides that for the purposes of the RFA, an exchange is considered a ''small business'' if it has been exempted from the reporting requirements of Rule 601 of Regulation NMS,[938] and is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in Rule 0–10. Under this standard, none of the national securities exchanges subject to Rule 613 is a ''small business'' for purposes of the RFA. In addition, FINRA is not a small entity as defined in Rule 0–10.[939] Therefore, the Commission believes that Rule 613, which requires that the SROs file an NMS plan with the Commission to create, implement, and maintain the consolidated audit trail, will not have a significant economic impact on a substantial number of small entities because this requirement will only apply to the existing national securities exchanges and national securities associations, which do not qualify as small entities pursuant to the RFA.

For the foregoing reasons, the Commission hereby certifies that, pursuant to 5 U.S.C. 605(b), Rule 613 will not have a significant economic impact on a substantial number of small entities.

VI. Statutory Authority

Pursuant to the Exchange Act and particularly, Sections 2, 3(b), 5, 6, 11A, 15, 15A, 17(a) and (b), 19, and 23(a) thereof, 15 U.S.C. 78b, 78c(b), 78e, 78f, 78k–1, 78o, 78o–3, 78q(a) and (b), 78s and 78w(a), the Commission is adopting Rule 613 of Regulation NMS, as set forth below.

Text of Rule

List of Subjects in 17 CFR Part 242

Brokers, Reporting and recordkeeping requirements, Securities.

In accordance with the foregoing, Title 17, Chapter II, of the Code of Federal Regulations is amended as follows.

PART 242—REGULATIONS M, SHO, ATS, AC, AND NMS AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 1. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 2. Add § 242.613 to read as follows:

§ 242.613 Consolidated audit trail.

(a) *Creation of a national market system plan governing a consolidated audit trail.*

(1) Each national securities exchange and national securities association shall jointly file on or before 270 days from the date of publication of the Adopting Release in the **Federal Register** a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository as required by this section. The national market system plan shall discuss the following considerations:

(i) The method(s) by which data will be reported to the central repository including, but not limited to, the sources of such data and the manner in which the central repository will receive, extract, transform, load, and retain such data; and the basis for selecting such method(s);

(ii) The time and method by which the data in the central repository will be made available to regulators, in accordance with paragraph (e)(1) of this section, to perform surveillance or analyses, or for other purposes as part of their regulatory and oversight responsibilities;

(iii) The reliability and accuracy of the data reported to and maintained by the central repository throughout its lifecycle, including transmission and receipt from market participants; data extraction, transformation and loading at the central repository; data maintenance and management at the central repository; and data access by regulators;

(iv) The security and confidentiality of the information reported to the central repository;

(v) The flexibility and scalability of the systems used by the central repository to collect, consolidate and store consolidated audit trail data, including the capacity of the consolidated audit trail to efficiently incorporate, in a cost-effective manner, improvements in technology, additional capacity, additional order data, information about additional securities or transactions, changes in regulatory requirements, and other developments;

(vi) The feasibility, benefits, and costs of broker-dealers reporting to the consolidated audit trail in a timely manner:

(A) The identity of all market participants (including broker-dealers and customers) that are allocated NMS securities, directly or indirectly, in a primary market transaction;

(B) The number of such securities each such market participant is allocated; and

(C) The identity of the broker-dealer making each such allocation;

(vii) The detailed estimated costs for creating, implementing, and maintaining the consolidated audit trail as contemplated by the national market system plan, which estimated costs should specify:

(A) An estimate of the costs to the plan sponsors for establishing and maintaining the central repository;

(B) An estimate of the costs to members of the plan sponsors, initially and on an ongoing basis, for reporting the data required by the national market system plan;

(C) An estimate of the costs to the plan sponsors, initially and on an ongoing basis, for reporting the data required by the national market system plan; and

(D) How the plan sponsors propose to fund the creation, implementation, and maintenance of the consolidated audit

[935] *See* FINRA Proposal Letter, p. 5–6 and Wachtel Letter, p. 1.

[936] *See* Rule 613(a)(3)(vi).

[937] Section 604(a)(4) of the RFA.

[938] 17 CFR 242.601.

[939] 13 CFR 121.201.

trail, including the proposed allocation of such estimated costs among the plan sponsors, and between the plan sponsors and members of the plan sponsors;

(viii) An analysis of the impact on competition, efficiency and capital formation of creating, implementing, and maintaining of the national market system plan;

(ix) A plan to eliminate existing rules and systems (or components thereof) that will be rendered duplicative by the consolidated audit trail, including identification of such rules and systems (or components thereof); to the extent that any existing rules or systems related to monitoring quotes, orders, and executions provide information that is not rendered duplicative by the consolidated audit trail, an analysis of:

(A) Whether the collection of such information remains appropriate;

(B) If still appropriate, whether such information should continue to be separately collected or should instead be incorporated into the consolidated audit trail; and

(C) If no longer appropriate, how the collection of such information could be efficiently terminated; the steps the plan sponsors propose to take to seek Commission approval for the elimination of such rules and systems (or components thereof); and a timetable for such elimination, including a description of how the plan sponsors propose to phase in the consolidated audit trail and phase out such existing rules and systems (or components thereof);

(x) Objective milestones to assess progress toward the implementation of the national market system plan;

(xi) The process by which the plan sponsors solicited views of their members and other appropriate parties regarding the creation, implementation, and maintenance of the consolidated audit trail, a summary of the views of such members and other parties, and how the plan sponsors took such views into account in preparing the national market system plan; and

(xii) Any reasonable alternative approaches to creating, implementing, and maintaining a consolidated audit trail that the plan sponsors considered in developing the national market system plan including, but not limited to, a description of any such alternative approach; the relative advantages and disadvantages of each such alternative, including an assessment of the alternative's costs and benefits; and the basis upon which the plan sponsors selected the approach reflected in the national market system plan.

(2) The national market system plan, or any amendment thereto, filed pursuant to this section shall comply with the requirements in § 242.608(a), if applicable, and be filed with the Commission pursuant to § 242.608.

(3) The national market system plan submitted pursuant to this section shall require each national securities exchange and national securities association to:

(i) Within two months after effectiveness of the national market system plan jointly (or under the governance structure described in the plan) select a person to be the plan processor;

(ii) Within four months after effectiveness of the national market system plan synchronize their business clocks and require members of each such exchange and association to synchronize their business clocks in accordance with paragraph (d) of this section;

(iii) Within one year after effectiveness of the national market system plan provide to the central repository the data specified in paragraph (c) of this section;

(iv) Within fourteen months after effectiveness of the national market system plan implement a new or enhanced surveillance system(s) as required by paragraph (f) of this section;

(v) Within two years after effectiveness of the national market system plan require members of each such exchange and association, except those members that qualify as small broker-dealers as defined in § 240.0–10(c) of this chapter, to provide to the central repository the data specified in paragraph (c) of this section; and

(vi) Within three years after effectiveness of the national market system plan require members of each such exchange and association that qualify as small broker-dealers as defined in § 240.0–10(c) of this chapter to provide to the central repository the data specified in paragraph (c) of this section.

(4) Each national securities exchange and national securities association shall be a sponsor of the national market system plan submitted pursuant to this section and approved by the Commission.

(5) No national market system plan filed pursuant to this section, or any amendment thereto, shall become effective unless approved by the Commission or otherwise permitted in accordance with the procedures set forth in § 242.608. In determining whether to approve the national market system plan, or any amendment thereto, and whether the national market system plan or any amendment thereto is in the public interest under § 242.608(b)(2), the Commission shall consider the impact of the national market system plan or amendment, as applicable, on efficiency, competition, and capital formation.

(b) *Operation and administration of the national market system plan.*

(1) The national market system plan submitted pursuant to this section shall include a governance structure to ensure fair representation of the plan sponsors, and administration of the central repository, including the selection of the plan processor.

(2) The national market system plan submitted pursuant to this section shall include a provision addressing the requirements for the admission of new sponsors of the plan and the withdrawal of existing sponsors from the plan.

(3) The national market system plan submitted pursuant to this section shall include a provision addressing the percentage of votes required by the plan sponsors to effectuate amendments to the plan.

(4) The national market system plan submitted pursuant to this section shall include a provision addressing the manner in which the costs of operating the central repository will be allocated among the national securities exchanges and national securities associations that are sponsors of the plan, including a provision addressing the manner in which costs will be allocated to new sponsors to the plan.

(5) The national market system plan submitted pursuant to this section shall require the appointment of a Chief Compliance Officer to regularly review the operation of the central repository to assure its continued effectiveness in light of market and technological developments, and make any appropriate recommendations for enhancements to the nature of the information collected and the manner in which it is processed.

(6) The national market system plan submitted pursuant to this section shall include a provision requiring the plan sponsors to provide to the Commission, at least every two years after effectiveness of the national market system plan, a written assessment of the operation of the consolidated audit trail. Such document shall include, at a minimum:

(i) An evaluation of the performance of the consolidated audit trail including, at a minimum, with respect to data accuracy (consistent with paragraph (e)(6) of this section), timeliness of reporting, comprehensiveness of data elements, efficiency of regulatory access, system speed, system downtime,

system security (consistent with paragraph (e)(4) of this section), and other performance metrics to be determined by the Chief Compliance Officer, along with a description of such metrics;

(ii) A detailed plan, based on such evaluation, for any potential improvements to the performance of the consolidated audit trail with respect to any of the following: improving data accuracy; shortening reporting timeframes; expanding data elements; adding granularity and details regarding the scope and nature of Customer-IDs; expanding the scope of the national market system plan to include new instruments and new types of trading and order activities; improving the efficiency of regulatory access; increasing system speed; reducing system downtime; and improving performance under other metrics to be determined by the Chief Compliance Officer;

(iii) An estimate of the costs associated with any such potential improvements to the performance of the consolidated audit trail, including an assessment of the potential impact on competition, efficiency, and capital formation; and

(iv) An estimated implementation timeline for any such potential improvements, if applicable.

(7) The national market system plan submitted pursuant to this section shall include an Advisory Committee which shall function in accordance with the provisions set forth in this paragraph (b)(7). The purpose of the Advisory Committee shall be to advise the plan sponsors on the implementation, operation, and administration of the central repository.

(i) The national market system plan submitted pursuant to this section shall set forth the term and composition of the Advisory Committee, which composition shall include representatives of the member firms of the plan sponsors.

(ii) Members of the Advisory Committee shall have the right to attend any meetings of the plan sponsors, to receive information concerning the operation of the central repository, and to provide their views to the plan sponsors; provided, however, that the plan sponsors may meet without the Advisory Committee members in executive session if, by affirmative vote of a majority of the plan sponsors, the plan sponsors determine that such an executive session is required.

(c) *Data recording and reporting.*

(1) The national market system plan submitted pursuant to this section shall provide for an accurate, time-sequenced record of orders beginning with the receipt or origination of an order by a member of a national securities exchange or national securities association, and further documenting the life of the order through the process of routing, modification, cancellation, and execution (in whole or in part) of the order.

(2) The national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and member to report to the central repository the information required by paragraph (c)(7) of this section in a uniform electronic format, or in a manner that would allow the central repository to convert the data to a uniform electronic format, for consolidation and storage.

(3) The national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and member to record the information required by paragraphs (c)(7)(i) through (v) of this section contemporaneously with the reportable event. The national market system plan shall require that information recorded pursuant to paragraphs (c)(7)(i) through (v) of this section must be reported to the central repository by 8:00 a.m. Eastern Time on the trading day following the day such information has been recorded by the national securities exchange, national securities association, or member. The national market system plan may accommodate voluntary reporting prior to 8:00 a.m. Eastern Time, but shall not impose an earlier reporting deadline on the reporting parties.

(4) The national market system plan submitted pursuant to this section shall require each member of a national securities exchange or national securities association to record and report to the central repository the information required by paragraphs (c)(7)(vi) through (viii) of this section by 8:00 a.m. Eastern Time on the trading day following the day the member receives such information. The national market system plan may accommodate voluntary reporting prior to 8:00 a.m. Eastern Time, but shall not impose an earlier reporting deadline on the reporting parties.

(5) The national market system plan submitted pursuant to this section shall require each national securities exchange and its members to record and report to the central repository the information required by paragraph (c)(7) of this section for each NMS security registered or listed for trading on such exchange or admitted to unlisted trading privileges on such exchange.

(6) The national market system plan submitted pursuant to this section shall require each national securities association and its members to record and report to the central repository the information required by paragraph (c)(7) of this section for each NMS security for which transaction reports are required to be submitted to the association.

(7) The national market system plan submitted pursuant to this section shall require each national securities exchange, national securities association, and any member of such exchange or association to record and electronically report to the central repository details for each order and each reportable event, including, but not limited to, the following information:

(i) For original receipt or origination of an order:

(A) Customer-ID(s) for each customer;

(B) The CAT–Order-ID;

(C) The CAT–Reporter-ID of the broker-dealer receiving or originating the order;

(D) Date of order receipt or origination;

(E) Time of order receipt or origination (using time stamps pursuant to paragraph (d)(3) of this section); and

(F) Material terms of the order.

(ii) For the routing of an order, the following information:

(A) The CAT-Order-ID;

(B) Date on which the order is routed;

(C) Time at which the order is routed (using time stamps pursuant to paragraph (d)(3) of this section);

(D) The CAT-Reporter-ID of the broker-dealer or national securities exchange routing the order;

(E) The CAT-Reporter-ID of the broker-dealer, national securities exchange, or national securities association to which the order is being routed;

(F) If routed internally at the broker-dealer, the identity and nature of the department or desk to which an order is routed; and

(G) Material terms of the order.

(iii) For the receipt of an order that has been routed, the following information:

(A) The CAT-Order-ID;

(B) Date on which the order is received;

(C) Time at which the order is received (using time stamps pursuant to paragraph (d)(3) of this section);

(D) The CAT-Reporter-ID of the broker-dealer, national securities exchange, or national securities association receiving the order;

(E) The CAT-Reporter-ID of the broker-dealer or national securities exchange routing the order; and

(F) Material terms of the order.

(iv) If the order is modified or cancelled, the following information:

(A) The CAT-Order-ID;

(B) Date the modification or cancellation is received or originated;

(C) Time the modification or cancellation is received or originated (using time stamps pursuant to paragraph (d)(3) of this section);

(D) Price and remaining size of the order, if modified;

(E) Other changes in material terms of the order, if modified; and

(F) The CAT-Reporter-ID of the broker-dealer or Customer-ID of the person giving the modification or cancellation instruction.

(v) If the order is executed, in whole or part, the following information:

(A) The CAT-Order-ID;

(B) Date of execution;

(C) Time of execution (using time stamps pursuant to paragraph (d)(3) of this section);

(D) Execution capacity (principal, agency, riskless principal);

(E) Execution price and size;

(F) The CAT-Reporter-ID of the national securities exchange or broker-dealer executing the order; and

(G) Whether the execution was reported pursuant to an effective transaction reporting plan or the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information.

(vi) If the order is executed, in whole or part, the following information:

(A) The account number for any subaccounts to which the execution is allocated (in whole or part);

(B) The CAT-Reporter-ID of the clearing broker or prime broker, if applicable; and

(C) The CAT-Order-ID of any contra-side order(s).

(vii) If the trade is cancelled, a cancelled trade indicator.

(viii) For original receipt or origination of an order, the following information:

(A) Information of sufficient detail to identify the customer; and

(B) Customer account information.

(8) All plan sponsors and their members shall use the same Customer-ID and CAT-Reporter-ID for each customer and broker-dealer.

(d) *Clock synchronization and time stamps.* The national market system plan submitted pursuant to this section shall require:

(1) Each national securities exchange, national securities association, and member of such exchange or association to synchronize its business clocks that are used for the purposes of recording the date and time of any reportable event that must be reported pursuant to this section to the time maintained by the National Institute of Standards and Technology, consistent with industry standards;

(2) Each national securities exchange and national securities association to evaluate annually the clock synchronization standard to determine whether it should be shortened, consistent with changes in industry standards; and

(3) Each national securities exchange, national securities association, and member of such exchange or association to utilize the time stamps required by paragraph (c)(7) of this section, with at minimum the granularity set forth in the national market system plan submitted pursuant to this section, which shall reflect current industry standards and be at least to the millisecond. To the extent that the relevant order handling and execution systems of any national securities exchange, national securities association, or member of such exchange or association utilize time stamps in increments finer than the minimum required by the national market system plan, the plan shall require such national securities exchange, national securities association, or member to utilize time stamps in such finer increments when providing data to the central repository, so that all reportable events reported to the central repository by any national securities exchange, national securities association, or member can be accurately sequenced. The national market system plan shall require the sponsors of the national market system plan to annually evaluate whether industry standards have evolved such that the required time stamp standard should be in finer increments.

(e) *Central repository.*

(1) The national market system plan submitted pursuant to this section shall provide for the creation and maintenance of a central repository. Such central repository shall be responsible for the receipt, consolidation, and retention of all information reported pursuant to paragraph (c)(7) of this section. The central repository shall store and make available to regulators data in a uniform electronic format, and in a form in which all events pertaining to the same originating order are linked together in a manner that ensures timely and accurate retrieval of the information required by paragraph (c)(7) of this section for all reportable events for that order.

(2) Each national securities exchange, national securities association, and the Commission shall have access to the central repository, including all systems operated by the central repository, and access to and use of the data reported to and consolidated by the central repository under paragraph (c) of this section, for the purpose of performing its respective regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations. The national market system plan submitted pursuant to this section shall provide that such access to and use of such data by each national securities exchange, national securities association, and the Commission for the purpose of performing its regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations shall not be limited.

(3) The national market system plan submitted pursuant to this section shall include a provision requiring the creation and maintenance by the plan processor of a method of access to the consolidated data stored in the central repository that includes the ability to run searches and generate reports.

(4) The national market system plan submitted pursuant to this section shall include policies and procedures, including standards, to be used by the plan processor to:

(i) Ensure the security and confidentiality of all information reported to the central repository by requiring that:

(A) All plan sponsors and their employees, as well as all employees of the central repository, agree to use appropriate safeguards to ensure the confidentiality of such data and agree not to use such data for any purpose other than surveillance and regulatory purposes, provided that nothing in this paragraph (e)(4)(i)(A) shall be construed to prevent a plan sponsor from using the data that it reports to the central repository for regulatory, surveillance, commercial, or other purposes as otherwise permitted by applicable law, rule, or regulation;

(B) Each plan sponsor adopt and enforce rules that:

(*1*) Require information barriers between regulatory staff and non-regulatory staff with regard to access and use of data in the central repository; and

(*2*) Permit only persons designated by plan sponsors to have access to the data in the central repository;

(C) The plan processor:

(*1*) Develop and maintain a comprehensive information security program for the central repository, with dedicated staff, that is subject to regular reviews by the Chief Compliance Officer;

(*2*) Have a mechanism to confirm the identity of all persons permitted to access the data; and

(*3*) Maintain a record of all instances where such persons access the data; and

(D) The plan sponsors adopt penalties for non-compliance with any policies and procedures of the plan sponsors or central repository with respect to information security.

(ii) Ensure the timeliness, accuracy, integrity, and completeness of the data provided to the central repository pursuant to paragraph (c) of this section; and

(iii) Ensure the accuracy of the consolidation by the plan processor of the data provided to the central repository pursuant to paragraph (c) of this section.

(5) The national market system plan submitted pursuant to this section shall address whether there will be an annual independent evaluation of the security of the central repository and:

(i) If so, provide a description of the scope of such planned evaluation; and

(ii) If not, provide a detailed explanation of the alternative measures for evaluating the security of the central repository that are planned instead.

(6) The national market system plan submitted pursuant to this section shall:

(i) Specify a maximum error rate to be tolerated by the central repository for any data reported pursuant to paragraphs (c)(3) and (c)(4) of this section; describe the basis for selecting such maximum error rate; explain how the plan sponsors will seek to reduce such maximum error rate over time; describe how the plan will seek to ensure compliance with such maximum error rate and, in the event of noncompliance, will promptly remedy the causes thereof;

(ii) Require the central repository to measure the error rate each business day and promptly take appropriate remedial action, at a minimum, if the error rate exceeds the maximum error rate specified in the plan;

(iii) Specify a process for identifying and correcting errors in the data reported to the central repository pursuant to paragraphs (c)(3) and (c)(4) of this section, including the process for notifying the national securities exchanges, national securities association, and members who reported erroneous data to the central repository of such errors, to help ensure that such errors are promptly corrected by the reporting entity, and for disciplining those who repeatedly report erroneous data; and

(iv) Specify the time by which data that has been corrected will be made available to regulators.

(7) The national market system plan submitted pursuant to this section shall require the central repository to collect and retain on a current and continuing basis and in a format compatible with the information consolidated and stored pursuant to paragraph (c)(7) of this section:

(i) Information, including the size and quote condition, on the national best bid and national best offer for each NMS security;

(ii) Transaction reports reported pursuant to an effective transaction reporting plan filed with the Commission pursuant to, and meeting the requirements of, § 242.601; and

(iii) Last sale reports reported pursuant to the Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information filed with the Commission pursuant to, and meeting the requirements of, § 242.608.

(8) The national market system plan submitted pursuant to this section shall require the central repository to retain the information collected pursuant to paragraphs (c)(7) and (e)(7) of this section in a convenient and usable standard electronic data format that is directly available and searchable electronically without any manual intervention for a period of not less than five years.

(f) *Surveillance.* Every national securities exchange and national securities association subject to this section shall develop and implement a surveillance system, or enhance existing surveillance systems, reasonably designed to make use of the consolidated information contained in the consolidated audit trail.

(g) *Compliance by members.*

(1) Each national securities exchange and national securities association shall file with the Commission pursuant to section 19(b)(2) of the Act (15 U.S.C. 78s(b)(2)) and § 240.19b–4 of this chapter on or before 60 days from approval of the national market system plan a proposed rule change to require its members to comply with the requirements of this section and the national market system plan approved by the Commission.

(2) Each member of a national securities exchange or national securities association shall comply with all the provisions of any approved national market system plan applicable to members.

(3) The national market system plan submitted pursuant to this section shall include a provision requiring each national securities exchange and national securities association to agree to enforce compliance by its members with the provisions of any approved plan.

(4) The national market system plan submitted pursuant to this section shall include a mechanism to ensure compliance with the requirements of any approved plan by the members of a national securities exchange or national securities association.

(h) *Compliance by national securities exchanges and national securities associations.*

(1) Each national securities exchange and national securities association shall comply with the provisions of the national market system plan approved by the Commission.

(2) Any failure by a national securities exchange or national securities association to comply with the provisions of the national market system plan approved by the Commission shall be considered a violation of this section.

(3) The national market system plan submitted pursuant to this section shall include a mechanism to ensure compliance by the sponsors of the plan with the requirements of any approved plan. Such enforcement mechanism may include penalties where appropriate.

(i) *Other securities and other types of transactions.* The national market system plan submitted pursuant to this section shall include a provision requiring each national securities exchange and national securities association to jointly provide to the Commission within six months after effectiveness of the national market system plan a document outlining how such exchanges and associations could incorporate into the consolidated audit trail information with respect to equity securities that are not NMS securities, debt securities, primary market transactions in equity securities that are not NMS securities, and primary market transactions in debt securities, including details for each order and reportable event that may be required to be provided, which market participants may be required to provide the data, an implementation timeline, and a cost estimate.

(j) *Definitions.* As used in this section:

(1) The term *CAT–Order-ID* shall mean a unique order identifier or series of unique order identifiers that allows the central repository to efficiently and accurately link all reportable events for an order, and all orders that result from the aggregation or disaggregation of such order.

(2) The term *CAT–Reporter-ID* shall mean, with respect to each national securities exchange, national securities association, and member of a national securities exchange or national

securities association, a code that uniquely and consistently identifies such person for purposes of providing data to the central repository.

(3) The term *customer* shall mean:

(i) The account holder(s) of the account at a registered broker-dealer originating the order; and

(ii) Any person from whom the broker-dealer is authorized to accept trading instructions for such account, if different from the account holder(s).

(4) The term *customer account information* shall include, but not be limited to, account number, account type, customer type, date account opened, and large trader identifier (if applicable).

(5) The term *Customer-ID* shall mean, with respect to a customer, a code that uniquely and consistently identifies such customer for purposes of providing data to the central repository.

(6) The term *error rate* shall mean the percentage of reportable events collected by the central repository in which the data reported does not fully and accurately reflect the order event that occurred in the market.

(7) The term *material terms of the order* shall include, but not be limited to, the NMS security symbol; security type; price (if applicable); size (displayed and non-displayed); side (buy/sell); order type; if a sell order, whether the order is long, short, short exempt; open/close indicator; time in force (if applicable); if the order is for a listed option, option type (put/call), option symbol or root symbol, underlying symbol, strike price, expiration date, and open/close; and any special handling instructions.

(8) The term *order* shall include:

(i) Any order received by a member of a national securities exchange or national securities association from any person;

(ii) Any order originated by a member of a national securities exchange or national securities association; or

(iii) Any bid or offer.

(9) The term *reportable event* shall include, but not be limited to, the original receipt or origination, modification, cancellation, routing, and execution (in whole or in part) of an order, and receipt of a routed order.

By the Commission.

Dated: July 18, 2012.

Elizabeth M. Murphy,

Secretary.

Note: The following exhibit will not appear in the Code of Federal Regulations.

Exhibit A

Key to Comment Letters Cited in Adopting Release Proposal To Implement Consolidated Audit Trail (File No. S7–11–10)

1. Letter from Rep. Melissa L. Bean, U.S. Congress, to Mary Schapiro, Chairman, Commission, dated May 20, 2010 (''Bean Letter'').
2. Letter from Norris W. Beach to Elizabeth M. Murphy, Secretary, Commission, dated May 26, 2010 (''Beach Letter'').
3. Letter from Steven Vannelli to Elizabeth M. Murphy, Secretary, Commission, dated May 26, 2010 (''Vannelli Letter'').
4. Letter from Simhan Mandyam, Managing Partner, Triage Life Sciences LLC, to Elizabeth M. Murphy, Secretary, Commission, dated May 26, 2010 (''Triage Letter'').
5. Letter from Paul Drescher, Registered Principal, Foothill Securities, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated May 28, 2010 (''Foothill Letter'').
6. Letter from Chandler Green to Elizabeth M. Murphy, Secretary, Commission, dated June 1, 2010 (''Green Letter'').
7. Letter from Dan T. Nguyen, Wealth Management Company, to Elizabeth M. Murphy, Secretary, Commission, dated June 5, 2010 (''Wealth Management Letter'').
8. Letter from Nicos Anastaspoulos to Elizabeth M. Murphy, Secretary, Commission, dated June 6, 2010 (''Anastaspoulos Letter'').
9. Letter from Ning Wen, Sales Director, Know More Software, Inc., to Heather Seidel, Division of Trading and Markets, Assistant Director, Commission, dated June 9, 2010 (''Know More Letter'').
10. Letter from John McCrary to Elizabeth M. Murphy, Secretary, Commission, dated June 11, 2010 (''McCrary Letter'').
11. Letter from Howard Meyerson, General Counsel, and Vlad Khandros, Market Structure and Public Policy Analyst, Liquidnet, to Elizabeth M. Murphy, Secretary, Commission, dated July 19, 2010 (''Liquidnet Letter'').
12. Letters from Justin S. Magruder, President, Noetic Partners, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated July 22, 2010 and August 3, 2010 (''Noetic Partners Letter I'' and ''Noetic Partners Letter II).
13. Letter from Martin Koopman, Director, Aditat, to Elizabeth M. Murphy, Secretary, Commission, dated July 28, 2010 (''Aditat Letter'').
14. Letter from Courtney Doyle McGuinn, FPL Operations Director, FIX Protocol Limited, to Elizabeth M. Murphy, Secretary, Commission, dated August 5, 2010 (''FIX Letter'').
15. Letter from Senator Edward E. Kaufman, U.S. Senate, to Elizabeth M. Murphy, Secretary, Commission, dated August 5, 2010 (''Kaufman Letter'').
16. Letter from Mahesh Kumaraguru to Elizabeth M. Murphy, Secretary, Commission, dated August 5, 2010 (''Kumaraguru Letter'').
17. Letter from R. T. Leuchtkafer to Elizabeth M. Murphy, Secretary, Commission, dated August 5, 2010 (''Leuchtkafer Letter'').
18. Letter from Horst Simon, Associate Laboratory Director for Computing Sciences and Division Director, Computational Research Department, and David Leinweber, Director, LBNL Center for Innovative Financial Technology Computing Sciences, Lawrence Berkeley National Laboratory, to Elizabeth M. Murphy, Secretary, Commission, dated August 8, 2010 (''Berkeley Letter'').
19. Letter from Peter A. Bloniarz, Dean, College of Computing & Information, University of Albany, George Berg, Associate Professor and Chair, Department of Computer Science, University of Albany, Sandor P. Schuman, Affiliated Faculty, Department of Informatics, University of Albany, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Albany Letter'').
20. Letter from Christopher Nagy, Managing Director Order Strategy, Co-Head Government Relations, and John Markle, Deputy General Counsel, Co-Head Government Relations, TD AMERITRADE, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Ameritrade Letter'').
21. Letter from James J. Angel, Associate Professor of Finance, Georgetown University, Commission, dated August 9, 2010 (''Angel Letter'').
22. Letter from Eric J. Swanson, Senior Vice President and General Counsel, BATS Exchange, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''BATS Letter'').
23. Letter from Anthony D. McCormick, Chief Executive Officer, Boston Options Exchange Group, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''BOX Letter'').
24. Letter from Charlie J. Marchesani, President Broadridge Financial Solutions, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Broadridge Letter'').
25. Letter from Eric W. Hess, General Counsel, Direct Edge Holdings, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Direct Edge Letter'').
26. Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''FINRA Letter'').
27. Letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, and Janet McGinness Kissane, Senior Vice President and Corporate Secretary, NYSE Euronext, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''FINRA/NYSE Euronext Letter'').
28. Letter from Ted Myerson, Chief Executive Officer, Doug Kittelsen, Chief Technology Officer, and M. Gary LaFever, General Counsel and Chief Corporate Development Officer, FTEN, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''FTEN Letter'').
29. Letter from Karrie McMillan, General Counsel, Investment Company Institute, to Elizabeth M. Murphy, Secretary,

Commission, dated August 9, 2010 (''ICI Letter'').

30. Letter from Stuart J. Kaswell, Executive Vice President, Managing Director and General Counsel, Managed Funds Association, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Managed Funds Association Letter'').

31. Letter from Dror Segal and Lou Pizzo, Mansfield Consulting, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Mansfield Letter'').

32. Letter from Andrew C. Small, General Counsel, Scottrade, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Scottrade Letter'').

33. Letter from Devin Wenig, Chief Executive Officer, Markets Division, Thomson Reuters, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Thomson Reuters Letter'').

34. Letter from Jon Feigelson, Senior Vice President, General Counsel and Head of Corporate Governance, TIAA–CREF Individual and Institutional Services, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''TIAA–CREF Letter'').

35. Letter from Ronald C. Long, Director, Regulatory Affairs, Wells Fargo Advisors, to Elizabeth M. Murphy, Secretary, Commission, dated August 9, 2010 (''Wells Fargo Letter'').

36. Letter from John A. McCarthy, General Counsel, GETCO, to Elizabeth M. Murphy, Secretary, Commission, dated August 10, 2010 (''GETCO Letter'').

37. Letter from Michael Erlanger, Managing Principal, Marketcore, Inc., to Commission, dated August 10, 2010 (''Marketcore Letter'').

38. Letter from Edward J. Joyce, President and Chief Operating Officer, Chicago Board Options Exchange, Inc., to Commission, dated August 11, 2010 (''CBOE Letter'').

39. Letter from Leonard J. Amoruso, Senior Managing Director and General Counsel, Knight Capital Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated August 11, 2010 (''Knight Letter'').

40. Letter from Jose Manso, Executive Vice President, Sales and Marketing, Middle Office Solutions LLC, to Commission, dated August 11, 2010 (''Middle Office Letter'').

41. Letter from Manisha Kimmel, Executive Director, Financial Information Forum, to Elizabeth M. Murphy, Secretary, dated August 12, 2010 (''FIF Letter'').

42. Letter from John Harris, Chief Executive Officer, BondMart Technologies, Inc., to Commission, dated August 12, 2010 (''BondMart Letter'').

43. Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, NASDAQ OMX Group, Inc., to Elizabeth M. Murphy, Secretary, dated August 12, 2010 (''Nasdaq Letter I'').

44. Letter from Patrick J. Healy, Chief Executive Officer, Issuer Advisory Group LLC, to Elizabeth M. Murphy, Secretary, Commission, dated August 15, 2010 (''IAG Letter'').

45. Letter from James T. McHale, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, Commission, dated August 17, 2010 (''SIFMA Letter'').

46. Letter from Mike Riley, Chief Executive Officer, Endace Technology Limited, to Elizabeth M. Murphy, Secretary, Commission, dated August 30, 2010 (''Endace Letter'').

47. Letter from Terry Keene, Chief Executive Officer, Integration Systems LLC, to Elizabeth M. Murphy, Secretary, Commission, dated November 12, 2010 (''iSys Letter'').

48. Letter from Bonnie K. Wachtel, Wachtel & Co., Inc., to Elizabeth M. Murphy, Secretary, Commission, dated November 24, 2010 (''Wachtel Letter'').

49. Letter from Richard A. Ross to Elizabeth M. Murphy, Secretary, Commission, dated December 6, 2010 (''Ross Letter'').

50. Letter from James T. McHale, Managing Director and Associated General Counsel, Securities Industry and Financial Markets Association, to David Shillman, Associate Director, Division of Trading and Markets, Commission, dated January 12, 2011 (''SIFMA Drop Copy Letter'').

51. Letter from Daniel J. Connell, Chief Executive Officer, Correlix, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated February 4, 2011 (''Correlix Letter'').

52. Letter from Richard A. Ross, Founder, High Speed Analytics, to Elizabeth M. Murphy, Secretary, Commission, dated February 9, 2011 (''High Speed Letter'').

53. Letter from Michael Belanger, President, Jarg Corporation; Joseph Carrabis, Chief Regulatory Officer and Founder, NextStage Evolution; Wayne Ginion, Vice President, Enterprise Infrastructure Services; and David Morf, Partner, Senior Regional Economics Advisor, Founding Member, Center for Adaptive Solutions, to Elizabeth M. Murphy, Secretary, Commission, dated April 6, 2011 (''Belanger Letter'') (note, this letter is an amended letter that replaces a letter submitted by the same parties on March 30, 2011).

54. Letter from Richard G. Ketchum, Chairman and Chief Executive Officer, FINRA, to Robert Cook, Director, Division of Trading and Markets, and Carlo DiFlorio, Director, Office of Compliance Inspections and Examinations, Commission, dated April 6, 2011 (''FINRA Proposal Letter'').

55. Letter from Senator Charles E. Schumer, U.S. Senate, to Mary L. Schapiro, Chairman, Commission, dated May 9, 2011 (''Schumer Letter'').

56. Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, NASDAQ OMX Group, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated November 18, 2011 (''Nasdaq Letter II'').

57. Letter from Geraldine M. Lettieri to Elizabeth M. Murphy, Secretary, Commission, dated November 29, 2011 (''Lettieri Letter'').

58. Letter from James T. McHale, Managing Director and Associated General Counsel, Securities Industry and Financial Markets Association, to Robert Cook, Director, Division of Trading and Markets, Commission, dated February 7, 2012 (''SIFMA February 2012 Letter'').

59. Letter from John M. Damgard, President, Futures Industry Association, to Elizabeth M. Murphy, Secretary, Commission, dated February 22, 2012 (''FIA Letter'').

60. Letter from Manisha Kimmel, Executive Director, Financial Information Forum, to Elizabeth M. Murphy, Secretary, Commission, dated March 2, 2012 (''FIF Letter II'').

61. Letter from Jennifer Setzenfand, Chairman, Security Traders Association, dated March 7, 2012 (''STA Letter'').

62. Letter from Dr. Gil Van Bokkelen, Chairman and Chief Executive Officer, Athersys, Inc., to Mary Schapiro, Chairman, Commission, dated March 14, 2012 (''Van Bokkelen Letter'').

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FEDERAL REGISTER

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Part III

Department of the Interior

Bureau of Indian Affairs

Indian Child Welfare Act; Designated Tribal Agents for Service of Notice; Notice

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Child Welfare Act; Designated Tribal Agents for Service of Notice

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice.

SUMMARY: The regulations implementing the Indian Child Welfare Act provide that Indian tribes may designate an agent other than the tribal chairman for service of notice of proceedings under the Act. This notice includes the current list of designated tribal agents for service of notice.

FOR FURTHER INFORMATION CONTACT: Sue V. Settles, Chief, Human Services Division, Bureau of Indian Affairs, 1849 C Street NW., Mail Stop 4513–MIB, Washington, DC 20240; Telephone: (202) 513–7622.

SUPPLEMENTARY INFORMATION:

The regulations implementing the Indian Child Welfare Act, 25 U.S.C. 1901 *et seq.,* provide that Indian tribes may designate an agent other than the tribal chairman for service of notice of proceedings under the Act. *See* 25 CFR § 23.12. The Secretary of the Interior is required to publish in the **Federal Register** the names and addresses of the designated tribal agents. This notice is published in exercise of authority delegated by the Secretary of the Interior to the Principal Deputy Assistant Secretary—Indian Affairs by 209 DM 8.

This notice presents, in two different formats, the names and addresses of current designated tribal agents for service of notice. The first format lists designated tribal agents by region and alphabetically by tribe within each region. The second format is a table that lists designated tribal agents alphabetically by the tribal affiliation (first listing American Indian tribes, then listing Alaska Native tribes). Each format also lists the Bureau of Indian Affairs contact(s) for each of the twelve regions.

A. List of Designated Tribal Agents by Region
1. Alaska Region
2. Eastern Oklahoma Region
3. Eastern Region
4. Great Plains Region
5. Midwest Region
6. Navajo Region
7. Northwest Region
8. Pacific Region
9. Rocky Mountain Region
10. Southern Plains Region
11. Southwest Region
12. Western Region
B. List of Designated Tribal Agents by Tribal Affiliation
1. Tribes Other Than Alaska Native Tribes and Villages
2. Alaska Native Tribes and Villages

A. List of Designated Tribal Agents by Region

1. Alaska Region

Gloria Gorman, M.S.W., BIA Human Services Director, P.O. Box 21647, Juneau, AK 99802–5520; Phone: (907) 586–7611; Fax: (907) 586–7037.

A

Afognak, Native Village of (formerly the Village of Afognak), Denise Malutin, ICWA Worker, 323 Carolyn Street Kodiak, AK 99615; Phone: (907) 486–6357; Email: *denise@afognak.org*

Agdaagux Tribe of King Cove, Grace Smith, Family Programs Coordinator, Aleutian/Pribilof Islands Association, 1131 East International Airport Road Anchorage, AK 99518–1408; Phone: (907) 276–2700 or 222–4236; Fax: (907) 222–9735 Email: *graces@apiai.org*

Akhiok, Native Village of, Rachelle Joy, Kodiak Area Native Association, 3449 Rezanof Drive East, Kodiak, AK 99615; Phone: (907) 486–9800; Fax: (907) 486–4829; Email: *rachelle.joy@kanaweb.org*

James Tucker, ICWA advocate, P.O. Box 5030 Akhiok, AK 99615; Phone: (907) 486–4829; Fax: (907) 836–2345

Akiachak Native Community Tribal Administrator, P.O. Box 51070, Akiachak, AK 99551–0070; Phone: (907) 825–4626/4073; Fax: (907) 825–4029

Akiak Native Community, Sheila Williams, Tribal Administrator, P.O. Box 52127, Akiak, AK 99552; Phone: (907) 765–7112/7117; Fax: (907) 765–7512/7120

Native Village of Akutan, Grace Smith, Family Programs Coordinator, Aleutian/Pribilof Islands Association, 1131 East International Airport Road, Anchorage, AK 99518–1408; Phone: (907) 276–2700; Fax: (907) 279–4351; Email: *graces@apiai.org*

Village of Alakanuk, Charlene Smith, ICWA Specialist, P.O. Box 149, Alakanuk AK 99554; Phone: (907) 238–3704/3730; Fax: (907) 238–3705; Email: *csmith@avcp.org*

Association of Village Council Presidents, Sarah Jenkins, ICWA Social Worker, P.O. Box 219, Bethel, AK 99559; Phone: (907) 543–7400; Fax: (907) 543–5759; Email: *sjenkins@avcp.org* and *lalexie@avcp.org*

Alatna Village, Catherine Henzie, Tribal Family Youth Specialist, P.O. Box 70, Allakaket, AK 99720; Phone: (907) 968–8397; Fax: (907) 968–2305

Legal Department, Tanana Chiefs Conference, 122 First Avenue, Suite 600 Fairbanks, AK 99701; Phone: (907) 452–8251 Ext. 3178; Fax: (907) 459–3953

Aleknagik, Native Village of, Jane Gottschalk, Caseworker II, P.O. Box 115, Aleknagik, AK 99555; Phone: (907) 842–4577; Fax: (907) 842–2229

Bristol Bay Native Association,Children's Services Program Manager, P.O. Box 310, 1500 Kanakanak Road, Dillingham, AK 99576; Phone: (907) 842–4139; Fax: (907) 842–4106; Email: *cnixon@bbna.com*

Algaaciq Native Village (St. Mary's), Gertrude Paukan, ICWA Case Worker, P.O. Box 48, 200 Paukan Avenue, St. Mary's, AK 99658–0048; Phone: (907) 438–2932/2933; Fax: (907) 438–2227; Email: *gpaukan@avcp.org*

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B

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California Valley Miwok Tribe, as of date, there is no recognized government for this federally recognized tribe.

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Cuyapaipe Ewiiaapaayp Band of Kumeyaay Indians (See Ewiiaapaayp Band of Kumeyaay Indians

D

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Y

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Crow Tribe of the Crow Reservation of Montana, Director of Tribal Social Services, P.O. Box 159, Crow Agency, Montana 59022; Telephone: (406) 638–4202; Fax: (406) 638–4283

E

Eastern Shoshone Tribe of the Wind River Reservation, ICWA Coordinator, P.O. Box 945, Fort Washakie, Wyoming 82514; Telephone: (307) 332–6591; Fax: (307) 332–6593

F

Fort Belknap Indian Community Assiniboine & Gros Ventre Tribes, Myron L. Trottier, ICWA Case Manager/Acting Director, Fort Belknap Social Services 656 Agency Main Street, Harlem, Montana 59526; Telephone: (406) 353–8346 and (406) 353–8370; Fax: (406) 353–4634; Email: *mtrottier@ftbelknap.org*

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N

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Ofelia De La Rosa, Regional Social Worker, P.O. Box 368, Anadarko, Oklahoma 73005; Telephone: (405) 247–1585 Fax: (405) 247–2895

A

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C

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D

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F

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I

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O

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P

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Prairie Band of Potawatomi Nation, Chairperson, 16281 Q. Road, Mayetta, Kansas 66509; Telephone: (785) 966–2255

S

Sac and Fox Nation in Kansas and Nebraska, Michael Dougherty, Tribal Chairperson, 305 N. Main St., Reserve, Kansas 66434; Telephone: (785) 742–0053 Ext: 23; Fax: (785) 742–7146

Sac and Fox Nation, Principal Chief, Route 2, Box 246, Stroud, Oklahoma 74079; Telephone: (918) 968–3526

T

Tonkawa Tribe of Oklahoma, President, P.O. Box 70, Tonkawa, Oklahoma 74653; Telephone: (580) 628–2561

W

Wichita & Affiliated Tribes, Joan Williams, Family & Children Services Director, P.O. Box 729, Anadarko, Oklahoma 73005; Telephone: (405) 247–8627; Fax: (405) 247–8873; Email: *joan.williams@wichita tribe.com*

11. Southwest Region

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A

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C

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S

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T

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Y

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A

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B

Battle Mountain Band Council, Rhonda Hicks, ICWA Coordinator, 37 Mountain View Drive, Battle Mountain, Nevada 89820; Telephone: (775) 635–9189; Fax: (775) 635–8528

C

Chemehuevi Indian Tribe, Ronald Escobar, Secretary/Treasurer, P.O. Box 1902 Havasu Lake, California 92363; Telephone: (760) 858–4219; Fax: (760) 858–5400

Cocopah Indian Tribe, Liz Manjarrez, ICWA Specialist, 14515 South Veterans Drive, Somerton, Arizona 85350; Telephone: (928) 627–3729; Fax: (928) 627–3316; Email: *cocopahicwa@cocopah.com*

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D

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E

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Fallon Paiute Shoshone Tribe, Bonnie Rushford, Social Service Director, 1007 Rio Vista, Fallon, Nevada 89406; Telephone: (775) 423–1215; Fax: (775) 423–8960; Email: *ssdirector@fpst.org*

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K

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Q

Quechan Tribal Council, Mike Jackson, President, P.O. Box 1899, Yuma, Arizona 85366–1899; Telephone: (760) 572–0213; Fax: (760) 572–2102

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Reno-Sparks Indian Colony, Jane Smith, Human Srvices Assistant, 405 Golden Lane, Reno, Nevada 89502; Telephone: (775) 329–5071; Fax: (775) 785–8758; Email: *jsmith@rsic.org*

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San Juan Southern Paiute Tribe, Savania Tsosie, Social Worker, 180 North 200 East, Suite 111, St. George, Utah 84770; Telephone: (435) 674–9720; Fax: (435) 674–9714; Email: *savania.tsosie@bia.gov*

Shoshone-Paiute Tribes of Duck Valley, Lanette Bitsilly, Social Worker, P.O. Box 219, Owyhee, Nevada 89832; Telephone: (775) 757–2253; Fax: (775) 757–2910; Email: *bitsilly.lanette@shopai.org*

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South Fork Band Council, Debbie Honeyestewa-Social Service Director, 21 Lee B–13, Spring Creek, Nevada 89815; Telephone: (775) 744–2412; Fax: (775) 744–2306

Summit Lake Paiute Tribe, Jerri Lynn Barlese, Council Secretary/Treasurer, 1708 H Street Sparks, Nevada 89431; Telephone: (775) 827–9670; Fax: (775) 827–9678; Email: *jerrilynn.barlese@summitlaketribe.org*

T

Te-Moak Tribe of Western Shoshone Indians (See Elko Band Council)

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U

Ute Indian Tribe, Floyd M. Wyasket, Social Service Director, Box 190 Fort Duchesne, Utah 84026; Telephone: (435) 725–4026 or (435) 823–0141; Fax: (435) 722–5030; Email: *floydw@utetribe.com*

W

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Wells Band Te-moak Shoshone, Alicia Aguilar, Social Services/ICWA Coordinator, P.O. Box 809, Wells,

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White Mountain Apache Tribe, Cora Hinton, ICWA Representative/CPS Supervisor, P.O. Box 1870 Whiteriver, Arizona 85941; Telephone: (928) 338–4164, Fax: (928) 338–1469; Email: *chinton@wmat.us*

Winnemucca Tribe, Chairman, P.O. Box 1370, Winnemucca, Nevada 89446

Y

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B. List of Designated Tribal Agents by Tribal Affiliation

1. Tribes Other Than Alaska Native Tribes and Villages

Alabama-Quassarte (*See* Creek)

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Apache

The Apache Tribe of Oklahoma, Teresa Taylor, Indian Child Welfare Program Director, P.O. Box 1330, Anadarko, Oklahoma 73005, Phone: (405) 247–9857, Cell: (405) 933–6481, Fax: (405) 247–7617, Email: *icw@apachetribe.org,* Southern Plains Region

Apache, (*See* Chiricahua)

Fort Sill Apache Tribe of Oklahoma, Ramona Austin—ICW Director, 43187 US Highway 281, Apache, Oklahoma 73006, Phone: (580) 588–2298, Fax: (580) 588–2106, Southern Plains Region

Apache

Jicarilla Apache Nation, Monica L. Carrasco—Director, P.O. Box 546, Dulce, New Mexico 87528, Phone: (505) 759–3162, Fax: (505) 759–3588, Email: *mcarrasco@jbhd.org,* Southwest Region

Mescalero Apache Tribe, Crystal Garcia—Tribal Census Clerk, P.O. Box 227, Mescalero, New Mexico 88340, Phone: (575) 464–9209, Fax: (575) 464–9191, Email: *cgarcia@matisp.net,* Southwest Region

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Apache, (*See* Yavapai)

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Arapahoe

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Arapaho, (*See* Cheyenne)

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Arikara, (*See* Three Affiliated Tribes/Hidatsa/Mandan)

Three Affiliated Tribes, (Mandan, Arikara & Hidatsa), Katherine Felix, ICWA Specialist, 404 Frontage Road, New Town, North Dakota 58763, Phone: (701) 627–4781, Fax: (701) 627–5550, Email: *kfelix@mhanation.com,* Great Plains Region

Gros Ventre, (*See* Assiniboine)

Gros Ventre and Assiniboine, Fort Belknap Indian Community, Assiniboine & Gros Ventre Tribes, Myron L. Trottier, ICWA Case Manager/Acting Director, Fort Belknap Social Services, 656 Agency Main Street, Fort Belknap Agency, Harlem, Montana 59526, Phone: (406) 353–8346 or (406) 353–8370, Fax: (406) 353–4634, Email: mtrottier@ftbelknap.org, Rocky Mountain Region

Assiniboine, (*See* Sioux)

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Blackfeet

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Caddo

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Cahuilla

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Cahuilla, (*See* Mission)

Augustine Band of Cahuilla Indians, Mary Ann Green—Chairperson, P.O. Box 846, Coachella, California 92236, Phone: (760) 398–4722, Pacific Region

Cahuilla, (*See* Mission)

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Cahuilla, (*See* Mission)

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Cahuilla, (*See* Mission/Cupeno)

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Cahuilla, (*See* Mission)

Morongo Band of Cahuilla Mission Indians, Duke Steppe—Social Worker, 11581 Potrero Road, Banning, California 92220, Phone: (951) 849–4697, Pacific Region

Cahuilla, (*See* Mission)

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Cahuilla, (*See* Mission)

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Cahuilla, (*See* Mission)

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Cahuilla

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Cayuga, (*See* Iroquois/Seneca)

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Cayuga, (*See* Seneca)

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Chemehuevi, (*See* Colorado River/Hopi/Mojave/Navajo)

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Chemehuevi, (*See* Luiseno/Mission)

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Cheyenne

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Cheyenne, (*See* Arapaho)

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Chickasaw

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Chitimacha

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Chippewa, (*See* Ojibwe)

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Chippewa

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Chippewa, (*See* Cree)

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Chippewa, (*See* Ottawa/Peshawbestown)

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Chippewa, (*See* Keweenaw)

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Chippewa, (*See* Ojibwe)

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Chippewa, (*See* Ojibwe)

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Chippewa

Minnesota Chippewa Tribe, Linda Johnson, Human Services Director, (Includes Six Component Reservations:, Bois Forte Band, Fond Du Lac band; Grand Portage Band; Leech Lake Band; Mille Lacs Band; White Earth Band), Adrienne Adkins, Human Services Director, P.O. Box 217, Cass Lake, Minnesota 56633, Phone: (218) 335–8585, Fax: (218) 335–8080, Email: *ljohnston@mnchippewatribe.org,* Midwest Region

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Chippewa

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Chippewa

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Chiricahua, (*See* Apache)

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Choctaw

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Mississippi Band of Choctaw Indians, Kirsten L. Clegg, Child Welfare Supervisor, Department of Family & Community Services, Children & Family Services Program, P.O. Box 6050, Choctaw, Mississippi 39350, Phone: (601) 650–1741, Fax: (601) 656–8817, Email: kclegg@choctaw.org, Eastern Region

Chukchansi

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Chimash, (*See* Mission)

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Chemehuevi, (*See* Colorado River/Hopi/Mojave/Navajo)

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Coushatta

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Chippewa, (*See* Cree)

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Creek, (*See* Alabama-Quassarte)

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Creek

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Crow

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Cupeno, (*See* Cahuilla/Mission)

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Delaware, (*See* Lenapi/Munsee)

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Diegueno, (*See* Mission)

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Diegueno, (*See* Kumeyaay)

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Diegueno, (*See* Mission)

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Diegueno, (*See* Mission)

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Diegueno

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Diegueno, (*See* Mission)

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Flathead, (*See* Kootenai/Salish)

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Kootenai

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Goshute

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Grand Ronde, (*See* Shasta/Siletz)

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Gros Ventre, (*See* Assiniboine)

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Hidatsa, (*See* Arikara/Mandan/Three Affiliated Tribes)

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Ho-Chunk, (*See* Winnebago)

The Ho-Chunk Nation, Valerie Blackdeer—ICWA Coordinator, P.O. Box 40, Black River Falls, Wisconsin 54615, Phone: (715) 284–9851, Fax: (715) 284–0097, Email: valerie.blackdeer@ho-chunk.com, Midwest Region

Hoh

Hoh Indian Tribe, Annette Pen—ICW, P.O. Box 2196, Forks, Washington 98331, Phone: (360) 374–5022, Fax: (360) 374–5039, Email: *milab@hohtribe-nsn.org,* Northwest Region

Hoopa

Hoopa Valley Tribe, Millie Grant—Director Human Services, P.O. Box 1267, Hoopa, California 95546, Phone: (530) 625–4236 x 19, Pacific Region

Chemehuevi, (*See* Colorado River/Hopi/Mojave/Navajo)

Colorado River Indian Tribes, Daniel L. Barbara, M.Ed.—Executive Director, Dept. of Health & Social Services, 12302 Kennedy Drive, Parker, Arizona 85344, Phone: (928) 669–6577, Fax: (928) 669–8881, Email: *daniel.barbara@crit-dhs.org,* Western Region

Hopi

The Hopi Tribe, Loren Sekayumptewa, MSW, Ph.D. (ABD), Director of Social & Behavioral Health Services, P.O. Box 68, Second Mesa, Arizona 86043, Phone: (928) 737–2685, Fax: (928) 737–2667, Western Region

Hualapai

Hualapai Tribe, Carrie Imus, Director, Hualapai Human Services, P.O. Box 480, Peach Springs, Arizona 86434, Phone: (928) 769–2383/2269, Fax: (928) 769–2659, Email: cimus@frontiernet.net, Western Region

Huron, (*See* Potawatomi)

Nottawaseppi Huron Band of the Potawatomi, Meg Fairchild, LMSW, CAAC, Clinical Social Worker, 1474 Mno Bmadzewen Way, Fulton, Michigan 49052, Phone: (269) 729–4422, Fax: (269) 729–4460, Email: *socialwpc@nhbp.org,* Midwest Region

Wyandotte, (*See* Huron)

Wyandotte Nation, Kate Randall—Director of Family Services, 64700 E. Hwy 60, Wyandotte, Oklahoma 74370, Phone: (918) 678–2297, Fax: (918) 678–3087, Email: *krandall@wyandotte-nation.org,* Eastern Oklahoma Region

Iowa

Iowa Tribe of Kansas, Chairperson, 3345 B. Thrasher Road, White Cloud, Kansas 66094, Phone: (785) 595–3258, Southern Plains Region

Iowa Tribe of Oklahoma, Janice Rowe-Kurak, Chairman, 335588 E. 750 Road, Perkins, Oklahoma 74059, (405) 547–2402, (405) 547–1032, Email: *rowe-kurak@iowanation.org,* Southern Plains Region

Iroquois, (*See* Cayuga/Seneca)

Cayuga Nation of New York, Anita Thompson—Assistant Administration, P.O. Box 803, Versailles, New York 14168, Phone: (315) 568–0750, Fax: (315) 568–0752, Email: *anita.thompson@cayuganation-nsn.gov,* Eastern Region

Iroquois, (*See* Oneida)

Oneida Indian Nation, Kim Jacobs—Nation Clerk, Box 1, Vernon, New York 13476, Phone: (315) 829–8337, Fax: (315) 829–8392, Email: *kjacobs@oneida.nation.org,* Eastern Region

Iroquois, (*See* Onondaga)

Onondaga Nation of New York, Council of Chiefs, P.O. Box 85, Nedrow, New York 13120, Phone: (315) 469–9196, Fax: (315) 492–4822, Eastern Region

Iroquois, (*See* Mohawk)

Saint Regis Mohawk Tribe, Clarissa Chatland—ICWA Program Coordinator, 412 State, Route 37, Akwesasne, New York 13655, Phone: (518) 358–4516, Fax: (518) 358–9258, Email:, *clarissa.terrance-chatland@SRMT-nsn.gov,* Eastern Region

Iroquois, (*See* Seneca)

Seneca Nation of Indians, Tracy Pacini, Child and Family Services Coordinator, 987 RC Hoag Drive, P.O. Box 500, Salamanca, New York 14779, Phone: (716) 945–5894, Fax: (716) 945–7881, Email: *tracy.pacini@senecahealth.org,* Eastern Region

Iroquois, (*See* Seneca/Tonawanda)

Tonawanda Band of Seneca, Roger Hill, Chief—Council of Chiefs, 7027 Meadville Road, Basom, New York 14013, Phone: (716) 542–4244, Fax: (716) 542–4008, Eastern Region

Iroquois, (*See* Tuscarora)

Tuscarora Nation of New York, Chief Leo Henry, Clerk, 206 Mount Hope Road, Lewistown, New York 14092, Phone: (716) 297–1148, Fax: (716) 297–7355, Eastern Region

Kalispel

Kalispel Tribe of Indians, Wendy L. Thomas, MSW, Support Services Director, 934 S. Gargeld Rd., Airway Heights, Washington 99001, Phone: (509) 789–7634, Cell: (509) 671–6972, Fax: (509) 789–7659, Email:, *wthomas@camashealth.com,* Northwest Region

Karuk, (*See* Tolowa/Yurok)

Elk Valley Rancheria, Chairperson, 2332 Howland Hill Road, Crescent City, California 95531, Phone: (707) 464–4680, Fax: (707) 465–2638, Email: *evrlibrary@elk-valley.com,* Pacific Region

Karuk

Karuk Tribe, Mike Edwards, Child and Family Services Director, Karuk Health Clinic, 1519 S. Oregon Street, Yreka, California 96097, Phone: (530) 842–9200 Ext: 6301, Fax: (530) 841–5150, Email: *medwards@karuk.us,* Pacific Region

Karuk, (*See* Shasta)

Quartz Valley Indian Tribe, Mary Gowen—ICWA Director, 13601 Quartz Valley Road, Fort Jones, California 96032, Phone: (530) 468–5907 Ext: 314, Fax: (530) 468–5608, Email: *icwa@qvir.com,* Pacific Region

Kashia, (*See* Pomo)

Kashia Band of Pomo Indians of the Stewarts Point Rancheria, Melissa Cerda—Administrative Assistant, 3535 Industrial Drive, Suite B–2, Santa Rosa, CA 95403, Telephone: (707) 591–0580, Fax: (707) 591–0583, Email: *melissa@stewartspoint.org,* Pacific Region

Kaw

Kaw Nation, Chairperson, Drawer 50, Kaw City, Oklahoma 74641, Phone: (580) 269–2552, Southern Plains Region

Keweenaw, (*See* Chippewa)

Keweenaw Bay Indian Community, Judy Heath, Social Service Director, 16429 Beartown Road, Baraga, Michigan 49908, Phone: (906) 353–4201, Fax: (906) 353–8171, Email: *judy@kbic-nsn.gov,* Midwest Region

Kickapoo

Kickapoo Tribe of Indians of the, Kickapoo Reservation in Kansas, Chairperson, P.O. Box 271, Horton, Kansas 66439, Phone: (785) 486–2131, Southern Plains Region

Kickapoo Tribe of Oklahoma, Jodi Michele Warrior, Indian Child Welfare Director, P.O. Box 469, McLoud, Oklahoma 74851, Phone: (405) 964–5426, Fax: (405) 964–5431, Email: *jwarrior@kickapootribeofoklahoma.com,* Southern Plains Region

Kickapoo Traditional Tribe of Texas, Connie Valenzuela—Indian Child Welfare Director, 286 Falcon Blvd., Eagle Pass, Texas 78852, Phone: (830) 776–5601, Fax: (830) 776–5605, Work Cell: (830) 513–2937, Email: *connie.valenzuela@ktttribe.org,* Southern Plains Region

Kiowa

Kiowa Tribe of Oklahoma, Richard Hernasy—ICWA Director, P.O. Box 369, Carnegie, Oklahoma 73015, Phone: (580) 654–2300, (580) 654–2363, Southern Plains Region

Klamath, (*See* Modoc/Yahooskin)

The Klamath Tribe, Jim Collins,—ICWA Specialist, P.O. Box 436, Chiloquin, Oregon 97624, Phone: (541) 783–2219 Ext: 137, Fax: (541) 783–7783, Email: *jim.collins@klamathtribes.com,* Northwest Region

Klamath, (*See* Modoc)

Modoc Tribe of Oklahoma, Regina Shelton—Tribal Protection, 625 6th SE, Miami, Oklahoma 74354, Phone: (918) 542–7890, Fax: (918) 542–7878, Eastern Oklahoma Region

Kootenai, (*See* Flathead/Salish)

Confederated Salish & Kootenai Tribes, Lena Young Running Crane—ICWA Specialist, Box 278, Pablo, Montana 59855, Phone: (406) 675–2700, Fax: (406) 275–2883, Northwest Region

Kumeyaay, (*See* Diegueno)

Ewiiaapaayp Band of Kumeyaay Indians, Will Micklin, CEO, Ewiiaapaayp Tribal Government, 4054 Willow Road, Alpine, California 91903, Phone: (619) 445–6315, Fax: (619) 445–9126, Pacific Region

Kumeyaay, (*See* Diegueno)

Jamul Indian Village, Charity White-Voth, Kumeyaay Family Services Director, Southern Indian Health Council, Inc., 4058 Willow Road, Alpine California 91903, Phone: (619) 445–1188, Fax: (619) 445–0765, Pacific Region

Lenapi, (*See* Delaware/Munsee)

The Delaware Nation, Lydia Ramirez, ICW Director, P.O. Box 825, Anadarko, Oklahoma 73005, Phone: (405) 247–2448 Ext: 1152, Fax: (405) 247–5942, Email: *lramirez@delawarenation.com,* Southern Plains Region

Luiseno

La Jolla Band of Luiseno Indians, Manager Tribal Family Services, Indian Health Council, Inc., P.O. Box 406, Pauma Valley, CA 92061,

Telephone: (760) 749–1410, Fax: (760) 749–5518, Pacific Region

Pauma & Yuima Band of Mission Indians, Maria Garcia—ICWA Manager, Department of Social Services, 35008 Pala-Temecula Road, PMB 50, Pala, California 92059, Phone: (760) 891–3542, Pacific Region

Pechanga Band of Mission Indians, Mark Macarro—Spokesman, P.O. Box 1477, Temecula, California 92593, Phone: (951) 676–2768, Pacific Region

Luiseno, (*See* Cahuilla/Mission)

Soboba Band of Luiseno Indians, Tribal Social Worker, Sobboba Social Services Department, P.O. Box 487, San Jacinot, California 92581, Phone: (707) 463–2644, Fax: (707) 487–1738, Pacific Region

Luiseno, (*See* Chemehuevi/Mission)

Twenty-Nine Palms Band of Mission Indians, Executive Director, Indian Child & Family Services, P.O. Box 2269, Temecula, California 92590, Phone: (951) 676–8832, Fax: (951) 676–3950, Pacific Region

Lummi

Lummi Nation, Amy Finkbonner, Lummi Children's Services Manager, P.O. Box 1024, Ferndale, Washington 98248, Phone: (360) 384–2324, Fax: (360) 380–2157, Email: *amyf@lummi-nsn.gov,* Northwest Region

Maidu

Tyme Maidu Tribe (Berry Creek Rancheria), Terilynn Steele—ICWA Supervisor, 5 Tyme Way, Oroville, California 95966, Phone: (530) 534–3859, Fax: (530) 534–1151, Email: *jessebrown@berrycreekrancheria.com,* Pacific Region

Maidu, (*See* Me-Wuk/Miwok)

Enterprise Rancheria, Shari Ghalayini, ICWA Representative, 2133 Monte Vista Ave., Oroville, California 95966, Phone: (530) 532–9214, Fax: (530) 532–1768, Email: *sharig@ enterpriserancheria.org,* Pacific Region

Maidu

Greenville Rancheria, Dr. Gonzalo Gonzalez, Behavioral Health, Patty Allen, Chief Financial Officer, Crystal Rios, Tribal Secretary/Tresurer, Faustina Lopez, Tribal Representative, P.O. Box 279, Greenville, California 95947, Phone: (530) 284–7990, Fax: (530) 284–7299, Email: *ggonzalez@ greenvillerancheria.com, pallen@ greenvillerancheria.com, crios@greenvillerancheria.com, flopez@greenvillerancheria.com,* Pacific Region

Maidu, (*See* Mechoopda)

Mechoopda Tribe, Susan Bromley—Office Manager, 125 Mission Ranch Boulevard, Chico, California 95926, Phone: (530) 899–8922 Ext: 210, Fax: (530) 899–8517, Email: *sbromley@ mechoopda-nsn.gov,* Pacific Region

Maidu

Mooretown Rancheria, Francine McKinley—ICWA Director, 1 Alverda Drive, Oroville, California 95966, Phone: (530) 533–3625, Fax: (530) 533–3625, Email: *icwa@mooretown.org,* Pacific Region

Maidu, (*See* Paiute/Pit River)

Susanville Rancheria, Chairperson—ICWA Director, 745 Joaquin Street, Susanville, California 96130, Phone: (530) 257–6264, Fax: (530) 257–7986, Pacific Region

Maidu, (*See* Miwok/Me-Wuk)

Auburn Rancheria, Vevila Hussey, United Auburn Indian Community, 935 Indian Rancheria Road, Auburn, California 95603, Phone: (916) 251–1550, Fax: (530) 887–1028, Pacific Region

Makah

Makah Indian Tribal Council, Robin Denney, Social Service Manager, Sandy Soeneke, ICW Caseworker, P.O. Box 115, Neah Bay, Washington 98357, Phone: (360) 645–3251/3257, Fax: (360) 645–2685/2806, Northwest Region

Maliseet

Houlton Band of Maliseet Indians, Tiffany Randall—ICWA Director, 13–2 Clover Court, Hourton, Maine 04730, Phone: (207) 694–0213, Fax: (207) 532–7287, Email: *icwa.director@ maliseets.com,* Eastern Region

Mandan, (*See* Arikara/Three Affiliated), Tribes/Hidatsa

Three Affiliated Tribes, (Mandan, Arikara & Hidatsa), Katherine Felix—ICWA Specialist, 404 Frontage Road, New Town, North Dakota 58763, Phone: (701) 627–4781, Fax: (701) 627–5550, Email: *kfelix@ mhanation.com,* Great Plains Region

Maricopa, (*See* Pima)

Gila River Indian Community, Byron Donahue, ICWA Case Manager, P.O. Box 427, Sacaton, Arizona 85147, Phone: (520) 562–3396, Fax: (520) 562–3633, Email: *byron.donahue@ gric.nsn.us,* Western Region

Maricopa, (*See* Pima)

Salt River Pima-Maricopa Indian Community, Office of fGeneral Counsel, Cheryl Scott—Asst. Attorney General Counsel, 10,005 East Osborn Road, Scottsdale, Arizona 85256, Phone: (480) 362–7448, Fax: (480) 362–7591, Email: *cheryl.scott@ SRPMIC-nsn.gov,* Western Region

Maidu, (*See* Mechoopda)

Mechoopda Tribe, Susan Bromley—Office Manager, 125 Mission Ranch Boulevard, Chico, California 95926, Phone: (530) 899–8922 Ext: 210, Fax: (530) 899–8517, Email: *sbromley@ mechoopda-nsn.gov,* Pacific Region

Menominee

Menominee Indian Tribe of Wisconsin, Mary Husby—Director of Social Services, P.O. Box 910, Keshena, Wisconsin 54135, Phone: (715) 799–5161, Fax: (715) 799–6061, Email: *mhusby@mitw.org,* Midwest Region

Maidu, (*See* Miwok/Me-Wuk)

Auburn Rancheria, Vevila Hussey, United Auburn Indian Community, 935 Indian Rancheria Road, Auburn, California 95603, Phone: (916) 251–1550, Fax: (530) 887–1028, Pacific Region

Pomo, (*See* Me-Wuk/Miwok)

Buena Vista Rancheria of Me-Wuk Indians, Penny Arciniaga—Tribal Member Services, 1418 20th Street, Suite 200, Sacramento, California 95811, Phone: (916) 491–0011, Fax: (916) 491–0012, Email: *penny@ buenavistatribe.com,* Pacific Region

Me-Wuk, (*See* Miwok)

California Valley Miwok Tribe, As of date, there is no recognized gervernment ofr this federally recognized tribe.

Me-Wuk, (*See* Miwok)

Cher-Ae Heights Indian Community of the Trinidad Rancheria, Amy Atkins—ICWA Representative, P.O. Box 630, Trinidad, California 95570, Phone: (707) 677–0211, Fax: (707) 677–3921, Email: *aatkins@ trinidadrancheria.com,* Pacific Region

Miwok, (*See* Me-Wok)

Chicken Ranch Rancheria, Jan Costa—Tribal Administrator, P.O. Box 1159, Jamestown, California 95327, Phone: (209) 984–4806, Fax: (209) 984–5606, Email: *chixrnch@mlode.com,* Pacific Region

Maidu, (*See* Me-Wuk/Miwok)

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Me-Wuk, (*See* Miwok/Pomo)

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Me-Wuk, (*See* Miwok)

Ione Band of Miwok Indians, Pamela Baumgartner—Tribal Administrator, P.O. Box 699, Plymouth, California 95669, Phone: (209) 245–5800 Ext: 5801, Email: *pam@ionemiwok.org,* Pacific Region

Me-Wuk

Jackson Rancheria, Kimberly Heffron—Tribal Secretary, P.O. Box 1090, Jackson, California 95642, Phone: (209) 223–1935, Fax: (209) 223–5366, Email: *kheffron@jacksonrancheria-nsn.gov,* Pacific Region

Shingle Springs Band of Miwok Indians, (Shingle Springs Rancheria), Malissa Tayaba, Director Social Services, P.O. Box 1340, Shingle Springs, California 95682, Phone: (530) 698–1400 or (530) 698–1436, Fax: (530) 676–8033, Email: *mtayaba@ssband.org,* Pacific Region

Tuolumne Band of Me-wuk Indians, Kevin Day, Tribal Chair, P.O. Box 699, Tuolumne, California 95379, Phone: (209) 928–5300, Fax: (209) 928–1677, Pacific Region

Wilton Rancheria, Mary Tarango, Tribal Chairperson, 9300 West Stockton Blvd. Ste., 205 Elk Grove, California 95758, Telephone: (916) 683–6000, Fax: (916) 683–6015, Pacific Region

Miami

Miami Tribe of Oklahoma, Callie Lankford, MSW, Social Services Director, P.O. Box 1326, Miami, Oklahoma 74355, Phone: (918) 541–1381, Fax: (918) 540–2814, Email: *clankford@miamination.com,* Eastern Oklahoma Region

Miccosukee

Miccosukee Tribe of Indians of Florida, J. Degaglia, Ph.D., N.C.C., L.M.H.C., Director Social Service Department, P.O. Box 440021, Miami, Florida 33144, Phone: (305) 223–8380 Ext: 2267, Fax: (305) 223–1011, Email: *jd@miccosukeetribe.com,* Eastern Region

Micmac

Aroostook Band of Micmacs, Tania M. Morey—ICWA Coordinator, 7 Northern Road, Presque Isle, Maine 04769, Phone: (207) 764–1972, Fax: (207) 764–7667, Email: *tmorey@micmac-nsn.gov,* Eastern Region

Mission, (*See* Cahuilla)

Augustine Band of Cahuilla Indians, Mary Ann Green—Chairperson, P.O. Box 846, Coachella, California 92236, Phone: (760) 398–4722, Pacific Region

Mission, (*See* Diegueno)

Barona Band of Mission Indians, Charity White-Voth, Kumeyaay Family Services Director, Southern Indian Health Council, Inc., 4058 Willow Road, Alpine California 91903, Phone: (619) 445–1188, Fax: (619) 445–0765, Pacific Region

Mission, (*See* Cahuilla)

Cabazon Band of Mission Indians, Chairman, 84–245 Indio Springs Drive, Indio, California 92201, Phone: (760) 342–2593, Pacific Region

Mission, (*See* Cahuilla)

Cahuilla Band of Mission Indians, Executive Director, Indian Child & Family Services, P.O. Box 2269, Temecula, California 92590, Phone: (951) 676–8832, Pacific Region

Mission, (*See* Diegueno)

Campo Band of Mission Indians, Charity White-Voth, Kumeyaay Family Services Director, Southern Indian Health Council, Inc., 4058 Willow Road, Alpine California 91903, Phone: (619) 445–1188, Fax: (619) 445–0765, Pacific Region

Mission

Inaja & Cosmit Band of Mission Indians, Tribal Family Services, Manager, Indian Health Services, Inc., P.O. Box 406, Pauma Valley, California 92061, Phone: (706) 749–1410, Pacific Region

Mission, (*See* Cahuilla/Cupeno)

Los Coyotes Band of Cahuilla & Cupeno Indians, Tribal Family Services, Manager, Indian Health Council, Inc., P.O. Box 406, Pauma Valley, California 92061, Phone: (760) 749–1410, Pacific Region

Mission, (*See* Diegueno)

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Mission, (*See* Cahuilla/Cupeno)

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Mission, (*See* Diegueno)

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Mission, (*See* Diegueno)

Mesa Grande Band of Mission Indians, Tribal Family Services, Manager, Indian Health Services, Inc., P.O. Box 406, Pauma Valley, California 92061, Phone: (706) 749–1410, Pacific Region

Mission, (*See* Cahuilla)

Morongo Band of Cahuilla Mission Indians, Duke Steppe—Social Worker, 11581 Potrero Road, Banning, California 92220, Phone: (951) 849–4697, Pacific Region

Mission, (*See* Luiseno)

Pala Band of Mission Indians, Maria Garcia—ICWA Manager, Department of Social Services, 35008 Pala-Temecula Road, PMB 50, Pala, California 92059, Phone: (760) 891–3542, Pacific Region

Mission, (*See* Luiseno)

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Mission, (*See* Luiseno)

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Mission, (*See* Luiseno)

Pechanga Band of Mission Indians, Mark Macarro—Spokesman, P.O. Box 1477, Temecula, California 92593, Phone: (951) 676–2768, Pacific Region

Mission, (*See* Cahuilla)

Ramona Band or Village of Cahuilla, Susan Reckker—Tribal Administrator, P.O. Box 391670, Anza, California 92539, Phone: (951) 763–4105, Fax: (951) 763–4325, Email: *sreckker@ramonatribe.com,* Pacific Region

Mission, (*See* Diegueno)

Rincon Band of Mission Indians, Tribal Family Services, Manager, Indian Health Services, Inc., P.O. Box 406, Pauma Valley, California 92061, Phone: (706) 749–1410, Pacific Region

Mission, (*See* Cahuilla)

Santa Rosa Band of Cahuilla Indians, Mayme Estrada—Chair, P.O. Box 609, Hemet, California 92546, Phone: (951) 658–5311, Fax: (951) 658–6733, Pacific Region

Mission, (*See* Chimash)

Santa Ynez Band of Chumash Indians, Caren Romero, Jess Montoya, ICWA Representative, Executive Director, Santa Ynez, California 93460, Phone: (805) 694–2671, Fax: (805) 686–2060, Email: *cromero@sythc.com,* Pacific Region

Mission, (*See* Diegueno)

Santa Ysabel Band of Mission Indians, Iipay Nation, Linda Ruis—Director, Santa Ysabel Social Services Department, P.O. Box 701, Santa Ysabel, California 92070, Phone: (760) 765–1106, Fax: (760) 765–0312, Pacific Region

Mission, (*See* Cahuilla/Luiseno)

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Mission, (*See* Diegueno)

Sycuan Band of Mission Indians, Charity White-Voth, Kumeyaay Family Services Director, Southern Indian Health Council, Inc., 4058 Willow Road, Alpine California 91903, Phone: (619) 445–1188, Fax: (619) 445–0765, Pacific Region

Mission, (*See* Chemehuevi/Luiseno)

Twenty-Nine Palms Band of Mission Indians, Executive Director, Indian Child & Family Services, P.O. Box 2269, Temecula, California 92590, Phone: (951) 676–8832, Fax: (951) 676–3950, Pacific Region

Mission, (*See* Diegueno)

Viejas (Baron Long) Band of Mission Indians, Charity White-Voth, Kumeyaay Family Services Director, Southern Indian Health Council, Inc., 4058 Willow Road, Alpine California 91903, Phone: (619) 445–1188, Fax: (619) 445–0765, Pacific Region

Maidu, (*See* Miwok/Me-Wuk)

Auburn Rancheria, Vevila Hussey, United Auburn Indian Community, 935 Indian Rancheria Road, Auburn, California 95603, Phone: (916) 251–1550, Fax: (530) 887–1028, Pacific Region

Pomo, (*See* Me-Wuk/Miwok)

Buena Vista Rancheria of Me-Wuk Indians, Penny Arciniaga, Tribal Member Services, 1418 20th Street, Suite 200, Sacramento, California 95811, Phone: (916) 491–0011, Fax: (916) 491–0012, Email: *penny@buenavistatribe.com,* Pacific Region

Miwok, (*See* Me-Wok)

California Valley Miwok Tribe, As of date, there is no recognized gervernment ofr this federally recognized tribe., Pacific Region

Miwok, (*See* Me-Wuk)

Cher-Ae Heights Indian Community of the Trinidad Rancheria, Amy Atkins—ICWA Representative, P.O. Box 630, Trinidad, California 95570, Phone: (707) 677–0211, Fax: (707) 677–3921, Email: *aatkins@trinidadrancheria.com,* Pacific Region

Miwok, (*See* Me-Wok)

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Maidu, (*See* Me-Wuk/Miwok)

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Me-Wuk, (*See* Miwok/Pomo)

Federated Indians—Graton Rancheria, Lara Walker-Human Services, 6400 Redwood Drive, Suite 300, Rohnert Park, California 94928, Phone: (707) 566–2288, Fax: (707) 566–2291, Email: *lwalker@gratonrancheria.com,* Pacific Region

Me-Wuk, (*See* Miwok)

Ione Band of Miwok Indians, Pamela Baumgartner—Tribal Administrator, P.O. Box 699, Plymouth, California 95669, Phone: (209) 245–5800 Ext: 5801, Email: *pam@ionemiwok.org,* Pacific Region

Miwok, (*See* Me-Wok)

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Miwok

Shingle Springs Band of Miwok Indians, (Shingle Springs Rancheria), Malissa Tayaba—Director Social Services, P.O. Box 1340, Shingle Springs, California 95682, Phone: (530) 698–1400 or (530) 698–1436, Fax: (530) 676–8033, Email: *mtayaba@ssband.org,* Pacific Region

Me-Wuk, (*See* Miwok)

Tuolumne Band of Me-wuk Indians, Kevin Day, Tribal Chair, P.O. Box 699, Tuolumne, California 95379, Phone: (209) 928–5300, Fax: (209) 928–1677, Pacific Region

Me-Wuk, (*See* Miwok)

Wilton Rancheria, Mary Tarango, Tribal Chairperson, 9300 West Stockton Blvd. Ste., 205 Elk Grove, California 95758, Telephone: (916) 683–6000, Fax: (916) 683–6015, Pacific Region

Klamath, (*See* Modoc/Yahooskin)

The Klamath Tribe, Jim Collins,—ICWA Specialist, P.O. Box 436, Chiloquin, Oregon 97624, Phone: (541) 783–2219 Ext: 137, Fax: (541) 783–7783, Email: *jim.collins@klamathtribes.com,* Northwest Region

Modoc, (*See* Klamath)

Modoc Tribe of Oklahoma, Regina Shelton—Tribal Protection, 625 6th SE, Miami, Oklahoma 74354, Phone: (918) 542–7890, Fax: (918) 542–7878, Eastern Oklahoma Region

Mohawk, (*See* Iroquois)

Saint Regis Mohawk Tribe, Clarissa Chatland, ICWA Program Coordinator, 412 State, Route 37, Akwesasne, New York 13655, Phone: (518) 358–4516, Fax: (518) 358–9258, Email:, *clarissa.terrance-chatland@SRMT-nsn.gov,* Eastern Region

Mohegan

Mohegan Indian Tribe, Irene Miller—APRN, Director, Family Services, 5 Crow Hill Road, Uncasville, Connecticut 06382, Phone: (860) 862–6236, Eastern Region

Mohican, (*See* Munsee)

Stockbridge Munsee Community, Stephanie Bowman—ICWA Manager, Stockbridge Munsee Health and Wellness Center, W12802 County A, Bowler, Wisconsin 54416, Phone: (715) 793–4580, Fax: (715) 793–1312, Email: stephanie.bowman@mohican.com, Midwest Region

Chemehuevi, (*See* Colorado River/Hopi/Mojave/Navajo)

Colorado River Indian Tribes, Daniel L. Barbara, M.Ed.—Executive Director, Dept. of Health & Social Services, 12302 Kennedy Drive, Parker, Arizona

85344, Phone: (928) 669–6577, Fax: (928) 669–8881, Email: *daniel.barbara@crit-dhs.org,* Western Region

Mojave

Fort Mojave Indian Tribe, Melvin Lewis Sr.—Director, 500 Merriman Avenue, Needles, California 92363, Phone: (760) 629–3745, Western Region

Mono

Big Sandy Rancheria Band of Western Mono Indians, Dorothy Barton, MSW, ICWA/Social Services Coordinator, P.O. Box 337, Auberrry , California 93602, Phone: (559) 855–4003 Ext: 215, Fax: (559) 855–4129, Email: *dbarton@bsrnation.com,* Pacific Region

Cold Springs Rancheria, Terri Works—ICWA Director, 32861 Sycamore Rd., Suite #300, Tollhouse, California 93667, Phone: (559) 855–5043/(559) 855–8360, Fax: (559) 855–4445, Email: *csrancheriaterri@tc.net,* Pacific Region

North Fork Rancheria of Mono Indians, Elaine Fink—Tribal Chairwoman, P.O. Box 929, North Fork, California 93643, Phone: (559) 877–2484, Fax: (559) 877–2461, Email: *efink@northforkrancheria-nsn.gov,* Pacific Region

Mono, (*See* Yokut)

Tule River Reservation, Lolita Garfield, MSW, Director Family Social Services, 340 North Reservation Road, Porterville, California 93258, Phone: (559) 781–4271 ext: 1013, Fax: (559) 791–2122, Email: *icwadir@tulerivertribe-nsn.gov,* Pacific Region

Muckleshoot

Muckleshoot Indian Tribe, Sharon Hamilton-Curley, Human Services Division Director, 39015 172nd Avenue, SE, Auburn, Washington 98092, Phone: (253) 876–3155, Fax: (253) 876–2855, Email: *Sharon.curley@muckleshoot.nsn.us,* Northwest Region

Munsee, (*See* Delaware/Lenapi)

The Delaware Nation, Lydia Ramirez, ICW Director, P.O. Box 825, Anadarko, Oklahoma 73005, Phone: (405) 247–2448 Ext: 1152, Fax: (405) 247–5942, Email: *lramirez@delawarenation.com,* Southern Plains Region

Munsee, (*See* Mohican)

Stockbridge Munsee Community, Stephanie Bowman—ICWA Manager, Stockbridge Munsee Health and Wellness Center, W12802 County A, Bowler, Wisconsin 54416, Phone: (715) 793–4580, Fax: (715) 793–1312, Email: stephanie.bowman@mohican.com, Midwest Region

Narragansett

Narragansett Tribe of Rhode Island, Wenoah Harris—Director, Tribal Child and Family Services, 4375B South County Trail, P.O. Box 268, Charlestown, Rhode Island 02813, Phone: (401) 364–1100 ext: 233, Cell: (401) 862–8863, Fax: (401) 364–1104, Email: *Wenonah@nithpo.com,* Eastern Region

Chemehuevi, (*See* Colorado River/Hopi/Mojave/Navajo)

Colorado River Indian Tribes, Daniel L. Barbara, M.Ed.—Executive Director, Dept. of Health & Social Services, 12302 Kennedy Drive, Parker, Arizona 85344, Phone: (928) 669–6577, Fax: (928) 669–8881, Email: *daniel.barbara@crit-dhs.org,* Western Region

Navajo

Navajo Nation, Regina Yazzie M.S.W., Program Director, Navajo Children and Family Services (ICWA), P.O. Box 1930, Window Rock, Arizona 86515, Phone: (928) 871–6806, Fax: (928) 871–7667, Email: *reginayazzie@nndss.org,* Navajo Region

Ramah Navajo School Board, Inc., Ms. Marlene Martinez, Administrative Services Director, P.O. Box 10, Pine Hill, New Mexico 87357, Phone; (505) 775–3256, Fax: (505) 775–3240, Email: *marlene@rnsb.k12.nm.us,* Navajo Region

Nez Perce

Nez Perce Tribe, Janet Bennett—ICWA Caseworker, P.O. Box 365, Lapwai, Idaho 83540, Phone: (208) 843–2463, Fax: (208) 843–9401, Northwest Region

Nisqually

Nisqually Indian Community, Raymond Howell—ICWA Contact, 4820 She-Nah-Num Drive, SE, Olympia, Washington 98513, Phone: (360) 456–5221, Fax: (360) 407–0017, Northwest Region

Nomlaki, (*See* Wintun)

Cortina Rancheria, (Cortina Indian Rancheria), Charlie Wright—Tribal Chairman, P.O. Box 1630, Williams, California 95987, Phone: (530) 473–3274, Fax: (530) 473–3301, Pacific Region

Nomlaki, (*See* Wintun)

Paskenta Band of Nomlaki Indians, Ines Crosby—Tribal Administrator, P.O. Box 398, 1012 South Street, Orland, California 95963, Phone: (530) 865–2010, Fax: (530) 865–1870, Email: *office@paskenta.org,* Pacific Region

Nomlaki, (*See* Pit River/Pomo/Wintun/, Wailaki/Yuki

Round Valley Indian Tribes, Kenneth Wright—Tribal President, 77826 Covelo Road, Covelo, California 95428, Phone: (707) 983–6126, Fax: (707) 983–6128, Email: *administrator@rvit.org,* Pacific Region

Nooksack

Nooksack Indian Tribe, Bernadine Roberts—ICW Program Manager, 5061 Deming Road, Deming, Washington 98244, Phone: (360) 306–5090, Fax: (360) 306–5099, Email: *broberts@nooksack-nsn.gov,* Northwest Region

Odawa

Little Traverse Bay Band of Odawa Indians, Denneen Smith—Human Services Director, 7500 Odawa Circle, Harbor Springs, Michigan 49740, Phone: (213) 242–1620, Fax: (213) 242–1635, Midwest Region

Ojibwe, (*See* Chippewa)

Bad River Band of Lake Superior Chippewa, Esie Leoso-Corbine—ICWA Director, P.O. Box 55, Odanah, Wisconsin 54861, Phone: (715) 682–7135 Ext: 1414, Fax: (715) 685–7888, Email: *bricw@badriver-nsn.gov,* Midwest Region

Ojibwe, (*See* Chippewa)

Leech Lake Band of Ojibwe, Tammie Finn—Child Welfare Director, 115 Sixth Street NW, Suite E, Cass Lake, Minnesota 56633, Phone: (218) 335–8240, Fax: (218) 335–3779, Email: *tamie.finn@llojibwe.com,* Midwest Region

Ojibwe, (*See* Chippewa)

Mille Lacs Band of Ojibwe, Ryan Champagne, Director of Family Services, MilleLacs Band Government Center, 43408 Oodena Drive, Onamia, Minnesota 56359, Phone: (320) 532–7776 Ext: 7762, Fax: (320) 532–7583, Email: *ryan.champagne@millelacsband.com,* Midwest Region

Ojibwe, (*See* Chippewa)

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Omaha

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Oneida

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Oneida, (*See* Iroquois)

Oneida Indian Nation, Kim Jacobs—Nation Clerk, Box 1, Vernon, New York 13476, Phone: (315) 829–8337, Fax: (315) 829–8392, Email: *kjacobs@oneida.nation.org,* Eastern Region

Onondaga, (*See* Iroquois)

Onondaga Nation of New York, Council of Chiefs, P.O. Box 85, Nedrow, New York 13120, Phone: (315) 469–9196, Fax: (315) 492–4822, Eastern Region

Osage

Osage Nation, Ann Davis—Social Work Supervisor, 255 Senior Drive, Pawhuska, Oklahoma 74056, Phone: (918) 287–5218, Fax: (918) 287–5231, Email: *edavis@osagetribe.org,* Eastern Oklahoma Region

Otoe

Otoe-Missouria Indian Tribe of Oklahoma, Ada Mohojah—Social Services Director, 8151 Highway 177, Red Rock, Oklahoma 74651, Phone: (580) 723–4466 Ext: 256, Cell: (580) 307–7303, Fax: (580) 723–1016, Email: *amehojah@omtribe.org,* Southern Plains Region

Ottawa, (*See* Chippewa/, Peshawbestown)

Grand Traverse Band of Ottawa and Chippewa Indians, Helen Cook, Anishinaabek Family Services Supervisor, 2605 N. West Bay Shore Drive, Peshawbestown, Michigan 49682–9275, Phone: (231) 534–7681, Fax: (231) 534–7706, Email: *helen.cook@gtbindians.com,* Midwest Region

Ottawa

Little River Band of Ottawa Indians, Inc. Eugene Zeller—Tribal Prosecutor, 3031 Domres Road, Manistee, Michigan 49660, Phone: (231) 398–3384, Fax: (231) 398–3387, Email: *gzeller@lrboi.com,* Midwest Region

Ottawa Tribe of Oklahoma, Roy A. Ross—Social Service/CPS Director, P.O. Box 110, Miami, Oklahoma 74354, Phone: (918) 540–1536, Fax: (918) 542–3214, Eastern Oklahoma Region

Paiute, (*See* Shoshone)

Big Pine Paiute Tribe, Rita Mendoza, Tribal Court Clerk/ICWA Representative, P.O. Box 700, 825 S. Main Street, Big Pine, California 93513, Phone: (760) 938–2003, Fax: (760) 938–2942, Email: *r.mendoza@bigpinepaiute.org,* Pacific Region

Paiute, (*See* Shoshone)

Bishop Paiute Tribe, Margaret L. Romero—ICWA Specialist, 50 TuSu Lane, Bishop, California 93514, Phone: (760) 873–3584, Fax: (760) 873–4143, Email: *Margaret.romero@bishoppaiute.org,* Pacific Region

Paiute

Bridgeport Indian Colony, Ron Eagleye Johnny—Tribal Administrator, P.O. Box 37, 355 Sage Brush Drive, Bridgeport, California 93517, Phone: (760) 932–7083, Fax: (760) 932–7846, Email: *admin@bridgeportindiancolony.com,* Pacific Region

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Cedarville Rancheria, Duanna Knighton—Tribal Administrator, 300 West First Street, Alturas, California 96101, Phone: (530) 223–3969, Fax: (530) 223–4776, Email: cedranch@citlink.net, Pacific Region

Paiute, (*See* Warm Springs/Wasco/, Washoe)

Confederated Tribes of Warm Springs Reservation, Warms Springs Tribal Court, Chief Judge Lola Sohappy, ICWA Contact, P.O. Box 850, Warm Springs, Oregon 97761, Phone; (541) 553–3454, Fax: (541) 553–3281, Northwest Region

Paiute, (*See* Shoshone)

Fallon Paiute Shoshone Tribe, Fallon Business Council, Bonnie Rushford—Social Service Director, 1007 Rio Vista, Fallon, Nevada 89406, Phone: (775) 423–1215, Fax: (775) 423–8960, Email: *ssdirector@fpst.org,* Western Region

Paiute

Fort Bidwell Indian Community, Mariellen Sam, ICWA Representative/Enrollment Officer, P.O. Box 129, Fort Bidwell, California 96112, Phone: (530) 279–6310, Fax: (530) 279–2233, Pacific Region

Fort Independence Indian Reservation, Israel Naylor—Tribal Chairman, P.O. Box 67, 131 North Hwy 395, Independence, California 93526, Phone: (760) 878–5160, Fax: (760) 878–2311, Email: *israel@fortindependence.com,* Pacific Region

Paiute, (*See* Shoshone)

Ft. McDermitt Paiute-Shoshone Tribes, Dee Crutcher, ICWA Advocate-Human Services Program, P.O. Box 68, McDermitt, Nevada 89421, Phone: (775) 532–8263, Fax: (775) 532–8060, Email: *deecrutcher@gmail.com,* Western Region

Paiute

Kaibab Band of Paiute Indians, Matt Lyons-Social Services, Lisa Stanfield—Secretary, Lorraine Benn—Enrollment, HC 65- Box 2, Fredonia, Arizona 86022, Phone: (928) 643–8320 (Matt), (928) 643–8336 (Lisa), (928) 643–7245 (Lorraine), Fax: (928) 643–7245, Email: *mlyons@kaibabpaiute-nsn.gov; lstanfield@kaibabpaiute-nsn.gov; lbenn@kaibabpaiute-nsn.gov,* Western Region

Las Vegas Paiute Tribe, Ruth Fite-Patrick, Social Service Caseworker, 1257 Paiute Circle, Las Vegas, Nevada 89106, Phone: (702) 382–0784 Ext: 2236, Fax: (702) 384–5272, Email: *rfitepatrick@lvpaiute.com,* Western Region

Paiute, (*See* Shoshone)

Lone Pine Paiute Shoshone Reservation, Kathy Bancroft, Enrollment Committee Chairperson, P.O. Box 747, Lone Pine, California 96545, Phone: (760) 876–1034, Fax: (760) 876–8302, Pacific Region

Paiute

Lovelock Paiute Tribe, Victor Mann—Chairman, 201 Bowean Street, Lovelock, Nevada 89419, Phone: (775) 273–7861, Fax: (775) 273–3802, Western Region

Moapa Band of Paiutes, Dawn M. Bruce—Social Services Director, P.O. Box 340, Moapa, Nevada 89025, Phone: (702) 865–2708, Fax: (702) 864–0408, Email: *mbopsocialservices@mvdsl.com,* Western Region

Paiute, (*See* Shoshone)

Northwestern Band of Shoshoni Nation, Lawrence Honena—ICWA Contact, 427 North Main, Suite 101, Pcatello, Idaho 83204, Phone: (208) 478–5712, Fax: (208) 478–5713, Northwest Region

Paiute

Paiute Indian Tribe of Utah, Tyler Goddard—Behavioral Care Director,

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Pyramid Lake Paiute Tribe, Nikki Isaacs, Ph.D.—Social Service Director, P.O. Box 256, Nixon, Nevada 89424, Phone: (775) 574–1047, Fax: (775) 574–1052, Email: *nisaacs@plpt.nsn.us,* Western Region

Paiute, (*See* Shoshone/Washoe)

Reno-Sparks Indian Colony, Jane Smith—Human Services Assistant, 405 Golden Lane, Reno, Nevada 89502, Phone: (775) 329–5071, Fax: (775) 785–8758, Email: jsmith@rsic.org, Western Region

Paiute

San Juan Southern Paiute Tribe, Savania Tsosie—Social Worker, 180 North 200 East, Suite 111, St. George, UT 84770, Phone: (435) 674–9720, Fax: (435) 674–9714, Email: *savania.tsosie@bia.gov,* Western Region

Paiute, (*See* Shoshone)

Shoshone-Paiute Tribes of Duck Valley, Lanette Bitsilly—Social Worker, P.O. Box 219, Owyhee, Nevada 89832, Phone: (775) 757–2253, Fax: (775) 757–2910, Email: *bitsilly.lanette@shopai.org,* Western Region

Summit Lake Paiute Tribe, Jerri Lynn Barlese—Council Secretary/Treasurer, 1708 H Street, Sparks, Nevada 89431, (775) 827–9670, (775) 827–9678, Email: *jerrilynn.barlese@summitlaketribe.org,* Western Region

Paiute, (*See* Maidu/Pit River)

Susanville Rancheria, Chairperson—ICWA Director, 745 Joaquin Street, Susanville, California 96130, Phone: (530) 257–6264, Fax: (530) 257–7986, Pacific Region

Paiute, (*See* Shoshone)

Timbi-sha Shoshone Tribe, Wally Eddy, 621 West Line Street, Suite 109 Bishop, CA 93514, Telephone: (760) 872–3614, Fax: (760) 872–3670, Email: icwa@timbisha.com, Pacific Region

Paiute

Utu Utu Gwaitu Paiute Tribe, Adora L. Saulque—Vice-Chairperson, 25669 Hwy 6 PMB I, Benton, California 93512, Phone: (760) 933–2321, Fax: (760) 933–2412, Email: *bentonpaiutetribe@hughes.net, adorasaulque@hughes.net,* Pacific Region

Walker River Paiute Tribe, Elliott Aguilar—ICWA Specialist, P.O. Box 146, Schurz, Nevada 89427, Phone: (775) 773–2058 Ext: 11, Email: *eaguilar@wrpt.us,* Western Region

Paiute, (*See* Shoshone)

Winnemucca Tribe, Chairman, P.O. Box 1370, Winnemucca, Nevada 89446, Western Region

Paiute

Yerington Paiute Tribe, Stan Dodd—Human Services Director, 171 Campbell Lane, Yerington, Nevada 89447, Phone: (775) 463–7705, Fax: (775) 463–5929, Email: *sdodd@ypt-nsn.gov,* Western Region

Papago

Ak-Chin Indian Community, Carole Lopez—Enrollment Specialist, 42507 West Peters + Nall Road, Maricopa, Arizona 85318, Phone: (520) 568–1000, (520) 568–1001, Email: *clopez@ak-chin.nsn.us,* Western Region

Papago, (*See* Tohono O'odham)

Tohono O'Odham Nation, Jonathan L. Jantzen—Attorney General, P.O. Box 830, Sells, Arizona 85634, Phone: (520) 383–3410, Fax: (520) 383–2689, Email: *jonathan.jantzen@tonation-nsn.gov,* Western Region

Passamaquoddy

Passamaquaddy Indian Township, Dolly Barnes, LCSW—Director, Child and Family Services, P.O. Box 301, Princeton, Maine 04668, Phone: (207) 796–6134, Fax: (207) 796–5606, Eastern Region

Passamaquaddy Tribe-Pleasant Point, Molly Newell, Sipayik Human Services Director, P.O. Box 343, Perry, Maine 04667, Phone: (207) 853–2600 Ext: 258, Fax: (207) 853–9618, Email: *molly@wabanaki.com,* Eastern Region

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Penobscot

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Peoria

Peoria Tribe of Indians of Oklahoma, Doug Journeycake, Indian Child Welfare Director, P.O. Box 1527, Miami, Oklahoma 74354, Phone: (918) 540–2535, Fax: (918) 540–3538, Email: *djourneycake@peoriatribe.com,* Eastern Oklahoma Region

Pequot

Mashantucket Pequot Tribal Nation, Valerie Burgess—Director, Child Protective Services, 102 Muhshee Mahchaq, P.O. Box 3313, Mashantucket, Connecticut 06338, Phone: (860) 396–2007, Fax: (860) 396–2144, Email: *vburgess@mptn-nsn.gov,* Eastern Region

Peshawbestown, (*See* Chippewa/Ottawa)

Grand Traverse Band of Ottawa and Chippewa Indians, Helen Cook, Anishinaabek Family Services Supervisor, 2605 N. West Bay Shore Drive, Peshawbestown, Michigan 49682–9275, Phone: (231) 534–7681, Fax: (231) 534–7706, Email: *helen.cook@gtbindians.com,* Midwest Region

Maricopa, (*See* Pima)

Gila River Indian Community, Byron Donahue, ICWA Case Manager, P.O. Box 427, Sacaton, Arizona 85147, Phone: (520) 562–3396, Fax: (520) 562–3633, Email: *byron.donahue@gric.nsn.us,* Western Region

Maricopa, (*See* Pima)

Salt River Pima-Maricopa Indian Community, Office of fGeneral Counsel, Cheryl Scott—Asst. Attorney General Counsel, 10,005 East Osborn Road, Scottsdale, Arizona 85256, Phone: (480) 362–7448, Fax: (480) 362–7591, Email: *cheryl.scott@SRPMIC-nsn.gov,* Western Region

Pit River

Alturas Rancheria, Chairperson, 900 Running Bear Rd., Yreka, California 96097, Phone: (530) 949–9877, Pacific Region

Pit River Reservation, Coordinator—ICWA Program, 36970 Park Avenue, Burney, California 96013, Phone: (530) 335–5530, Fax: (530) 335–3140, Pacific Region

Pit River, (*See* Wintun/Yana)

Redding Rancheria, Director, Social Services, 2000 Rancheria Road, Redding, California 96001–5528, Phone: (530) 225–8979, Pacific Region

Nomlaki, (*See* Pit River/Pomo/Wintun/, Wailaki/Yuki

Round Valley Indian Tribes, Kenneth Wright, Tribal President, 77826 Covelo Road, Covelo, California

95428, Phone: (707) 983–6126, Fax: (707) 983–6128, Email: *administrator@rvit.org,* Pacific Region

Pit River, (*See* Maidu/Paiute)

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Pomo

Big Valley Rancheria, ICWA, 2726 Mission Rancheria Road, Lakeport, California 95453, Phone: (707) 263–3924, Fax: (707) 263–3977, Email: *resparza@big-valley.net,* Pacific Region

Pomo, (*See* Me-Wuk/Miwok)

Buena Vista Rancheria of Me-Wuk Indians, Penny Arciniaga—Tribal Member Services, 1418 20th Street, Suite 200, Sacramento, California 95811, Phone: (916) 491–0011, Fax: (916) 491–0012, Email: *penny@buenavistatribe.com,* Pacific Region

Pomo, (*See* Me-Wuk/Miwok)

California Valley Miwok Tribe, As of date, there is no recognized gervernment ofr this federally recognized tribe., Pacific Region

Pomo

Cloverdale Rancheria, Marcellena Becerra—ICWA Advocate, 555 S. Cloverdale Blvd., Cloverdale, California 95425, Phone: (707) 894–5775, Cell: (707) 953–9954, Fax: (707) 894–5727, Pacific Region

Coyote Valley Band of Pomo Indians, Melinda Hunter, Health & Human Service Director, 7601 North State Street, P.O. Box 39, Redwood Valley, California 95470, Phone: (707) 472–2202, Fax: (707) 485–1416, Email: tribalcouncilmember@coyotevalleytribe.com, Pacific Region

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Elem Indian Colony, Nathan M. Brown II, Chairman, P.O. Box 757, Clearlake Oaks, California 95423, Phone: (707) 295–6131, Fax: (707) 263–0120, Email: *nathanmbrown@hughes.net,* Pacific Region

Me-Wuk, (*See* Miwok/Pomo)

Federated Indians—Graton Rancheria, Lara Walker-Human Services, 6400 Redwood Drive, Suite 300, Rohnert Park, California 94928, Phone: (707) 566–2288, Fax: (707) 566–2291, Email: *lwalker@gratonrancheria.com,* Pacific Region

Pomo

Guidiville Band of Pomo Indians, Merlene Sanchez—Tribal Chairperson, P.O. Box 339, Talmage, California 95481, Phone: (707) 462–3682, (707) 462–3183, Email: *admin@guidiville.net,* Pacific Region

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Lower Lake Rancheria, Chairperson, P.O. Box 3162, Santa Rosa, California 95402, Phone: (707) 575–5586, Pacific Region

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Nomlaki, (*See* Pit River/Pomo/Wintun/, Wailaki/Yuki

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Pomo, (*See* Wailaki)

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Wailaki, (*See* Pomo)

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Kashia, (*See* Pomo)

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Ponca

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Potawatomi

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Potawatomi, (*See* Chippewa)

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Potawatomi

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Pueblo

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Pueblo, (*See* Tigua)

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Pueblo

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Quapaw

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Quechan

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Quileute

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Salish, (*See* Flathead/Kootenai)

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Sauk-Suiattle

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Seneca, (*See* Cayuga/Iroquois)

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Seneca, (*See* Cayuga)

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Iroquois, (*See* Seneca)

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Seneca, (*See* Iroquois/Tonawanda)

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Iroquois, (*See* Seneca)

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Serrano

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Shasta, (*See* Grand Ronde/Siletz)

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Shasta, (*See* Karuk)

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Shoalwater

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Shoshone

Battle Mountain Band Council, Rhonda Hicks—ICWA Coordinator, 37 Mountain View Drive, Battle Mountain, Nevada 89820, Phone: (775) 635–9189, Fax: (775) 635–8528, Western Region

Paiute, (*See* Shoshone)

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Shoshone, (*See* Paiute)

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Shoshone

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Paiute, (*See* Shoshone)

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Shoshone, (*See* Paiute)

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Shoshone, (*See* Paiute)

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Shoshone, (*See* Paiute)

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Shoshone, (*See* Paiute/Washoe)

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Shoshone, (*See* Shoshone-Bannock)

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Paiute, (*See* Shoshone)

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Shoshone

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Paiute, (*See* Shoshone)

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Shoshone

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Shoshone, (*See* Paiute)

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Shoshone, (*See* Yomba)

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Shoshone, (*See* Shoshone-Bannock)

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Siletz, (*See* Grand Ronde/Shasta)

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Siletz

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Assiniboine, (*See* Sioux)

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S'kllalam

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Skokomish Tribal Council, Renee Guy/Kim Thomas, ICWA Contact, N. 80 Tribal Center Road, Shelton, Washington 98584–9748, Phone: (360) 426–7788, Fax: (360) 462–0082, Northwest Region

Snoqualmie

Snoqualmie Tribe, Marie Ramirez, MSW, ICWA Contact, P.O. Box 280, Carnation, Washington 98014, Phone: (425) 333–5425, Fax: (425) 333–5428, Northwest Region

Spokane

Spokane Tribe of Indians, Tawhnee Colvin, Program Manager/Case Manager, P.O. Box 540, Wellpinit, Washington 99040, Phone: (509) 258–7502, Fax: (509) 258–7029, Email: *tawhneec@spokanetribe.com,* Northwest Region

Squaxin

Squaxin Island Tribe, Donald Whitener—Tribal Administrator, 10 SE Squaxin Lane, Shelton, Washington 98584–9200, Phone: (360) 432–3900, Fax: (360) 426–6577, Email: dwhitener@squaxin.us, Northwest Region

Stillaguamish

Stillaguamish Tribe of Indians, Gloria Green—ICW Director, 17014 59th Ave NE, P.O. Box 3782, Arlington, Washington 98223, Phone: (360) 435–3985 Ext: 21, Fax: (360) 435–2867, Northwest Region

Suquamish

Suquamish Tribe of the Port Madison Reservation, Dennis Deaton—ICWA Contact, P.O. Box 498, Suquamish, Washington 98392, Phone: (360) 394–8478, Fax: (360) 697–6774, Northwest Region

Swinomish

Swinomish Indians, Tracy Parker, Swinomish Family Services Coordinator, 17337 Reservation Rd., LaConner, Washington 98257, Phone: (360) 466–7222, Fax: (360) 466–1632, Email: *tparker@swinomish.nsn.us,* Northwest Region

Tachi, (*See* Yokut)

Santa Rosa Rancheria Tachi-Yokut Tribe, Janice Cuara—Tribal Administrator, 16835 Alkali Drive, P.O. Box 8, Lemoore, California 93245, Phone: (559) 924–1278 Ext. 4051, Cell: (559) 381–4928, Fax: (559) 925–2931, Email: jcuara@tachi-yokut.com, Pacific Region

Three Affiliated Tribes, (*See* Arikara/Hidatsa/Mandan)

Three Affiliated Tribes, (Mandan, Arikara & Hidatsa), Katherine Felix—ICWA Specialist, 404 Frontage Road, New Town, North Dakota 58763, Phone: (701) 627–4781, Fax: (701) 627–5550, Email: *kfelix@mhanation.com,* Great Plains Region

Tigua, (*See* Pueblo)

Pueblo of Isleta, Caroline Dailey—Acting ICWA Director, P.O. Box 1270, Isleta, New Mexico 87022, Phone: (505) 869- 2772, Southwest Region

Papago, (*See* Tohono O'odham)

Tohono O'Odham Nation, Jonathan L. Jantzen—Attorney General, P.O. Box 830, Sells, Arizona 85634, Phone: (520) 383–3410, Fax: (520) 383–2689, Email: *jonathan.jantzen@tonation-nsn.gov,* Western Region

Tolowa, (*See* Me-Wuk/Miwok)

Cher-Ae Heights Indian Community of the Trinidad Rancheria, Amy Atkins—ICWA Representative, P.O. Box 630, Trinidad, California 95570, Phone: (707) 677–0211, Fax: (707) 677–3921, Email: *aatkins@trinidadrancheria.com,* Pacific Region

Tolowa, (*See* Karuk/Yurok)

Elk Valley Rancheria, Chairperson, 2332 Howland Hill Road, Crescent City, California 95531, Phone: (707) 464–4680, Fax: (707) 465–2638, Email: *evrlibrary@elk-valley.com,* Pacific Region

Tolowa

Smith River Rancheria, Dorothy Perry, Director—Community & Family Services, 110 W. First Street, Smith River, California 95567, Phone: (707) 487–9255, Fax: (707) 487–0137, Email: *dperry@tolowa.com,* Pacific Region

Tonawanda, (*See* Iroquois/Seneca)

Tonawanda Band of Seneca, Roger Hill, Chief, Council of Chiefs, 7027 Meadville Road, Basom, New York 14013, Phone: (716) 542–4244, Fax: (716) 542–4008, Eastern Region

Tonkawa

Tonkawa Tribe of Oklahoma, President, P.O. Box 70, Tonkawa, Oklahoma 74653, Phone: (580) 628–2561, Southern Plains Region

Tulalip

Tulalip Tribe, Elishia Stewart—ICWA Contact, 6700 Totem Beach Road, Marysville, Washington 98271, Phone: (360) 651–3290, Fax: (360) 651–4742, Northwest Region

Tunica-Biloxi

Tunica Biloxi Indian Tribe of Louisiana, Betty Pierite Logan, Registered Social Worker, P.O. Box 493, Marksville, Louisiana 71351, Telephone: (318) 240–6442, Fax: (318) 253–9791, Email: *blogan@tunica.org,* Eastern Region

Tuscarora, (*See* Iroquois)

Tuscarora Nation of New York, Chief Leo Henry—Clerk, 206 Mount Hope Road, Lewistown, New York 14092,

Phone: (716) 297–1148, Fax: (716) 297–7355, Eastern Region

Umatilla

Confederated Tribes of the Umatilla Indian Reservation, M. Brent Leonhard, Deputy Attorney General, 46411 Timine Way, Pendleton, Oregon 97801, Phone: (541) 429–7406, Fax: (541) 429–7406, Email: *brentleonhard@ctuir.org,* Northwest Region

Umpqua

Cow Creek Band of Umpqua Tribe of Indians, Rhonda Malone—Human Services Director, 2371 NE Stephens Road, Roseburg, Oregon 97470, (541) 672–9405, Fax: (541) 677–5576, Email: *rmalone@cowcreek.com,* Northwest Region

Umpqua & Siuslaw

Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians, Roni Jackson, Family Case Worker/ICWA Specialist, 1245 Fulton Avenue, Coos Bay, Oregon 97420, Phone: (541) 888–9577, Fax: (541) 888–1027, Email: *rjackson@ctclusi.org,* Northwest Region

Upper Skagit

Upper Skagit Indian Tribe of Washington, Felice Keegahn, Indian Child Welfare Coordinator, 2284 Community Plaza Way, Sedro Woolley, Washington 98284, Phone: (360) 854–7077, Fax: (360) 854–7125, Email: *felicek@upperskagit.com,* Northwest Region

Ute

Southern Ute Indian Tribe, Jerri Sindelar, ICWA Caseworker II, MS 40, P.O. Box 737, Ignacio, Colorado 81137, Phone: (970) 769–2920, Fax: (970) 563–0334, Email: *jsindelar@southern-ute.nsn.us,* Southwest Region

Ute Indian Tribe, Floyd Wyasket—Social Service Director, Box 190 or Box 736, Fort Duschesne, Utah 84026, Phone: (435) 725–4026 or (435) 823–0141, Fax: (435) 722–5030, Email: *floydw@utetribe.com,* Western Region

Ute Mountain Ute Tribe, Cole McKinney—Acting Director CPS/CW, P.O. Box 309, Towaoc, Colorado 81334, Phone: (970) 564–5307, Fax: (970) 564–5300, Email: *cmckinney@utemountain.org,* Southwest Region

Wailaki, (*See* Wintun)

Grindstone Indian Rancheria, Aaston Bill—ICWA, P.O. Box 63, Elk Creek, California 95939, Phone: (530) 968–5365, Fax: (530) 968–5366, Pacific Region

Nomlaki, (*See* Pit River/Pomo/Wintun/, Wailaki/Yuki

Round Valley Indian Tribes, Kenneth Wright—Tribal President, 77826 Covelo Road, Covelo, California 95428, Phone: (707) 983–6126, Fax: (707) 983–6128, Email: *administrator@rvit.org,* Pacific Region

Pomo, (*See* Wailaki)

Scotts Valley Band of Pomo Indians, Gabe Ray—Tribal ICWA Worker, 301 Industrial Avenue, Lakeport, California 95453, Phone: (707) 263–4220, Fax: (707) 263–4345, Email: *gray@svpomo.org,* Pacific Region

Wailaki, (*See* Pomo)

Sherwood Valley Band of Pomo Indians, Michael Fitzgerral—Tribal Chairman, 190 Sherwood Hill Drive, Willits, California 95490, Phone: (707) 459–9690, Fax: (707) 459–6936, Email: *svrchair@sbcglobal.net,* Pacific Region

Wampanoag

Mashpee Wampanoag Tribe, Yvonne Avant,Councilwoman, Human and Social Services Liaison, 483 Great Neck Road South, Mashpee, MA 02649, Phone: (508) 419–6017 Ext: 1, Cell: (774) 238–8388, Fax: (508) 477–0508, Email: *yavant@mwtribe.com,* Eastern Region

Wampanoag Tribe of Gay Head (Aquinnah), Bonnie Chalifoux—Director of Human Services, 20 Black Brook Road, Aquinnah, Massachusetts 02535, Phone: (508) 645–9265 Ext: 133, Fax: (508) 645–2755, Email: *bonnie@wampanoagtribe.net,* Eastern Region

Warm Springs, (*See* Paiute/Wasco/Washoe)

Confederated Tribes of Warm Springs Reservation, Warms Springs Tribal Court, Chief Judge Lola Sohappy, ICWA Contact, P.O. Box 850, Warm Springs, Oregon 97761, Phone; (541) 553–3454, Fax: (541) 553–3281, Northwest Region

Wasco, (*See* Paiute/Warm Springs/, Washoe)

Confederated Tribes of Warm Springs Reservation, Warms Springs Tribal Court, Chief Judge Lola Sohappy, ICWA Contact, P.O. Box 850, Warm Springs, Oregon 97761, Phone; (541) 553–3454, Fax: (541) 553–3281, Northwest Region

Washoe, (*See* Paiute/Warm Springs/, Wasco)

Confederated Tribes of Warm Springs Reservation, Warms Springs Tribal Court, Chief Judge Lola Sohappy, ICWA Contact, P.O. Box 850, Warm Springs, Oregon 97761, Phone; (541) 553–3454, Fax: (541) 553–3281, Northwest Region

Washoe, (*See* Paiute/Shoshone)

Reno-Sparks Indian Colony, Jane Smith, Human Services Assistant, 405 Golden Lane, Reno, Nevada 89502, Phone: (775) 329–5071, Fax: (775) 785–8758, Email: jsmith@rsic.org, Western Region

Washoe

Washoe Tribe of Nevada and California, Wanda Batchelor—Chairwoman, 919 HWY. 395 South, Gardnerville, Nevada 89410, Phone: (775) 265–8600, Fax: (775) 265–8651, Email: *ktrovato@washoetribe.us,* Western Region

Wichita

Witchita & Affiliated Tribes, Joan Williams, Family & Children Services Director, P.O. Box 729, Anadarko, Oklahoma 73005, Phone: (405) 247–8627, Fax: (405) 247–8873, Email: *joan.williams@wichitatribe.com,* Southern Plains Region

Winnebago, (*See* Ho-Chunk)

The Ho-Chunk Nation, Valerie Blackdeer—ICWA Coordinator, P.O. Box 40, Black River Falls, Wisconsin 54615, Phone: (715) 284–9851, Fax: (715) 284–0097, Email: valerie.blackdeer@ho-chunk.com, Midwest Region

Winnebago

Winnebago Tribe of Nebraska, Barbara Eagle—ICWA Specialist, #1 Mission Drive Box 723, Winnebago, Nebraska 68071, Phone: (402) 878–2378, Fax: (402) 878–2228, Email: *baeagle@winnebagotribe.com,* Great Plains Region

Wintun

Colusa Indian Community Council, Daniel Gomez Sr.—Chairman, 3730 Highway 45, Colusa, California 95932, Phone: (530) 458–8231, Fax: (530) 458–4186, Email: *dgomez@colusa-nsn.gov,* Pacific Region

Nomlaki, (*See* Wintun)

Cortina Rancheria, (Cortina Indian Rancheria), Charlie Wright—Tribal Chairman, P.O. Box 1630, Williams, California 95987, Phone: (530) 473–3274, Fax: (530) 473–3301, Pacific Region

Wailaki, (*See* Wintun)

Grindstone Indian Rancheria, Aaston Bill—ICWA, P.O. Box 63, Elk Creek, California 95939, Phone: (530) 968–5365, Fax: (530) 968–5366, Pacific Region

Nomlaki, (*See* Wintun)

Paskenta Band of Nomlaki Indians, Ines Crosby—Tribal Administrator, P.O. Box 398, 1012 South Street, Orland, California 95963, Phone: (530) 865–2010, Fax: (530) 865–1870, Email: *office@paskenta.org,* Pacific Region

Wintun, (*See* Pit River/Yana)

Redding Rancheria, Director, Social Services, 2000 Rancheria Road, Redding, California 96001–5528, Phone: (530) 225–8979, Pacific Region

Nomlaki, (*See* Pit River/Pomo/Wintun/, Wailaki/Yuki

Round Valley Indian Tribes, Kenneth Wright—Tribal President, 77826 Covelo Road, Covelo, California 95428, Phone: (707) 983–6126, Fax: (707) 983–6128, Email: *administrator@rvit.org,* Pacific Region

Wintun

Yocha Dehe Wintun Nation, Rumsey Rancheria, James Kinter—Tribal Council Secretary, P.O. Box 18, Brooks, California 95606, Phone: (530) 796–3400, Fax: (530) 796–2143, Email: *djones@yochadehe-nsn.gov,* Pacific Region

Wiyot

Bear River Band of Rhonerville Rancheria, Karen Cahill—Social Services Director, 27 Bear River Drive, Loleta, California 95551, Phone: (707) 733–1900 Ext: 290, Fax: (707) 733–1972, Email: *kcahill@bearrivertribe.com,* Pacific Region

Wiyot, (*See* Huron)

Blue Lake Rancheria, Bonnie Mobbs—Exec. Assistant, P.O. Box 428, Blue Lake, California 95525, Phone: (707) 668–5101, Fax: (707) 668–4272, Email: *bmobbs@bluelakerancheria-nsn.gov,* Pacific Region

Wiyot

Wiyot Tribe, Michelle Vassel—Director of Social Services, 1000 Wiyot Drive, Loleta, California 95551, Phone: (707) 733–5055, Fax: (707) 733–5601, Email: *www.wiyot.com,* Pacific Region

Wyandotte, (*See* Huron)

Wyandotte Nation, Kate Randall—Director of Family Services, 64700 E. Hwy 60, Wyandotte, Oklahoma 74370, Phone: (918) 678–2297, Fax: (918) 678–3087, Email: *krandall@wyandotte-nation.org,* Eastern Oklahoma Region

Klamath, (*See* Modoc/Yahooskin)

The Klamath Tribe, Jim Collins,—ICWA Specialist, P.O. Box 436, Chiloquin, Oregon 97624, Phone: (541) 783–2219 Ext: 137, Fax: (541) 783–7783, Email: *jim.collins@klamathtribes.com,* Northwest Region

Yana, (*See* Pit River/Wintun)

Redding Rancheria, Director, Social Services, 2000 Rancheria Road, Redding, California 96001–5528, Phone: (530) 225–8979, Pacific Region

Yakama

Confederated Tribes & Bands of the, Yakama Nation, David Lees, Esq., P.O. Box 1190, Toppenish, Washington 98948, Phone: (509) 865–5121 Ext: 4558, Fax: (509) 865–7078, Email: lees@yakama.com, Northwest Region

Yaqui

Pascua Yaqui Tribe, Tamara Walters, Assisstant Attorney General, 4725 West Calle Tetakusim, Bldg. B, Tucson, Arizona 85757, Phone: (520) 883–5108, Fax: (520) 883–5084, Email: *tamara.walters@pascuayaqui-nsn.gov,* Western Region

Yavapai

Fort McDowell Yavapai Nation, James Esquirell—CPS/ICWA Coordinator, Brian Holiday—Social Servies Director, Wassaja Family Services, P.O. Box 17779, Fountain Hills, Arizona 85268, Phone: (480) 789–7820, Fax: (480) 837–4809, Email: *jesquirell@ftmcdowell.org, bholiday@ftmcdowell.org,* Western Region

Apache, (*See* Yavapai)

Yavapai-Apache Nation, Cora Phillips—Social Service Program Manager, 2400 W. Datsi Street, Camp Verde, Arizona 86322, Phone: (928) 649–7107, Fax: (928) 567–6832, Email: *cphillips@yan-tribe.org,* Western Region

Yavapai

Yavapai-Prescott Indian Tribe, Elsie Watchman—Family Support Supervisor, 530 East Merritt, Prescott, Arizona 86301, Phone: (928) 515–7351, Fax: (928) 541–7945, Email: *ewatchman@ypit.com,* Western Region

Tachi, (*See* Yokut)

Santa Rosa Rancheria Tachi-Yokut Tribe, Janice Cuara—Tribal Administrator, 16835 Alkali Drive, P.O. Box 8, Lemoore, California 93245, Phone: (559) 924–1278 Ext. 4051, Cell: (559) 381–4928, Fax: (559) 925–2931, Email: jcuara@tachi-yokut.com, Pacific Region

Yokut

Table Mountain Rancheria, Frank Marquez Jr.—Tribal Chief of Police, 23736 Sky Harbour Rd., Friant, California 93626, Phone: (559) 822–6336, Fax: (559) 822–6340, Email: *fmarquezjr@tmr.org,* Pacific Region

Tejon Indian Tribe, Kathryn Montes Morgan, Tribal Chair, 1731 Hasti-Acres Drive #108, Bakersfield, CA 93309, Telephone: (661) 834–8566, Email: kmorgan@bak.rr.com, Pacific Region

Yokut, (*See* Mono)

Tule River Reservation, Lolita Garfield, MSW, Director Family Social Services, 340 North Reservation Road, Porterville, California 93258, Phone: (559) 781–4271 Ext: 1013, Fax: (559) 791–2122, Email: *icwadir@tulerivertribe-nsn.gov,* Pacific Region

Yomba, (*See* Shoshone)

Yomba Shoshone Tribe, Elisha A. Mockerman—Eligibility Worker, HC 61 Box 6275, Austin, Nevada 89310, Phone: (775) 964–2463, Fax: (775) 964–1352, Email: *emockerman@yombatribe.org,* Western Region

Nomlaki, (*See* Pit River/Pomo/Wintun/, Wailaki/Yuki

Round Valley Indian Tribes, Kenneth Wright—Tribal President, 77826 Covelo Road, Covelo, California 95428, Phone: (707) 983–6126, Fax: (707) 983–6128, Email: *administrator@rvit.org,* Pacific Region

Yurok

Big Lagoon Rancheria, Chairperson, P.O. Box 3060, Trinidad, California 95570, Phone: (707) 826–2079, Fax: (707) 826–0495, Email: *jstmartin@yuroktribe.nsn.us,* Pacific Region

Yurok, (*See* Wiyot)

Blue Lake Rancheria, Bonnie Mobbs—Exec. Assistant, P.O. Box 428, Blue Lake, California 95525, Phone: (707) 668–5101, Fax: (707) 668–4272, Email: *bmobbs@bluelakerancheria-nsn.gov,* Pacific Region

Yurok, (*See* Me-Wok/Miwok/Tolowa)

Cher-Ae Heights Indian Community of the Trinidad Rancheria, Amy Atkins—ICWA Representative, P.O. Box 630, Trinidad, California 95570, Phone: (707) 677–0211, Fax: (707) 677–3921, Email: *aatkins@trinidadrancheria.com,* Pacific Region

Yurok, (*See* Karuk/Tolowa)

Elk Valley Rancheria, Chairperson, 2332 Howland Hill Road, Crescent City, California 95531, Phone: (707) 464–4680, Fax: (707) 465–2638, Email: *evrlibrary@elk-valley.com,* Pacific Region

Yurok

Resighini Rancheria, Rick Dowd, Chairperson, Keshan Dowd, Social Service/ICWA, P.O. Box 529, Klamath, California 95548, Phone: (707) 482–2431, Fax: (707) 482–3425, Pacific Region

Yurok Tribe, Stephanie Weldon, Social Services Director, 190 Klamath Blvd., P.O. Box 1027, Klamath, California 95548, Phone: (707) 482–1350, Fax: (707) 482–1368, Email: *sweldon@yuroktribe.nsn.us,* Pacific Region

2. Alaska Native Tribes and Villages

Aleut

Agdaagux Tribe of King Cove, Grace Smith, Family Programs Coordinator, Aleutian/Pribilof Islands Association, 1131 E. International Airport Rd., Anchorage, AK 99518–1408, Phone: (907) 276–2700/(907) 222–4236, Fax: (907) 222–9735, Email: *graces@apiai.org,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Akhiok 1, Rachelle Joy, Kodiak Area Native Association, 3449 Rezanof Drive East, Kodiak, Alaska 99615, Phone: (907) 486–9800, Fax: (907) 486–4829, Email: *rachelle.joy@kanaweb.org,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Akhiok 2, James Tucker—ICWA Advocate, P.O. Box 5030, Akhiok, Alaska 99615, Phone: (907) 486–4829, Fax: (907) 836–2345, Alaska Region

Aleut

Native Village of Akutan, Grace Smith, Family Programs Coordinator, Aleutian/Pribilof Islands Association, 1131 East International Airport Road, Anchorage, Alaska 99518–1408, Phone: (907) 276–2700, Fax: (907) 279–4351, Email: *graces@apiai.org,* Alaska Region

Native Village of Atka, Grace Smith, Family Programs Coordinator, Aleutian/Pribilof Islands Association, 1131 East International Airport Road, Anchorage, Alaska 99518–1408, Phone: (907) 276–2700, Fax: (907) 279–9735, Email: *graces@apiai.org,* Alaska Region

Native Village of Belkofski, Grace Smith, Family Programs Coordinator, Aleutian/Pribilof Islands Association, 1131 East International Airport Road, Anchorage, Alaska 99518–1408, Phone: (907) 276–2700, Fax: (907) 222–9735, Email: *graces@apiai.org,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Chanega (aka: Chenega), Norma Selanoff, ICWA Worker, GayDell Trumblee, Tribal Administrator, P.O. Box 8079, Chenega Bay, Alaska 99574, Phone: (907) 573–5386/5130, Fax: (907) 573–5387/5120, Email: *g.trumblee@nativevillageofchanega.com,* Alaska Region

Aleut, (*See* Alutiiq)

Chignik Bay Tribal Council[1], Debbie Carlson—Administrator, P.O. Box 50, Chignik, Alaska 99564, Phone: (907) 749–2445, Fax: (907) 749–2423, Alaska Region

Aleut, (*See* Alutiiq)

Chignik Bay Tribal Council[2], Children's Services Program Manager, Bristol Bay Native Association, P.O. Box 310, 1500 Kanakanak Road, Dillingham, Alaska 99576, Phone: (907) 842–4139, Fax: (907) 842–4106, Email: *cnixon@bbna.com,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Chignik Lagoon[1], Nancy Anderson—ICWA, P.O. Box 09, Chignik Lagoon, Alaska 99565, Phone: (907) 840–2281, Fax: (907) 840–2217, Email: *clagoon@gci.net,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Chignik Lagoon[2], Children's Services Program Manager, Bristol Bay Native Association, P.O. Box 310, 1500 Kanakanak Road, Dillingham, Alaska 99576, Phone: (907) 842–4139, Fax: (907) 842–4106, *cnixon@bbna.com,* Alaska Region

Aleut, (*See* Alutiiq)

Chignik Lake Village[1], Crystal Kalmakoff—Caseworker II, P.O. Box 33, Chignik Lake, Alaska 99548, Phone: (907) 845–2358, Fax: (907) 845–2246, Alaska Region

Aleut, (*See* Alutiiq)

Chignik Lake Village[2], Children's Services Program Manager, Bristol Bay Native Association, P.O. Box 310, 1500 Kanakanak Road, Dillingham, Alaska 99576, Phone: (907) 842–4139, Fax: (907) 842–4106, *cnixon@bbna.com,* Alaska Region

Aleut, (*See* Alutiiq)

Cordova (*See* Eyak)

Aleut, (*See* Alutiiq)

Egegik Village[1], Marcia Abalama, ICWA Team Leader, P.O. Box 154, Egegik, Alaska 99579, Phone: (907) 233–2207, Fax: (907) 233–2212, Alaska Region

Aleut, (*See* Alutiiq)

Egegik Village[2], Children's Services Program Manager, Bristol Bay Native Association, P.O. Box 310, 1500 Kanakanak Road, Dillingham, Alaska 99576, Phone: (907) 842–4139, Fax: (907) 842–4106, Email: *cnixon@bbna.com,* Alaska Region

Aleut, (*See* Alutiiq)

English Bay (*See* Native Village of Nanwalek)

Aleut, (*See* Alutiiq)

Native Village of Afognak, (Formerly the Village of Afognak), Denise Malutin—ICWA Worker, 323 Carolyn Street, Kodiak, Alaska 99615, Phone: (907) 486–6357, Email: *denise@afognak.org,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Eyak (Cordova), Erin Kurz—ICWA Worker, P.O. Box 1388, Cordova, Alaska 99574, Phone: (907) 424–7738/2236, Fax: (907) 424–7809, Email: *erin@eyak-nsn.org,* Alaska Region

Aleut

Native Village of False Pass, Grace Smith, Family Programs Coordinator, Aleutian/Pribilof Islands Association, 1131 East International Airport Road, Anchorage, Alaska 99518–1408, Phone: (907) 276–2700, Fax: (907) 279–9735, Email: *graces@apiai.org,* Alaska Region

Aleut, (*See* Alutiiq)

Ivanoff Bay Village[1], Edgar Shangin—Tribal President, 7926 Old Seward Hwy, Suite B–5, Anchorage, Alaska 99518, Phone: (907) 522–2263, Fax: (907) 522–2363, Email: *ibvc@ivanofbay.com,* Alaska Region

Aleut, (*See* Alutiiq)

Ivanoff Bay Village[2], Children's Services Program Manager, Bristol Bay Native Association, P.O. Box 310, 1500 Kanakanak Road, Dillingham, Alaska 99576, Phone: (907) 842–4139, Fax: (907) 842–4106, Email: *cnixon@bbna.com,* Alaska Region

Aleut, (*See* Alutiiq)

Kaguyak Village, Margie Bezona, Community Development Director, Kodiak Area Native Association, 3449 E. Rezanof Drive, Kodiak, Alaska 99615, Phone: (907) 486–9816, Fax: (907) 486–9886, Email: *Margie.bezona@kanaweb.org,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Kanatak, Tony Olivera, Tribal Administrator/ICWA Director, P.O. Box 872231, Wailla, Alaska 99687, Phone: (907) 357–5991, Fax: (907) 357–5992, Email: *kanatak@mtaonline.net,* Alaska Region

Aleut, (*See* Alutiiq)

Native Village of Karluk, Joyce Jones—ICWA Worker, P.O. Box 22, Karluk, Alaska 99608, Phone: (907) 241–2228, Fax: (907) 241–2208, Alaska Region

Aleut

King Cove (*See* Agdaagux)

King Salmon Tribe, Ralph Angasan, Jr.—Tribal Administrator, Ruth Monsen—ICWA Worker, P.O. Box 68, King Salmon, Alaska 99613, Phone: (907) 246–3553/3447, Fax: (907) 246–3449, Email: *kstvc@starbans.net, Windsong1@starband.net,* Alaska Region

Aleut, (*See* Alutiiq)

Kodiak Tribal Council, (*See* Sun'aq Tribe of Kodiak)

Aleut, (*See* Alutiiq)

Native Village of Larsen Bay, Rachelle Joy, Kodiak Area Native Association, 3449 Rezanof Drive East, Kodiak, AK 99615, Phone: (907) 486–9800, Fax: (907) 486–4829, Email: *rachelle.joy@kanaweb.org,* Alaska Region

Aleut, (*See* Alutiiq)

Lesnoi Village (aka Woody Island), Margaret Roberts—President, 3248 Mill Bay Road, Kodiak, Alaska 99615, Phone: (907) 486–2821, Fax: (907) 486–2738, Email: *village@alaska.com,* Alaska Region

Aleut, (*See* Alutiiq)

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Aleut

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut

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Aleut

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut

Unalaska (*See* Qawalangin Tribe of Unalaska)

Aleut

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Aleut, (*See* Alutiiq)

Woody Island (*See* Lesnoi Village)

Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Aleut, (*See* Alutiiq)

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Alutiiq, (*See* Aleut)

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Alutiiq, (*See* Aleut)

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Alutiiq, (*See* Aleut)

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Aleut, (*See* Alutiiq)

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Alutiiq, (*See* Aleut)

English Bay (*See* Native Village of Nanwalek)

Aleut, (*See* Alutiiq)

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Alutiiq, (*See* Aleut)

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Aleut, (*See* Alutiiq)

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Alutiiq, (*See* Aleut)

Kodiak Tribal Council, (*See* Sun'aq Tribe of Kodiak)

Aleut, (*See* Alutiiq)

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Alutiiq, (*See* Aleut)

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Alutiiq, (*See* Aleut)

Woody Island (*See* Lesnoi Village)

Athabascan Indian

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Athabascan Indian

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Bettles Field (*See* Evansville Village)

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Copper Center, (*See* Native Village of Kluti-Kaah)

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Dillingham (*See* Curyung Tribal Council)

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Russian Mission, (*See* Iqurmuit Traditional Council)

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Native Village of Upper Kalskag (*See* Kalskag)

Dated: July 20, 2012.

Donald E. Laverdure,

Acting Assistant Secretary—Indian Affairs.

[FR Doc. 2012–18594 Filed 7–31–12; 8:45 am]

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Part IV

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Listing the British Columbia Distinct Population Segment of the Queen Charlotte Goshawk Under the Endangered Species Act; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R7–ES–2009–0049; MO 9221050083–B2]

RIN 1018–AY 43

Endangered and Threatened Wildlife and Plants; Listing the British Columbia Distinct Population Segment of the Queen Charlotte Goshawk Under the Endangered Species Act

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, hereby list the British Columbia distinct population segment (DPS) of the Queen Charlotte goshawk *(Accipiter gentilis laingi)* as threatened under the Endangered Species Act of 1973, as amended (Act). This final rule implements the Federal protections provided by the Act for this subspecies in British Columbia, Canada, on Vancouver Island and the surrounding smaller islands, the Queen Charlotte Islands, and the coastal mainland and adjacent islands west of the crest of the Coast Mountains. Because the British Columbia DPS is entirely outside the United States, we are not designating critical habitat.

DATES: This final rule becomes effective August 31, 2012.

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R7–ES–2009–0049 and comments and materials received, as well as supporting documentation used in the preparation of this rule, will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Suite 400, Arlington, VA 22203.

FOR FURTHER INFORMATION CONTACT: Steve Brockmann, Deputy Field Supervisor, Juneau Fish and Wildlife Field Office, 3000 Vintage Blvd. Suite 201, Juneau, AK 99801; telephone (907) 780–1181; fax (907) 586–7154.

SUPPLEMENTARY INFORMATION:

Background

Previous Agency Action

On May 9, 1994, the U.S. Fish and Wildlife Service (Service) received a petition from eight conservation groups and two individuals to list the Queen Charlotte goshawk as endangered, and to designate critical habitat. Logging of old-growth forest, where the bird nests and forages, was the primary threat identified. On August 26, 1994, we published our 90-day finding that the petition presented substantial information indicating that listing may be warranted, opened a public comment period, and initiated a status review to determine whether listing the subspecies was warranted (59 FR 44124).

Following our status review, we determined that listing the Queen Charlotte goshawk as threatened or endangered under the Act was not warranted and published our finding in the **Federal Register** on June 29, 1995 (60 FR 33784). We expressed concern for long-term viability of the bird under the existing management plan for the Tongass National Forest (covering about 80 percent of Southeast Alaska), but we acknowledged that a new management plan was being drafted, and the new plan was expected to provide improved protection for the subspecies. The June 1995 ''not warranted'' finding was challenged in the U.S. District Court for the District of Columbia, in a suit filed on November 17, 1995, by 8 of the original 10 petitioners, plus 2 additional conservation organizations and 1 additional individual. The district court granted summary judgment for the plaintiffs on September 25, 1996, holding that the Service should not have relied on ''possible future actions'' described in a draft revision to the 1979 Tongass Land Management Plan (TLMP) ''to provide sanctuary for the goshawk.'' The decision was remanded to the Service with instructions to make a listing determination based on the existing 1979 TLMP (*Southwest Center for Biological Diversity* v. *Babbitt,* 939 F. Supp. 49 (D.D.C. 1996)).

On September 4, 1997, we published our new finding that listing the Queen Charlotte goshawk as threatened or endangered was not warranted (62 FR 46710). In 1998, this finding was challenged in the same district court, and on July 20, 1999, the finding was remanded to us, with instructions to provide a more accurate and reliable population estimate, and to consider a 1999 revision of the 1997 TLMP. We appealed the district court's decision to the Court of Appeals for the District of Columbia. The court of appeals agreed with the Service and remanded the case back to the district court (*Southwest Center for Biological Diversity* v. *Babbitt,* 215 F. 3d 58 (D.C.C. 2000)).

On July 29, 2002, a district court magistrate issued recommended findings that: (1) We had fulfilled our obligation to use the best scientific data available; (2) the ''not warranted'' determination was entitled to deference; (3) our determination that the Queen Charlotte goshawk would persist in Alaska and the Queen Charlotte Islands was not unreasonable; (4) Vancouver Island, which constituted one-third of the subspecies' geographic range, was a ''significant portion'' of the subspecies' range; and (5) our failure to make a specific finding as to the conservation status of the subspecies on Vancouver Island was a material omission. The magistrate recommended a remand to the Service to make a finding as to whether the Queen Charlotte goshawk should be listed based on its conservation status on Vancouver Island (*Southwest Center for Biological Diversity* v. *Norton,* No. 98–934, 2002 U.S. Dist. LEXIS 13661, (D.D.C. July 29, 2002)).

On May 24, 2004, a district court judge issued an order that adopted the magistrate's recommendations, except for the magistrate's finding that Vancouver Island constituted a significant portion of the range for the Queen Charlotte goshawk. Instead, the district court directed the Service upon remand to reconsider and explain any determination as to whether or not Vancouver Island is a significant portion of the subspecies' range, and assess whether the Queen Charlotte goshawk is endangered or threatened on Vancouver Island (*Southwest Center for Biological Diversity* v. *Norton,* No. 98–0934 (D.D.C. May 24, 2004)).

On November 8, 2007, we published our ''Response to Court on Significant Portion of the Range, and Evaluation of Distinct Population Segments, for the Queen Charlotte Goshawk'' (72 FR 63123) (Response to Court). In the Response to Court, we found that Vancouver Island was a significant portion of the Queen Charlotte goshawk's range, that Southeast Alaska and British Columbia each supported distinct population segments, and that listing was warranted for the British Columbia DPS, but not for the Southeast Alaska DPS.

On November 3, 2009, we published a proposed rule to list the Queen Charlotte goshawk as threatened on Vancouver Island and the surrounding, smaller islands, and on the mainland coast of British Columbia. We also proposed to list the subspecies as endangered on the Queen Charlotte Islands (74 FR 56757). Upon publication, we initiated a 60-day public comment period, and requested information and comments, particularly on threats to the subspecies. We also solicited peer reviews from individuals with expertise in Queen Charlotte

goshawk biology and/or forest management in British Columbia.

Queen Charlotte Goshawk Biology and Habitat

The Queen Charlotte goshawk is a comparatively small, dark subspecies of northern goshawk (*Accipiter gentilis*) that nests and forages in the temperate, rainforest-dominated archipelagos and coastal mainland of Southeast Alaska and British Columbia. Taxonomic treatments and reviews have generally accepted the Queen Charlotte goshawk (A. g. laingi) as distinct from the subspecies found across most of North America (*A. g. atricapillus*) (reviewed in USFWS 2007a, pp. 12–13). For purposes of the Species at Risk Act, the Government of Canada has dropped the common name ''Queen Charlotte goshawk'' in favor of ''Northern Goshawk *laingi* subspecies'' (Canada Gazette II, 2005:139(2):p. 79). In British Columbia, the recovery team working on the subspecies has adopted this protocol (NGRT 2008, p. vii).

Natural history and threats to the subspecies are described in detail in our status reviews (USFWS 2007; USFWS 2010) and evaluated in our most recent finding, published in the **Federal Register** on November 8, 2007 (72 FR 63123). Below, we briefly summarize key aspects of the Queen Charlotte goshawk's natural history.

Goshawks typically nest and forage in old-growth forest, but use mature second-growth (previously harvested, regenerating stands that have developed adequate structure) for either purpose where old-growth forest is limited (Titus *et al.* 1994, pp. 19–24; Iverson *et al.* 1996, pp. 27–40; McClaren and Pendergast 2003, pp. 4–6). Non-forested land, recently clear-cut areas, and young second-growth stands are avoided (Iverson *et al.* 1996, pp. 27–40).

''Old growth'' or ''old forest'' refers to a structural stage of forest characterized by several age classes of trees, including dominant trees that have reached the maximum size typical for the site, accumulations of dead, dying, and decaying trees and logs, and younger trees growing in gaps between the dominant trees. Such stands are typically over 250 years old within the range of the Queen Charlotte goshawk, and have not been previously harvested.

Forest regeneration following timber harvest usually results in dense second-growth stands that may support populations of some prey species, but research across North America suggests that goshawks avoid these habitats, presumably because they are too dense for the hawks to effectively hunt (Iverson *et al.* 1996, p. 64; DeStefano and McCloskey 1997, p. 38; Beier and Drennan 1997, p. 570; reviewed by Greenwald *et al.* 2005, pp. 125–126 and USFWS 2007, pp. 62–67). Goshawks, however, have been observed hunting in 10–20-year-old second-growth stands by flying above the forest canopy (Bloxton 2002, pp. 42–43).

As second-growth stands approach economic maturity, the forest structure develops adequately to allow goshawks to nest and forage below the canopy. Second growth reaches economic maturity when its growth rate begins to slow. Trees of this age typically have not reached maximum size. Canopies of these stands are usually uniformly dense unless the stand was harvested in a multi-age system or has been thinned. We refer to such stands as ''mature,'' or ''mature second growth.'' In this document, ''young second growth'' refers to second growth that has not yet reached economic maturity.

Mature forest with structure suitable for goshawk nesting and foraging may develop as early as 45 to 50 years following harvest on the most productive sites in the southern portion of the Queen Charlotte goshawk's range (Doyle 2004, pp. 27–28; McClaren 2003a, p. 19), but may take over 100 years on less productive sites (Iverson *et al.* 1996, p. 71). These stands are typically harvested within a decade or two of reaching economic maturity, if they are in an area open to logging. On lands managed for sustained-yield timber harvest, approximately 10 to 20 percent of the second growth is typically mature and suitable as goshawk habitat, although this percentage varies with harvest history, stand treatments, and current demand for timber (Daniel *et al.* 1979, pp. 304–344). Unharvested retention areas (e.g., stream buffers) provide old-growth habitat in addition to any mature second growth in harvested landscapes.

Goshawks hunt primarily by flying between perches and launching attacks from those perches. They take a variety of medium-sized birds and mammals, depending largely on local availability (Squires and Reynolds 1997, p. 1), which varies markedly among the islands in the Queen Charlotte goshawk's range. Red squirrels (*Tamiasciurus hudsonicus*) and sooty grouse (*Dendragopus fuliginosis*) (formerly blue grouse, *D. obscurus*) form the bulk of the diet in many locations, with thrushes, jays, crows, ptarmigan, and woodpeckers frequently taken as well (Ethier 1999, pp. 21–22 and 32–47; Lewis 2001, pp. 81–107; Lewis *et al.* 2004, pp. 378–382; Doyle 2005, pp. 30–31; Doyle 2006, pp. 138–139; Lewis *et al.* 2006, pp. 1154–1156). During winter, many avian prey species migrate from the region, reducing the variety and abundance of prey available (Ethier 1999, p. 22; MacDonald and Cook 1999, pp. 23–24; Nagorsen 2002, pp. 92–97; Doyle 2005, p. 31). Winter diets of the Queen Charlotte goshawk are largely unknown, although Titus *et al.* (2003, p. 49) used stable isotopes from feathers to characterize diets of individual birds, and suggested that squirrels, passerines, and for some goshawks, ''intertidal marine birds'' and ptarmigan may be important prey outside the nesting season. Doyle (2004, p. 27; 2006, pp. 138–139) suggested that red squirrels and grouse are likely to be a key year-round prey, where they exist, since they remain active during the winter.

Prey availability is defined by prey abundance and suitability of habitat for successful hunting. Commercial logging can reduce both. Studies in coastal British Columbia have documented that density of important prey species including varied thrush (*Ixoreus naevius*), hairy woodpecker (*Picoides villosus*), and red-breasted sapsucker (*Sphyrapicus ruber*) are reduced by clearcut logging (Savard *et al.* 2000, pp. 59–63). Species consistently favored by clearcut logging tended to be small birds such as sparrows and warblers (Savard *et al.* 2000, pp. 32–33), which are not a major component of goshawk diets (Lewis *et al.* 2006, pp. 1153–1156). Red squirrel densities on the Queen Charlotte Islands were low in young second growth stands, but increased with age, peaking in 40 to 49-year-old stands (Doyle 2004, p. 23).

Old growth and mature second-growth forests provide productive habitat for prey species in a setting where goshawks can effectively hunt. Timber harvest is believed to result in prey population declines because few potential prey species within the range of the Queen Charlotte goshawk are adapted to open and edge habitats (Doyle 2006, pp. 138–139; Doyle and Mahon 2003, p. 1; reviewed by Iverson *et al.* 1996, pp. 59–61; USFWS 2007, pp. 42–45). Goshawk researchers have suggested that when and where logged areas grow into dense second-growth stands, hunting is impaired because these stands do not offer adequate flight space (e.g., Iverson *et al.* 1996, p. 71; DeStefano and McCloskey 1997, p. 38; Beier and Drennan 1997, p. 570; reviewed by Greenwald *et al.* 2005, pp. 125–126; USFWS 2007, pp. 62–67), although goshawks in coastal forests of western Washington have been observed hunting over dense second–growth stands (Bloxton 2002, pp. 42–43). Outside the range of the Queen Charlotte goshawk, where prey adapted

to open habitats are more common, goshawks have been observed hunting forest edges and openings (e.g., Kenward 1982, pp. 69–79; Kenward 2006, pp. 155–165.).

Queen Charlotte goshawk nests are typically located in large trees within mature or old-growth forest stands that have greater volume and canopy cover than the surrounding forest (Iverson *et al.* 1996, pp. 47–56; Flatten *et al.* 2002, pp. 2–3; McClaren 2003a, p. 12; McClaren and Pendergast 2003, pp. 4–6; Doyle 2005, pp. 12–14; USFWS 2007, pp. 26–30). Nesting pairs appear to be territorial, with nests spaced somewhat uniformly across available habitat. Nesting density, as measured by mean distance between adjacent nesting areas, appears to vary with habitat quality (primarily prey availability). Mean distance between nesting areas ranged from 4.3 miles (mi) (6.9 kilometers (km)) on Vancouver Island (McClaren 2003a, p. 13) to 6.7 mi (10.8 km) on the Queen Charlotte Islands (NGRT 2008, p. 8), yielding average nesting territories (circular plots centered on the nest area) of approximately 10,000 acres (ac) (3,700 hectares (ha)) on Vancouver Island and 25,000 ac (10,000 ha) on the Queen Charlotte Islands. Queen Charlotte goshawks appear to nest at lower densities than northern goshawks studied elsewhere (reviewed by McClaren 2003a, pp. 13 and 21; Doyle 2005, p. 15; and USFWS 2007, pp. 45–47).

Studies of northern goshawks across the western United States suggest that successful goshawk home ranges typically contain between 40 and 60 percent suitable foraging habitat (mature and old-growth forest) (e.g., Reynolds *et al.* 1992, p. 27; Patla 1997, pp. 71–74; Patla and Trost 1997, p. 34; Finn *et al.* 2002, pp. 431–433). These observations are consistent with findings for Queen Charlotte goshawks (Doyle 2005, p. 14; Iverson *et al.* 1996, p. 55; USFWS 1997, pp. 36–38). Goshawks in Southeast Alaska have been documented using landscapes with as little as 23 percent cover by old forest (Iverson *et al.* year, p. 55).

Individual nests are frequently not used in subsequent years as pairs often move to an alternate nest. Most alternate nests are clustered within a few hundred acres (200 to 500 ha) (McClaren 2003a, p. 13; Flatten *et al.* 2001, pp. 9–11), although females have been documented leaving the nesting area altogether, nesting in subsequent years with a new mate in a different territory up to 95 mi (152 km) away. Males have been documented moving up to 2 mi (3.2 km) between subsequent nests, but apparently remain in their nesting territory in subsequent years (Flatten *et al.* 2001, pp. 9–10).

Nest occupancy (percentage of nest areas with adult goshawks present) and nesting activity (percentage of nest areas with eggs laid) appear to vary with habitat suitability, prey availability, and weather, with greater occupancy or activity in areas with less fragmented forest habitat and in years with higher prey abundance and warmer, drier weather (Doyle and Smith 1994, p. 126; Patla 1997, pp. 34–35; Finn *et al.* 1998, p. 1; Ethier 1999, pp. 31 and 36; Finn *et al.* 2002, pp. 270–271; McClaren *et al.* 2002, p. 350; McClaren 2003a, pp. 11 and 16; Desimone and DeStefano 2005, pp. 317–318; Fairhurst and Bechard 2005, pp. 231–232; Patla 2005, pp. 328–330; Salafsky *et al.* 2005, pp. 242–244).

When prey availability and weather are suitable and nesting is initiated, nest success (percent of active nests that fledge at least one young) is typically high (87 percent rangewide, 1991 to 2004), as is productivity (1.6 to 2.0 fledglings per active nest) (USFWS 2007, p. 54). Fledglings typically spend about 6 weeks within several hundred yards (several hundred meters) of their nests learning flight and hunting skills before dispersing (McClaren *et al.* 2005, p. 257). Retention of mature forest structure near the nest is believed to be important for supporting this developmental stage (Reynolds *et al.* 1992, pp. 15–16; Kennedy *et al.* 1994, p. 80; Ethier 1999, p. 31; Finn *et al.* 2002, pp. 270–271; McClaren 2003a, pp. 11 and 16; Desimone and DeStefano 2005, pp. 317–318; McClaren *et al.* 2005, pp. 260–261; Patla 2005, pp. 328–330).

Range

In our previous status reviews and findings, we identified the range of the Queen Charlotte goshawk as the islands and mainland of Southeast Alaska and the Queen Charlotte Islands and Vancouver Island in British Columbia (60 FR 33784; 62 FR 46710; 72 FR 63123; USFWS 2007). In April 2008, the ''Northern Goshawk *(Accipiter gentilis laingi)* Recovery Team'' (NGRT) in Canada released a recovery strategy for the Queen Charlotte goshawk. The NGRT reviewed morphometric and radio-telemetry data, and distribution of coastal habitat and prey, and determined that, in addition to Vancouver Island and the Queen Charlotte Islands, the coastal mainland of British Columbia west of the Coast Range (including the Coastal Douglas-fir biogeographic zone and wet Coastal Western Hemlock subzones and variants) is also within the range of the subspecies (NGRT 2008, pp. 3–6). We believe that the NGRT's determination is the best available information on the range of the bird in Canada. Therefore, for purposes of this listing, we define the range of the DPS to include that portion of British Columbia that includes Vancouver Island and its surrounding islands, the mainland coast west of the crest of the Coast Range and adjacent islands, and the Queen Charlotte Islands (see map at *http://alaska.fws.gov/fisheries/endangered/pdf/goshawk/Goshawk_2.pdf*).

Summary of Comments and Recommendations

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion on our proposed rule from knowledgeable individuals with scientific expertise that included familiarity with the Queen Charlotte goshawk and its habitat, biological needs, and threats, and from forest managers familiar with forest conditions and management in British Columbia. We contacted five experts, and received responses from British Columbia Ministry of Environment (two reviewers), British Columbia Ministry of Forests and Range (two reviewers), and Alaska Department of Fish and Game (one reviewer). These were the only comments provided by State or Provincial government agencies, and are considered recommendations from the States.

We reviewed all comments we received from the peer reviewers for substantive issues and new information regarding the proposed listing of the subspecies. The reviewers made several suggestions to improve the accuracy and completeness of the rule, including new information that was not available when we completed our status review. Most reviewers stated that our conclusions appeared to be reasonable; one believed that our conclusions may be reasonable, with clarification of a few key, technical points. Peer review comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) *Comment:* Scientific uncertainty is not clearly expressed.

Our Response: We have carefully reviewed the proposed rule, and modified the language to be less assertive where uncertainty exists. For example, we have added qualifying language such as ''may be,'' ''suggests,'' ''appears to be,'' or ''is likely to'' where data or logic suggest an interpretation that is equivocal. Where appropriate, we

have added discussions of alternative explanations or interpretations.

Our analyses of forest resources rely on data sets compiled from various sources. We made several assumptions and adjustments to produce estimates of habitat availability across land ownerships and jurisdictions, and to make projections of future conditions. These assumptions and adjustments are described in our status review (USFWS 2007) and updated appendices (USFWS 2010), and are not repeated in detail in this final rule. We have added text acknowledging that the various sources of data for forest cover vary in their reliability.

(2) *Comment:* Use of literature to support specific points is inconsistent, inappropriate, or incomplete.

Our Response: We have used a wide variety of literature to support this rule. In doing so, we have endeavored to use peer-reviewed, published literature reporting on work from within the range of the Queen Charlotte goshawk whenever possible, as our first choice. Where such literature was not available, we have relied on unpublished reports and abstracts from scientific meetings that report on Queen Charlotte goshawks. We have also used many publicly available forest management documents, including plans, reports, agreements, and official agency news releases.

We have used peer-reviewed publications on goshawks from outside the range of the Queen Charlotte goshawk when deemed necessary to show consistency or diversity of findings across broad geographic areas, such as North America or western North America. In some cases, we have reported (or added) observations from coastal forests adjacent to the range of the Queen Charlotte goshawk, where we believe those observations offer useful insight. We have, in a few cases, used more general references, such as textbooks, when summarizing topics peripheral to the subject of goshawk biology and conservation. We have relied on draft documents only if they were available to the public, through agency Web sites, for example. We have avoided draft manuscripts that were in preparation and not generally available to the public. In a few cases, we have cited preliminary research results released openly at interagency meetings, but have characterized these as preliminary and unconfirmed.

Reviewers have suggested several additional references, most of which were not available when we prepared our status review (USFWS 2007) or the proposed rule. These have been incorporated into the final rule where appropriate.

(3) *Comment:* The Service's *Queen Charlotte Goshawk Status Review* (USFWS 2007) is primarily a literature review which does not present original field data so should not be cited as a reference; nor should other literature reviews.

Our Response: The final rule includes a summary of goshawk biology and habitat relations, but it is not intended to be an exhaustive treatise on the topic. More detail on many of the topics discussed in the final rule is available in our status review (USFWS 2007). Where that document contains a review of relevant literature, we refer the reader to it, with the phrase ''reviewed by USFWS 2007, pp. * * *'' We use the phrase ''reviewed by * * *'' to identify other literature reviews used in preparation of this rule, as well.

The status review and its companion (updated) appendices (USFWS 2010) also contain compilations and original analyses of unique data sets on forest resources across the range of the goshawk, drawn from a variety of sources. These data and the assumptions associated with them have been reviewed by the U.S. Forest Service and the British Columbia Ministry of Forests and Range. These analyses are central to our findings, and are cited throughout the final rule.

(4) *Comment:* Science, conservation, judgment, speculation, opinion, policy, law, and rulemaking are not clearly separated in the proposed rule.

Our Response: The final rule is a blend of scientific reporting, synthesis and interpretation, application of policy, and legal findings. This is inescapable. We have endeavored to clearly delineate among these categories in the final rule. Scientific results are typically identified by words such as ''documented,'' ''reported,'' or ''found,'' followed by, or preceded by, a citation. Where we relate interpretations by those scientists, as are often found in the discussion sections of scientific papers and reports, we typically use phrases such as ''interpreted,'' ''believed,'' or ''concluded.'' Our interpretations and conclusions are identified similarly, for example, ''we interpret this as * * *,'' ''we consider this * * *,'' or ''we conclude * * *.'' Where we discuss specific policies, we generally describe the policy, often with a list of relevant considerations, and then discuss the application of the policy, in this case. Conclusions related to our legal authorities are typically stated as findings, for example, ''we find that * * *'' or ''we conclude that * * *.''

(5) *Comment:* The link between loss of mature/old forest and goshawk population declines should be more clearly described.

Our Response: We have modified the text in several places to explain the basis of our conclusion that reduction of forest cover has reduced the ability of the landscape to support breeding goshawks, primarily through alteration of hunting habitat. No study has documented population declines as a direct result of logging, likely due, in part, to the difficulty in directly censusing goshawk populations. There is evidence from outside the range of the Queen Charlotte goshawk that logging reduces nest activity, which is believed to have reduced nesting populations (e.g., Crocker-Bedford 1990, pp. 263–267). Several investigators from across the range of the northern goshawk have concluded that prey availability, as controlled largely by forest structure, is more likely than nest site availability to limit goshawk populations (Doyle and Smith 1994, p. 126; Widen 1997, pp. 110–112; Reynolds and Joy 1998, p. 2; Reynolds *et al.* 2006, pp. 264–268 and 271–273). Within the range of the Queen Charlotte goshawk, models that estimate habitat capability and management recommendations to conserve goshawk habitat are based largely on observation and measurement of areas where goshawks successfully nest, and where they do not. These observations are supported by additional observations on distribution and availability of prey. Together, this body of knowledge represents the best available information on landscape management for conservation of goshawks. Our charge under the Act is to use the best available data to support our listing decisions.

(6) *Comment:* References should be cited to support the statement that commercial logging reduces prey.

Our Response: Text has been added that describes studies from British Columbia that address changes in bird communities with clearcut logging, and use of second-growth forest stands by red squirrels.

(7) *Comment:* Prey populations may be more stable within the range of the Queen Charlotte goshawk than elsewhere, so discussions of fluctuations in nest activity due to fluctuations in prey do not apply to the subspecies.

Our Response: We are aware of no data that show prey populations in the range of the Queen Charlotte goshawk are more stable than elsewhere, and the reviewer provided no information to support the statement. In contrast, prey fluctuations in coastal British Columbia are specifically discussed by Doyle

(2003), and Doyle (2007, p. 2), particularly as related to squirrel population response to fluctuations in cone crops.

(8) *Comment:* Snowshoe hares *(Lepus americanus)* and hoary marmots *(Marmota caligata)* are unlikely to be significant prey species because hares are not common along the mainland coast and adult marmots are too large for goshawks.

Our Response: We have deleted the discussions of both snowshoe hares and hoary marmots as potentially significant prey resources for goshawks along the mainland coast. We previously believed that snowshoe hares might provide prey for goshawks in recently logged areas along the mainland coast because Nagorsen (2002, p. 93) described the range of the species as ''the entire mainland of British Columbia but absent from coastal islands.'' The reviewer points out a more recent work by Nagorsen (2005, pp. 85–91) which indicates that snowshoe hares are not common along the coastal mainland. We simply misjudged the size differential of adult hoary marmots as potential prey.

(9) *Comment:* The proposed rule suggests that goshawks do not use young second growth for hunting, but Bloxton (2002, pp. 42–43) presented telemetry data suggesting that goshawks will hunt in some second-growth stands, to some degree.

Our Response: We have modified the text to acknowledge Bloxton's observations from western Washington.

(10) *Comment:* Unpublished literature on the morphology of Queen Charlotte goshawks has been made available to the Service, but has not been referenced or used. This information could be used to support an alternative approach to understanding subspecies concepts, or as evidence of hybridization, and to help evaluate distinctiveness of goshawks on the Queen Charlotte Islands.

Our Response: We addressed size and color (i.e., morphology) of Queen Charlotte goshawks in relation to other purported subspecies, and in relation to range boundaries, in our status assessment (USFWS 2007, pp. 13–19) and in our Response to Court (72 FR 63125). Among the recent, unpublished reports and conference abstracts that we have evaluated and cited in these reviews are Titus *et al.* (1994), Flatten *et al.* (1998, 2001b, 2002), and Flatten and McClaren (2003). We are in possession of one additional, draft manuscript by two of these same authors that to our knowledge has not been submitted for publication, and has not been otherwise released for general distribution. Its findings are generally consistent with the work reported in the other references named above. For these reasons, we have not cited it.

These reports describe size and color variation among goshawks on Vancouver Island and in Southeast Alaska, but not the Queen Charlotte Islands or mainland British Columbia. The findings are largely consistent with published subspecies descriptions, but with much larger sample sizes. The authors suggest that the observed variation in size and color may represent a clinal variation, with smaller birds to the south and larger birds to the north. We have added text to the final rule describing this work, as an alternative approach to understanding subspecies concepts, and as possible evidence of hybridization along the margins of the subspecies' range. We have not used these references in our evaluation of the Queen Charlotte Islands as a significant portion of the range because birds from these islands were not included in the analyses.

(11) *Comment:* Several terms in the proposed rule are undefined. A glossary would be useful.

Our Response: We have provided definitions of all technical terms upon their first use, in the text. Some discussions have been reworded to minimize technical terms and eliminate jargon.

(12) *Comment:* Discussions of forestry and forest management should be removed from the section on goshawk biology and moved into a (new) section on conservation/management.

Our Response: We have chosen to leave our discussions of forest succession and forest management in the section on goshawk biology and habitat because it is relatively brief and is directly relevant to understanding goshawk habitat limitations in areas where forests are managed for timber production.

(13) *Comment:* The Service should consider noting that active research and monitoring of goshawk nests has not occurred in Southeast Alaska since about 2000, so status of the bird is less certain than it was 6 to 9 years ago.

Our Response: This rule implements our 2007 finding that listing is warranted for the British Columbia DPS, but not Southeast Alaska (72 FR 63123). We, therefore, focus on threats in British Columbia, and do not address Southeast Alaska, except to describe previous agency actions. We have not added the suggested note because it does not provide information useful to our decision for British Columbia.

(14) *Comment:* The final rule should include discussions of clinal variation and breeding dispersal in the discussion of hybridization as a threat.

Our Response: We have added discussions on both of these topics.

(15) *Comment:* The discussion of Foreseeable Future fails to address uncertainty and does not adequately link habitat change to goshawk viability.

Our Response: We have revised the discussion of foreseeable future to better describe the data sources we used to estimate the amount of suitable goshawk habitat we believe will be available in the future, and the uncertainty associated with those estimates. We have repeated our understanding of the relationship between timber harvest, forest regeneration, and goshawk habitat, to clarify the basis for our inferences about the quantity and quality of goshawk habitat likely to exist in the future, given the timber harvest regimes currently envisioned.

(16) *Comment:* The basis for determining that Queen Charlotte goshawks in British Columbia are a DPS is not clear in the proposed rule. Is it based on a geopolitical boundary or is it based on biology and population ecology?

Our Response: We have added text that clarifies the two-part test defined by our DPS policy—first, that the populations are distinct, and second that they are significant. In this case we establish (1) that the population segments are distinct because they are separated by an international border across which habitat management and other regulatory mechanisms differ. Then we establish (2) that the population segment in British Columbia is significant to the taxon because it occupies approximately two thirds of the land area and three quarters of the productive forest habitat in the range of the subspecies, and may contain important genetic diversity for the subspecies.

(17) *Comment:* The description of how ''significant portion of the range'' is defined is rather general and not particularly useful.

Our Response: The Act defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as ''any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range'' (16 U.S.C. 1532). The term ''significant portion of the range'' is not defined in the Act or its implementing regulations.

In the proposed rule, we defined a significant portion of a species' range as an area important to conservation of the species because it contributed

meaningfully to representation, resiliency, or redundancy of the species. Representation, resiliency, and redundancy were discussed as general concepts; specific circumstances of each potentially significant portion of the British Columbia DPS's range were examined to evaluate how each area contributed to conservation of the DPS. In the final rule, we retain our focus on a given area's contribution to conservation of the DPS through redundancy, resiliency, and representation, but set a threshold for ''significant'' in terms of extinction risk. As described in the rule, a portion of the range is significant if the DPS would be in danger of extinction without the portion in question. This approach recognizes the Queen Charlotte goshawk itself as the reference point for determining whether a portion of the range is ''significant,'' and is consistent with recent case law on the matter *(see Greater Yellowstone Coalition* v. *Servheen,* 672 F. Supp. 2d. 1105,1124 (D. Mont. 2009)).

Since publication of the proposed rule, two district court decisions have influenced our interpretation of how to proceed if a portion of the range is deemed significant, and the goshawk is found to be either endangered or threatened within that portion of the range. In *Defenders of Wildlife* v. *Salazar* (729 F. Supp. 2d 1207 (D. Mont. 2010)) and in *WildEarth Guardians* v. *Salazar* (2010 U.S. Dist LEXIS 105253 (D. Ariz. Sept 30, 2010)), the courts ruled that the term ''significant portion of the range'' helps to define the circumstances under which a species should be listed as endangered or threatened. The courts ruled that the term does not, however, provide a basis for listing a species in only a portion of its range. Rather, if the Service determines that a species is endangered or threatened in a significant portion of its range, the species must be listed throughout its range. Because the Act defines ''species'' to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature,'' the same logic applies to both subspecies and distinct population segments (e.g., a subspecies or DPS found to be endangered in a significant portion of its range must be listed as endangered throughout its range). This interpretation is consistent with the somewhat ambiguous language of the Act, appears to implement Congressional intent, and is consistent with previous listing actions by the Service. We, therefore, adopt this interpretation in the final rule.

(18) *Comment:* Goshawks have been extirpated from urbanized areas such as Victoria on Vancouver Island, and that range is now occupied by Cooper's hawks. Scientific rationale should be provided to explain why such areas are considered part of the range of the listed subspecies.

Our Response: Goshawks are highly mobile and have established nests near human habitation in some situations. We believe that they could move through, and possibly nest near, any urbanized area within the range of the DPS, on Vancouver Island or elsewhere. In such cases, the birds themselves would remain listed entities. The Service does not designate critical habitat in foreign countries (50 CFR 424.12(h)), so inclusion of any area within our defined range of the DPS would create no additional restrictions or regulatory burdens under the Act.

(19) *Comment:* Discussions of potential impacts from disease should be supported by references.

Our Response: We have expanded our discussion of disease risks, with citation of relevant literature.

(20) *Comment:* The discussion of inbreeding depression as a risk to small populations such as the one on the Queen Charlotte Islands should consider how this topic has been dealt with for other small raptor populations.

Our response: The rule now mentions managed captive breeding and translocation as potential methods for mitigating the effects of low genetic diversity, as these methods have been used for other small populations, including raptors such as peregrine falcons and Mauritius kestrels.

(21) *Comment:* Several reviewers commented that the quality of second growth stands as potential habitat for goshawks in the future is under-represented.

Our Response: As we discuss in the rule under ''Queen Charlotte Goshawk Biology and Habitat,'' second-growth stands develop structure suitable to support nesting and foraging as the stands approach ''economic maturity,'' which is the age at which average annual growth of individual trees in a second-growth stand begins to slow. This may occur as early as 45 to 50 years on the most productive sites, but may take more than 100 years on less productive sites. We use the term ''mature'' or ''mature second growth'' to identify stands with suitable nesting and foraging structure that have regenerated following timber harvest or other forest disturbance. Throughout the rule, we use the phrase ''mature and old-growth habitat'' or ''mature and old forest'' to describe suitable goshawk nesting and foraging habitat, explicitly acknowledging the value of second-growth forests as goshawk habitat. Our analyses of forest cover assume that where second-growth stands will continue to be managed for timber production, approximately 15 percent of the second-growth forest will be of a structural stage that would support goshawk nesting at any given time, although this is likely to vary with harvest history, site productivity, and silvicultural treatments. Where second-growth stands will be protected from logging in the future, our analyses assume that previously harvested stands will provide suitable nesting and foraging habitat.

(22) *Comment:* The final rule should include updated information on the status of Land Use Planning processes for coastal mainland British Columbia and Haida Gwaii.

Our Response: As we acknowledge in this final rule, Land Use Planning continues to evolve in coastal British Columbia. We have used the most current information on the status of Land Use Planning processes available to us.

(23) *Comment:* There is too much emphasis placed on the South Island Forest District, which is only a portion of the goshawk's range in British Columbia.

Our Response: We necessarily focus on Vancouver Island as a potential ''significant portion of the range'' of the Queen Charlotte goshawk because we have been directed to do so by the District Court of the District of Columbia (*Southwest Center for Biological Diversity* v. *Norton,* No. 98–0934 (D.D.C. May 24, 2004)). The South Island Forest District covers the southern half of Vancouver Island plus several adjacent islands. The District includes some of the highest productivity forests in the range of the Queen Charlotte goshawk, and has some of the greatest challenges to conservation from timber harvesting, other competing land uses, and other species of conservation concern. The northern half of Vancouver Island and portions of the mainland are included in two other forest districts. These districts both have substantially lower levels of human impact, but are also managed for timber production. Our explicit consideration of the South Island Forest District (now called South Island Resource District) is limited to a brief discussion of the overlap between high levels of endemism and human impacts there.

(24) *Comment:* Results of spatially explicit modeling of goshawk habitat in

coastal British Columbia are now available to estimate the number of goshawk territories that might have been supported historically, currently, and in the future (Smith and Sutherland 2008).

Our Response: Although the cited reference is dated 2008, it was used internally by the NGRT and not available for public use when we wrote the proposed rule in 2009. Now that the document has been released, we have incorporated this important work into the final rule.

(25) *Comment:* Definitions and criteria used to evaluate habitat quality based on the percentage of mature/old forest are confusing and habitat quality classes appear to overlap.

Our response: One of the statistics we use to evaluate habitat quality is percentage of the landscape covered by mature and old forest, based on evaluations of goshawk habitat by Doyle and others in coastal British Columbia. In the proposed rule, we defined landscapes on Vancouver Island and the Queen Charlotte Islands differently than landscapes on the mainland, based on perceived differences in prey communities (see comment concerning snowshoe hares and marmots, above). Because we no longer believe that prey communities on the mainland are significantly more diverse than on the islands, we have eliminated this difference, and now consider landscapes with less than 40 percent cover by mature and old forest low-quality habitat and landscapes with greater than 40 percent cover by mature and old forest high-quality habitat, across the range of the DPS. A discussion of supporting literature is included in the rule.

(26) *Comment:* Since your analyses were completed in 2007, there have been reallocations of lands from 6 of the 11 Tree Farm Licenses on Vancouver Island to create a new Timber Sale Area, and private lands have been removed from three of the Tree Farm Licenses. Timber Supply Analyses have been updated for two of the three Timber Sale Areas on Vancouver Island.

Our Response: Timber supply analyses and logging projections by the Ministry of Forests and Range and timber tenure holders in British Columbia, which formed the basis of our 2007 analyses, are dynamic. We have not attempted to reanalyze these data because we do not believe that the reallocations will substantially alter the results or our conclusions. We base this on the fact that the lands removed from the Tree Farm Licenses appear to remain primarily in timber production status. They are, therefore, unlikely to provide significant additional protection for goshawk habitat.

(27) *Comment:* Approximately 27 percent of Vancouver Island is in private ownership. Forest cover data are not available for these lands, so habitat availability is underestimated in the proposed rule. These lands are believed to be very productive for goshawks. The Government of British Columbia has little influence on management of private lands to conserve goshawk habitat.

Our Response: We used estimates of forest cover on private lands provided by Neimann (2006). These data are designated ''BTM/BEC'' (Baseline Thematic Mapping/Biogeoclimatic Ecosystem Classification) in Niemann's (2006) tables, and total 939,000 ha, or 27 percent of Vancouver Island (matching the reviewer's estimate), including approximately 791,000 ha of forest. Of this total, 77 percent (609,000 ha) is second growth. We have acknowledged the Government of British Columbia's limited ability to manage timber harvest and goshawk habitat conservation on private lands in this final rule.

(28) *Comment:* Data on forest cover used in the rule come from a variety of sources of varying dates and of variable reliability. The limitations of these data are not well expressed, potentially leading readers to believe the data are more complete and accurate than they really are, especially for private land.

Our Response: Sources of data on forest and other land covers, and assumptions we made in developing various statistics, are listed primarily as footnotes in the tables of our updated appendices (USFWS 2010). The base data were gleaned from many sources. We endeavored to ensure the data were as comparable as possible, but as the reviewer notes, current, consistent data across ownerships do not exist. We acknowledge that there are several potential sources of error in these data, including differences in how forest covers were defined and categorized, harvest and growth that has occurred since the data were developed, and misclassifications of land cover. We have not provided definitive descriptions of the statistical error associated with these error sources primarily because no such estimates are available, to our knowledge. We continue to believe that our rangewide and regional estimates of forest cover and composition are the best available.

(29) *Comment:* Some of the statistics on forest cover in the appendix tables cited (USFWS 2008) do not sum across columns correctly.

Our Response: We have reviewed the data summaries in question and have corrected arithmetic errors. The updated information used in the final rule is presented in USFWS (2010). We have not updated tables A–10 through A–15, which present ''Habitat Value'' modeling discussed in our status review (USFWS 2007, pp. 99–101) because we do not use these analyses in the final rule.

(30) *Comment:* ''Productive forest'' is defined differently in Alaska than it is in British Columbia, potentially biasing comparisons between the two jurisdictions.

Our Response: This rule focuses on conditions within British Columbia, rather than comparing conditions in British Columbia to those in Southeast Alaska, so the issue is largely moot for purposes of this rulemaking. For our status review (USFWS 2007, 2010) and rangewide finding in our Response to Court (72 FR 63123), we developed estimates of productive forest across coastal British Columbia and Southeast Alaska. We relied on definitions used by the U.S. Forest Service and the British Columbia Ministry of Forests and Range, which do indeed differ. The definition used by the Ministry was qualitative (''capable of producing a merchantable stand within a defined period of time''), while the Forest Service's was quantitative (''capable of producing at least 20 cubic feet of wood fiber per acre per year, or having greater than 8,000 board feet per acre''). Goshawks rely on mature forest structure, rather than forest volume, so the difference is probably not critical for purposes of characterizing goshawk habitat, as long as the low-end productive forest by British Columbian standards is structurally similar to low-end productive forest by Alaskan standards. We assumed that they are because both agencies use these definitions to differentiate forests that produce enough wood volume to support commercial timber harvest from those that do not.

(31) *Comment:* Statistics in Table A–9 of the Service's updated appendices (USFWS 2008) do not account for old-growth forest that will not be harvested to protect non-timber values such as ''Identified Wildlife'' habitat, riparian retention, unstable ground, etc.

Our Response: Estimates of the amount and percentage of forest that will not be harvested within areas otherwise open to timber harvest, to protect non-timber values, are displayed in Table A–9 in the column labeled ''Retention.'' Forest that will not be harvested because it is too steep, wet, unstable, etc., is displayed in the column labeled ''Inoperable.'' These estimates come from Timber Supply

Analysis Reports provided by the British Columbia Ministry of Forests and Range.

(32) *Comment:* The proposed rule assumes that all old growth will be logged before second-growth logging begins, but 35 percent of the current harvest comes from second growth. This percentage is expected to rise over the next 50 years.

Our Response: We discussed the mix of old growth and second growth in the current harvest, and as an increasing percentage of the harvest, in our status review (USFWS 2007, pp. 90–91). We reviewed Timber Supply Analysis Reports for each timber tenure in the Coast Forest Region to determine the rate at which second growth would replace old growth in the harvest. We did not assume that all old growth would be logged before second growth logging begins, and none of our analyses or conclusions depends on such an assumption.

(33) *Comment:* There is inadequate discussion of emerging tools, techniques, and policies to minimize impacts to goshawks from timber harvest in British Columbia.

Our Response: The broad and expanding suite of forest management tools and restrictions used by the province of British Columbia is discussed under ''Factor D—Inadequacy of Regulatory Mechanisms'' and under ''Evaluation of Conservation Efforts.''

Public Comments

In the proposed rule published on November 3, 2009, we requested that all interested parties submit written comments on the proposal by December 8, 2009. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. We did not receive any requests for a public hearing.

During the comment period, we received comments from five parties, including a falconer's group, an environmental education center, the Canadian Wildlife Service, and two individuals. Two commenters supported our proposal to list the subspecies, one opposed the proposal, and two expressed no preference. All substantive information provided during the comment periods is addressed below, and has been incorporated into this final determination as appropriate.

(34) *Comment:* Listing the British Columbia DPS as threatened or endangered is inappropriate because (a) there is no evidence of significant range contraction or population declines, (b) only 3 to 5 percent of the forest habitat has been permanently lost to urbanization and agriculture, and (c) approximately half of the estimated population and nearly two thirds of the geographic area occupied by the DPS are on the mainland coast, where threats due to logging are believed to be ''low to moderate.'' Instead, more careful and comprehensive forest management planning is appropriate, especially in the Vancouver Island Conservation Region.

Our Response: The Act lists five threats or ''factors'' that we are to base our listing decisions upon. These include (A) the present or threatened destruction, modification, or curtailment of habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting the species continued existence. For a species to be listed under of the Act, documentation of either range contraction or population decline is not required. Instead, the Act is intended to address threats that either have caused, or are expected to cause, such effects.

Our review considers threats to habitat broader than conversion of forest to urban or agricultural uses. As we explain in this rule, clearcut logging is believed to be a threat because it creates openings with few suitable prey, and results in dense stands of second-growth forest that goshawks tend to avoid until those stands approach maturity. Habitat modeling recently released by the NGRT suggests that across British Columbia, habitat capability (the number of goshawk territories that could be supported) has declined by approximately 33 percent since industrial logging began approximately 100 years ago. Threats from logging appear to be somewhat lower on the mainland coast than they are on either the Queen Charlotte Islands or Vancouver Island. Still, our analyses indicate that habitat loss on the mainland coast is likely to contribute to declines and increased vulnerability of the small mainland population, which the NGRT estimates to be approximately 177 to 191 breeding pairs, based on habitat capability modeling and observed territory occupancy rates (NGRT 2008, p. 8).

(35) *Comment:* The Queen Charlotte Islands should not be considered a significant portion of the DPS's range because these islands provide only 9 percent of the area and support only about 3 to 5 percent of the breeding population. Further, the islands are only about 5 percent of the subspecies' entire range, and support only about 2 percent of the entire population. Therefore, listing goshawks on the Queen Charlotte Islands differently from how the subspecies is classified elsewhere within the DPS is not warranted.

Our Response: This rule addresses whether the Queen Charlotte Islands (and other such portions of British Columbia) constitute a significant portion of the range of the British Columbia DPS. It does not address whether the Queen Charlotte Islands (or any other areas) are a significant portion of the subspecies' entire range, which includes Southeast Alaska. The statistics provided by the commenter about percentages of the subspecies' entire range are, therefore, not relevant to this inquiry.

Our evaluation of significance, as related to ''significant portion of the range,'' is based on contribution of the area toward conservation of the DPS through representation, resiliency, and redundancy. The standard used in this rule differs from the standard we proposed in 2009 (74 FR 56757), as described below. We believe that this approach appropriately focuses on the biology and conservation status of the bird, best conforms to the purposes of the Act, and is consistent with judicial interpretations of the phrase ''significant portion of the range.''

(36) *Comment:* Because nesting habitat and prey numbers may limit goshawk populations in fragmented landscapes, goshawk habitat should be managed at varying scales to ensure adequate nesting and foraging habitat at the population level, as done through the Tongass Conservation Strategy in Southeast Alaska. Proper habitat management, not listing under the Act, is the key to species conservation.

Our Response: We agree with the commenter that appropriate habitat management at various scales is necessary to conserve goshawks where forests are managed for timber production and other values. However, when our analyses indicate that a species is in danger of extinction or is likely to become so in the foreseeable future, we are obligated to add it to the list of endangered or threatened species, as appropriate. With foreign species as considered in this rule, we have no authority to implement management and recovery efforts after listing. In this case we have, however, been working with the Provincial government and contributing to these efforts through membership on the NGRT and through exchange of information and draft document reviews, and intend to continue doing so.

(37) *Comment:* Consider supplementing the limited genetic diversity on the Queen Charlotte Islands by translocating birds from nearby island populations.

Our Response: This management recommendation is beyond the scope of this rule, and our authority. The NGRT has considered the issue of genetic isolation, and potential strategies to address it. We will ensure that the recovery team in British Columbia is aware of this recommendation.

(38) *Comment:* The Service should exercise due caution and all appropriate scientific skepticism in evaluating claims regarding the Queen Charlotte goshawk to avoid using the Act as a tool to curtail logging if the subspecies is not facing the threat of possible extinction.

Our Response: We have conducted a thorough assessment of the status of the Queen Charlotte goshawk (USFWS 2007). We have evaluated the best available data and other information and carefully considered the issues confronting the subspecies. Our analyses and findings have been published and independently reviewed. We have concluded that while recent and ongoing changes in forest management in British Columbia are encouraging, they have yet to fully demonstrate that they will be effective at protecting goshawk populations from ongoing threats related primarily to habitat loss from timber harvesting. We are, therefore, obligated under the Act to list the subspecies. We note, however, that neither the Service nor any other agent of the United States Government has authority to modify forest management in British Columbia. Our intent is to continue to assist when requested, and to encourage collaboration to affect rangewide conservation of the subspecies.

(39) *Comment:* If goshawks are listed in British Columbia, legal take of goshawks should not be affected outside the area in which they are listed, under ''similarity of species'' authorities.

Our Response: Section 4(e) of the Act authorizes the Service Director to designate non-listed species that closely resemble listed species as Threatened or Endangered for purposes of take, possession, transport, trade, export or import. In determining whether a species should be designated under this similarity of appearance authority, we must consider (1) the degree of difficulty enforcement personnel would have in distinguishing the species from a listed species, (2) the additional threat posed to the listed species by the loss of control occasioned because of the similarity of appearance, and (3) the probability that so designated a similar species will substantially facilitate enforcement and further the purposes and policy of the Act (50 CFR 17.50).

Although Queen Charlotte goshawks in British Columbia are essentially indistinguishable from those in Southeast Alaska, and difficult to tell from goshawks outside the range of Queen Charlotte goshawks, we do not believe that goshawks outside coastal British Columbia need to be designated under section 4(e) of the Act as threatened or endangered because we do not consider direct take for falconry or any other purpose to be a threat. Direct take is discussed further below under the heading ''Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.''

Summary of Changes From Proposed Rule

In the proposed rule, we determined that Vancouver Island (and surrounding smaller islands), the Queen Charlotte Islands, and the coastal mainland of British Columbia were each significant portions of the Queen Charlotte goshawk's range, and that the subspecies should be listed as endangered on the Queen Charlotte Islands and threatened elsewhere in British Columbia. For this final rule, we have modified our method for defining ''significant portion of the range'' to be more consistent with recent court rulings, as described below under ''Significant Portions of the British Columbia DPS's Range.'' As a result of this modified definition, Vancouver Island and the mainland coast of British Columbia are considered significant portions of the range, but the Queen Charlotte Islands are not. Because it is no longer considered a significant portion of the range, we no longer consider listing the population on the Queen Charlotte Islands as endangered to be warranted.

In both the proposed and final rules, we have used percentages of the landscape covered by mature second-growth and old-growth forest to define quality of the habitat. In the proposed rule, we used different standards for the mainland than we did for the islands, based on what we believed were differences in prey species availability, with snowshoe hares and marmots available to goshawks on the mainland but not on the islands. Information provided through our peer review indicates that snowshoe hares are not common along the coast, and adult marmots are too large for goshawks to regularly prey upon. We have, therefore, modified our indicators of high- and low-quality landscapes to be consistent across the DPS.

Review of the British Columbia DPS

Section 3(15) of the Act defines ''species'' to include ''any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' To interpret and implement the DPS provisions of the Act and Congressional guidance, the Service and the National Marine Fisheries Service published a ''Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act'' (DPS policy) in the **Federal Register** on February 7, 1996 (61 FR 4722). Under the DPS policy, three factors are considered in a decision concerning the establishment and classification of a possible DPS. The first two factors, (1) discreteness of the population segment in relation to the remainder of the taxon and (2) the significance of the population segment to the taxon to which it belongs, bear on whether the population segment is a valid DPS.

Under the DPS policy, a population may be considered discrete if (1) it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors; or (2) it is delimited by international governmental boundaries with differences in control of exploitation, management of habitat, conservation status, or relevant regulatory mechanisms. Significance in the context of the DPS policy is considered in relation to the population segment's importance to the taxon to which it belongs. This consideration may include, but is not limited to: (1) Its persistence in an ecological setting unusual or unique for the taxon; (2) evidence that its loss would result in a significant gap in the range of the taxon; (3) evidence that it is the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historic range; or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

If a population meets both tests, we consider it a DPS and then the third factor—the population segment's conservation status in relation to the Act's standards for listing, delisting, or reclassification, (i.e., should the population segment be listed as endangered or threatened)—is applied.

In our Response to Court in 2007 (72 FR 63128–63129), we determined that Queen Charlotte goshawks in British Columbia were distinct from those in Southeast Alaska, with differences in conservation status, habitat

management, and regulatory mechanisms. We also found that the population segments in British Columbia and Southeast Alaska were both significant as defined by our DPS policy, and concluded that two valid DPSs exist. Because forest management in both jurisdictions continues to evolve, we briefly review validity of the separate British Columbia DPS below.

We have estimated the effects of new protected areas on the Queen Charlotte Islands, and inclusion of the mainland coast of British Columbia, on future landscape condition in British Columbia and updated our analyses of forest resources across the range of the subspecies (USFWS 2010). We have considered modifications made to the 1997 Tongass Land Management Plan, as reflected in the 2008 forest plan. Significant differences in management regimes between Alaska and British Columbia remain. For example, we estimate that approximately 31 percent of the remaining old growth will ultimately be harvested and thereby converted to second growth in British Columbia, while only 12 percent of the remaining old growth will be harvested and converted to second growth in Southeast Alaska (USFWS 2010, Table A–17). When considered together with areas already harvested, we estimate that 59 percent of the original productive old growth will ultimately be harvested in British Columbia, but only 28 percent will be harvested in Southeast Alaska (USFWS 2010, Table A–9). Other differences between the jurisdictions noted in our Response to Court (72 FR 63129), including conservation status of the subspecies and regulatory mechanisms, remain. We conclude that management of forest habitat remains sufficiently different between Alaska and British Columbia to support our previous conclusion that the international border separates two discrete populations with significant differences in habitat management and regulatory mechanisms.

In our Response to Court, we concluded that the British Columbia population was biologically and ecologically significant within the meaning of the DPS policy because it occupied approximately one third of the land area and half of the productive forest in the range of the subspecies. Preliminary, unconfirmed results also suggested that the province may contain a significant amount of the genetic diversity of the subspecies (Talbot 2006, p. 1). With inclusion of mainland British Columbia (which was not considered part of the range in our Response to Court), the province now provides approximately two thirds of the land area and about three quarters of the productive forest for the species, rangewide (USFWS 2010, Table A–9). We conclude that the British Columbia population segment is discrete and significant, and that it remains a distinct population segment under the DPS policy.

Factors Affecting the British Columbia DPS

Section 4 of the Act (16 U.S.C. 1533), and implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species on the basis of any of five factors, as follows: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Information regarding the status of, and threats to, the British Columbia DPS of the Queen Charlotte goshawk in relation to the five factors provided in section 4(a)(1) of the Act is discussed below.

This final rule addresses the finding in our Response to Court (72 FR 63128) that listing as threatened or endangered is warranted for the British Columbia DPS. Below, we provide a summary of our analysis of threats to the British Columbia DPS from the Response to Court, along with a new analysis of threats to the DPS in light of relevant new information. We have included statistics on habitat availability and forest management where they are available. Our primary sources of forest data include the British Columbia Ministry of Forests and Range (especially Niemann 2006 for Vancouver Island and the coastal mainland) and Leversee (2006) for the Queen Charlotte Islands. These data sets have been compiled from a variety of sources, which vary in their reliability. Our analyses of forest statistics is detailed in an updated appendix to our status review (USFWS 2010), in which our data sources, assumptions, and calculations are described. We also rely on the NGRT evaluation of the threats discussed below (NGRT 2008, pp. 16–21), and results of habitat modeling done to assist the NGRT in recovery planning (Smith and Sutherland 2008 pp. 1–88).

Factor A. Present or Threatened Destruction, Modification, or Curtailment of the Habitat or Range

Mature second-growth and old-growth forest provides nesting and foraging habitat for goshawks and supports populations of preferred prey (Iverson *et al.* 1996, pp. 16–18 and 41–44; Ethier 1999, pp. 61–68; McClaren 2004, pp. 6–7). Logging within and near nest stands has been implicated in nest site abandonment, although effects of such logging have varied from nest area abandonment in some study areas to no effect on productivity elsewhere (Crocker-Bedford 1990, pp. 263–266; Penteriani and Faivre 2001, p. 213; Doyle and Mahon 2003, p. 39; Mahon and Doyle 2005, pp. 338–340, Doyle 2006, pp. 138–139). Clearcut logging generally reduces prey populations (reviewed by USFWS 2007, pp. 62–64), although, in some cases, sooty grouse populations may increase temporarily following logging (Zwickel and Bendell 1985, pp. 185–187). Logging may also impact foraging habitat by removing perches and hunting cover, and by creating openings and dense second-growth stands that are avoided by goshawks (Iverson *et al.* 1996, p. 36).

''Productive forest'' is defined by the British Columbia Ministry of Forest and Range as forest capable of producing trees large enough to be commercially viable as timber (i.e., ''merchantable'') (Niemann 2006, p. 1). Such forests, when mature, provide suitable structure for goshawk nesting and foraging. We, therefore, use the British Columbia Ministry of Forest and Range's definition of, and statistics on, productive forest as a measurable approximation of goshawk habitat. Unless otherwise specified, discussions of mature, old-growth, and second-growth forests below refer to productive forest only. Areas of nonproductive (or ''scrub'') forest of smaller trees (which are not included in the cited forest statistics) may be used by goshawks for foraging or other activities, but are generally not used for nesting (Iverson *et al.* 1996, pp. 41–44).

Goshawks nest and forage in a wide variety of settings, with varying amounts of forest cover, across North America, Europe and Asia (reviewed by Kenward 2006, pp. 293–294, Squires and Kennedy 2006, pp. 21–31). In the rainforest habitats of the Queen Charlotte goshawk, there are few prey species adapted to open habitats (Doyle and Mahon 2003, pp. 39; reviewed by Iverson *et al.* 1996, pp. 59–61 and USFWS 2007, pp. 42–45). For example, snowshoe hares and cottontail rabbits (*Sylvilagus* spp.) use forest edges and

open habitats and are important prey in some areas, but are not present across most of the range of the Queen Charlotte goshawk (Nagorsen 2002, pp. 92–96; Nagorsen 2005, pp. 89). Ground squirrels (*Spermophilus* spp.) are similarly missing (Nagorsen 2002, pp. 106–109; Nagorsen 2005). American robins (*Turdus migratorius*) use open habitats including clearcuts within the range of the Queen Charlotte goshawk, but Lewis (2001, pp. 113) found that robins made up only three percent of prey deliveries at nests in Southeast Alaska, even where timber harvest was heaviest.

Because Queen Charlotte goshawks rely primarily on forest-dwelling prey, adequate amounts of suitable forest cover appear to be critical (Doyle 2006, pp. 138–139; Doyle 2007, p. 2; Doyle and Mahon, 2003, p. 1). Iverson *et al.* (1996, p. 66) believed that goshawks likely require some unknown amount of productive old-growth forest at large spatial scales (e.g., greater than 10,000 ac (4,000 ha)), and that below that level goshawk abundance would decline. Doyle (2005, p. 14) investigated known goshawk territories on the Queen Charlotte Islands, and found that all contained at least 41 percent mature and old-growth forest, although only 4 territories (each containing at least 60 percent mature and old-growth forest) were successful during the preceding 3-year period (2002–2004). Doyle (2005, pp. 13–19) used these observations to estimate the number of potential territories that could support nesting goshawks on the Queen Charlotte Islands. (See also Doyle and Holt (2005, pp. 2.5–3 to 2.5–5) for further development of this model).

Percentages of the landscape in forest cover have also been used to define habitat quality in Finland (Byholm and Kekkonen 2008, pp. 1696–1700). Several studies of northern goshawk habitat elsewhere in western North America suggest that landscapes with 40 to 60 percent mature or old forest are either favored by goshawks for nesting and foraging, or should be maintained to support goshawks (Reynolds *et al.* 1992, p. 27; Patla 1997, pp. 71–72; Finn *et al.* 2002, pp. 434–435, Doyle 2005, pp. 12–18; reviewed by USFWS 1997, pp. 36–38).

Given these observations, we consider landscapes with less than 40 percent cover by mature and old-growth forest to be low-quality habitat, and those with greater than 40 percent mature and old-growth forest high-quality habitat. Some Queen Charlotte goshawk territories likely include less than 40 percent mature forest (Iverson *et al.* 1996, p. 55), so we do not consider this criterion an absolute minimum. The true minimum likely varies depending on other factors such as prey diversity and density. There is evidence, however, that Queen Charlotte goshawks are particularly sensitive to loss of mature forest because of a lack of prey adapted to open habitats (Doyle 2006, pp. 138–139, Doyle and Mahon 2003, p. 1). While uncertainty remains over how much mature and old forest is required to maintain productive goshawk nesting and foraging habitat, we consider a standard incorporating the proportion of the landscape in mature and old forest appropriate, and, based on the best available information, 40 percent a reasonable standard.

Productive forest (capable of producing commercially viable timber) covers approximately 52 percent of the 42-million-acre (17-million-hectare) Coast Forest Region delineated by the British Columbia Ministry of Forests and Range, which approximates the range of the Queen Charlotte goshawk in Canada (USFWS 2010, Table A–20). Therefore, on average, habitat was probably high quality for goshawks (greater than 40 percent mature and old growth) prior to wide-scale timber harvest, although some areas would have been, and remain, unsuitable (e.g., large alpine areas), while other areas had extensive tracts of high-quality habitat before logging began.

Industrial-scale logging began in the coastal rainforests of British Columbia in the early 1900s, peaked in the 1980s, and has remained relatively high since then (USFWS 2007, pp. 89–90). By 2002, timber harvest had converted approximately 7.9 million ac (3.2 million ha) (36 percent) of the 21 million ac (8.8 million ha) of productive forest in coastal British Columbia to second growth. This has reduced mature and old forest cover to approximately 37 percent of the landscape (USFWS 2010, Table A–20). This percentage translates, on average, to low-quality habitat (less than 40 percent cover by mature and old-growth forest). Again, naturally nonforested areas have always been unsuitable or low-quality habitat. Alpine areas (i.e., above timberline), for example, cover 19 percent of the landscape. Below timberline, approximately 46 percent of the landscape supports mature and old forest (USFWS 2010, Table A–20), so habitat as of 2002 (the most recent rangewide data available) appears to be suitable, on average, despite declines from historic levels. We do not know how much has been harvested since 2002, but we expect that old forest cover has been reduced by several percentage points since then.

Habitat modeling developed by the NGRT suggests that British Columbia supported approximately 1,060 suitable goshawk territories prior to initiation of industrial logging. Currently, the model predicts habitat capability of 708 territories, a 33 percent decline (Smith and Sutherland 2008, pp. 22, 29, 33, 65).

More than 100 new protected areas totaling approximately 3 million ac (1.2 million ha) were established on the British Columbia mainland coast in 2006 (BCMAL 2006, p. 1). This was followed by a December 2007 land use agreement between the Province of British Columbia and the Haida Nation, designating new protected areas totaling 628,000 ac (254,000 ha) on the Queen Charlotte Islands (BCOP 2007, pp. 1–2).

In March, 2009, the British Columbia Ministry of Agriculture and Lands announced an agreement with a broad range of stakeholders to designate protected areas and development lands across the coastal mainland, now known as the ''Great Bear Rainforest.'' Within this area, approximately 5.7 million ac (2.3 million ha) are now protected from logging (Armstrong 2009, pp. 4, 29; BCMAL 2009, pp. 1–2). An additional land use class, ''Biodiversity, Tourism and Mining Areas,'' covering approximately 741,000 ac (300,000 ha) where commercial forestry is now prohibited, was also announced in 2009. We estimate that protected areas include approximately 2.9 million ac (1.2 million ha) of productive forest (USFWS 2010, Table A–19 and Table A–23). These estimates are based largely on the Ministry of Forest and Range's evaluation of proposed protected areas in 2002, which were similar, but not identical, to areas finally designated in 2007 (Niemann 2006, p. 1). These are the best available data on forest cover in the protected areas that we are aware of.

Future timber harvest in three of the seven Forest Districts in the Coast Forest Region (North Coast, Central Coast, and Queen Charlotte Islands Districts) will be planned using ''Ecosystem Based Management,'' which is intended to support a sustainable economy while protecting a healthy ecosystem. No specifics on how timber harvests will change have been released (BCMAL 2006, pp. 2–3; BCOP 2007, pp. 1–2, BC 2008, p. 1). In the absence of any details about implementation of this management scheme, we rely on data and projections based on existing management practices (summarized in USFWS 2007, pp. 82–101; USFWS 2010, Tables A–1 to A–24; NGRT 2008, pp. 6–23; see also *Southwest Center for Biological Diversity* v. *Babbitt,* 939 F.Supp. 49 (D.D.C. 1996)).

Based on our updated analyses, we estimate that approximately 5.2 million ac (2.1 million ha) of the remaining old growth forest are likely to be harvested in British Columbia (USFWS 2010, Table A–9). We predict that this would result in a landscape with only 26 percent coverage by mature second growth and old forest. If we disregard alpine areas, mature and old forest would cover 32 percent of the area below timberline (USFWS 2010, Table A–24). In either case, we expect this to be low-quality habitat (i.e., less than 40 percent mature and old forest).

There are many policies and land use restrictions available to facilitate conservation of goshawks and other non-timber values within the areas otherwise open to timber harvest. These regulations governing timber harvest, and other emerging land management tools and techniques, are discussed below, under ''Factor D—Inadequacy of Regulatory Mechanisms.'' Future harvest levels and rates (amounts, methods, and timing) are uncertain, but additional conversion of old-growth forest to second growth is expected to continue throughout the DPS.

For the purposes of evaluating threats and recovery strategies, the NGRT has divided the British Columbia range of the Queen Charlotte goshawk into four Conservation Regions: Haida Gwaii (Queen Charlotte Islands), Vancouver Island, North Coast, and South Coast (NGRT 2008, pp. 4–6). They reviewed the best-available scientific information and, where data were unavailable, used expert opinion and data-derived estimates (NGRT 2008, p. 16). They consider threats to the goshawk from habitat loss and fragmentation to be low to moderate in the North Coast region, moderate in the South Coast region, and moderate to high on the Queen Charlotte Islands and Vancouver Island (NGRT 2008, pp. 16–17). These conclusions are consistent with our understanding of the habitat threats faced by goshawks in British Columbia.

Timber harvests in coastal British Columbia are currently composed of a mix of old growth and mature second growth. Approximately 35 percent of the harvest is currently from second growth. This percentage is expected to increase as old growth available for harvest is cut. Our review of Timber Supply Analysis Reports for Timber Sale Areas and Tree Farm Licenses indicates that within two to seven decades (time varying by individual timber tenure), currently available old growth on the mainland and Vancouver Island will be liquidated and timber harvests will be almost entirely from second growth (reviewed in USFWS 2007, pp. 89–91 and USFWS 2010, Table A–1). As a result, within 50 years only a few timber tenures are likely to have substantial reserves of old growth remaining within their timber harvesting land bases, and timber harvests across the region will likely be composed primarily of second growth. On the Queen Charlotte Islands, this is expected to take up to 12 decades (USFWS 2010, Table A–1).

We expect the amount of suitable goshawk habitat to continue to decline until all the old growth available for harvest has been converted to second growth. At that time, we expect the amount of habitat to stabilize, with less habitat than is available today. Thereafter, logging will be limited to the second growth, which we expect will be harvested on a sustained-yield basis. Because second-growth stands provide suitable goshawk habitat for only the final 10 to 20 percent of each timber harvest rotation (reviewed in USFWS 2007, pp. 62–67), we estimate that approximately 15 percent of the second growth will be mature, at any given time, and will provide suitable nesting and foraging habitat, while 85 percent will be younger, and provide largely unsuitable habitat (USFWS 2007, pp. 99 and 131). This percentage is likely to vary over time and space, depending largely on how uniformly harvests are conducted.

It is likely that some of the mature second growth will provide little value as either nesting or foraging habitat because, for example, it is in small fragments and surrounded by low-value second growth. It is also likely that some of the younger second growth will provide foraging and perhaps nesting opportunities. We do not know precisely how these variations might balance each other, but have based our estimate of 15 percent of the harvested landscape offering suitable habitat on the best available information. We assume that most of the remaining, unharvested old growth will also provide suitable goshawk habitat, except where it is in small, isolated fragments surrounded by unforested areas.

Wildlife populations typically continue to decline for several generations after habitat loss has occurred, as the populations reach equilibrium with their habitat and competitors (Tilman *et al.* 1994, pp. 65–66). Therefore, extinction may occur many years after habitat loss has ceased.

In summary, although new protected areas should help conserve some of the remaining goshawk habitat, significant degradation has occurred, and we expect continued decline in habitat quality within the range of the British Columbia DPS as old-growth forest available for harvest is converted to second growth. Mature second growth does provide suitable nesting and foraging habitat, but in commercially harvested landscapes, typically only a small percentage of the second growth exists in this age class, as it is typically harvested as it reaches economic maturity. Efforts are underway to modify timber harvest practices to reduce impacts on goshawks and other species (discussed below under Factor D), but we expect that most of the harvested landscape is likely to become low-quality habitat. Reductions in prey populations and loss of perches and hunting cover are likely to have increasingly negative effects on goshawks' ability to hunt prey and feed their young. Based on the best available information, we conclude that habitat loss is likely to contribute substantially to loss of long-term viability of Queen Charlotte goshawks in British Columbia. Therefore, we conclude that continued loss of habitat is likely to be a significant threat to the British Columbia DPS in the foreseeable future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

In Canada, *A. g. laingi* has been federally listed as ''Threatened'' under the Species at Risk Act since 2002 (51 Eliz. II, Ch. 29). British Columbia has included the subspecies on its ''Red List,'' as a candidate for ''Threatened'' or ''Endangered'' status, since 1994 (Cooper and Stevens 2000, pp. 3 and 14). In 2004, British Columbia recognized that, as a Schedule 1 Species at Risk, the Queen Charlotte goshawk, along with other named species, could be affected by forest management and required protection in addition to that provided by general forest management regulations (BCMSRM 2002, pp. 1–2; Barisoff 2004, p. 2; reviewed by USFWS 2007, pp. 11–12). Each of these designations provides some protection from direct take. For example, capture of Queen Charlotte goshawks has been banned since 1994, when the subspecies was added to the provincial Red List (see ''Factor D. Inadequacy of Regulatory Mechanisms'' for further discussion). Take of wild birds for falconry, therefore, is not a threat to the population. Further, the northern goshawk is listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The database in which CITES trade is documented, the World Conservation Monitoring Centre (WCMC) CITES Trade Database, does

not, for the most part, collect trade data at the subspecies level, and there are no CITES trade data available for the Queen Charlotte goshawk subspecies. However, as a Party to CITES, Canada must ensure that trade in northern goshawks, including the Queen Charlotte goshawk subspecies, does not adversely affect the species.

Although individual Queen Charlotte goshawks may be killed or captured illegally on occasion, we have no indication that such activity is common, or that it poses any threat to the subspecies. We do not expect overutilization for commercial, recreational, scientific, or educational purposes to contribute to population declines or extinction risk. The NGRT considers the threat of human persecution to be low to none (NGRT 2008, pp. 17 and 21). We conclude that overutilization for commercial, recreational, scientific, or educational purposes does not now, or in the foreseeable future, pose a significant threat to the British Columbia DPS of the Queen Charlotte goshawk.

Factor C. Disease or Predation

Disease and predation associated with Queen Charlotte goshawks are not well documented, but small populations such as those on Vancouver Island and the Queen Charlotte Islands can be vulnerable to diseases, particularly when simultaneously stressed by other factors such as prey shortages. Reynolds *et al.* (2006, pp. 269–270) reviewed diseases as a potential factor limiting northern goshawk populations, and concluded that there is no strong evidence that disease limits goshawk populations. The NGRT considers the threat from disease low, but has expressed concern that emerging diseases such as West Nile virus, which is transmitted by mosquitoes and is fatal in goshawks (Wunschmann *et al.* 2005, p. 259), may be difficult to mitigate if outbreaks occur (NGRT 2008, pp. 16, 21). In 2010, the disease was detected in four American crows (*Corvus brachyrhynchos*) and one black-billed magpie (*Pica hudsonia*) in British Columbia. It was not detected in any of the 48 birds tested in British Columbia in 2011 (CDC 2012, *http://www.ccwhc.ca/wnv_report_2010.php* and *http://www.ccwhc.ca/wnv_report_2011.php,* accessed 1/27/2012). No predictions are available on when we might expect the disease to affect goshawks in British Columbia.

Predation can also suppress small populations, leaving them vulnerable to other population stress factors. Goshawk predators within the British Columbia DPS include great horned owl *(Bubo virginianus),* bald eagle *(Haliaeetus leucocephalus),* American marten *(Martes americana),* wolverine *(Gulo gulo),* and black bear *(Ursus americanus).* Raccoons *(Procyon lotor),* which could take eggs or nestlings, have also been introduced on the Queen Charlotte Islands (Golumbia *et al.* 2003, pp. 13–15). The NGRT considers predation risk low across the range of the DPS (NGRT 2008, pp. 16–20).

No information suggests that disease or predation currently put Queen Charlotte goshawks in danger of extinction in the British Columbia DPS, but either disease or predation may contribute to extinction risk in the foreseeable future if their effects are exacerbated by other population stressors such as prey shortages, habitat limitations, or unfavorable weather (which affect nesting effort). We conclude that disease and predation do not currently put the Queen Charlotte goshawk at risk of extinction, although there is moderate risk that either could affect population viability once the goshawk population has declined in response to expected habitat loss, which is anticipated to peak in approximately 50 years.

Factor D. Inadequacy of Existing Regulatory Mechanisms

Direct Take: Throughout Canada, the Species at Risk Act protects the Queen Charlotte goshawk from direct harm, harassment, and take on Federal lands. Individuals, eggs, and occupied nests are protected on all jurisdictions in British Columbia under the provincial Wildlife Act (RSBC 1996, section 34). Possession and trade in the subspecies is forbidden throughout Canada, as is destruction of nests. Based on the available information, regulation of direct take appears to be adequate throughout the DPS.

Habitat Protection: Two mechanisms exist to protect habitat under the Federal Species at Risk Act in Canada: (1) Identification of critical habitat, which may not be destroyed; and (2) conservation agreements, which may be negotiated with any entity or individual. Other mechanisms have been used by the Provincial government to protect goshawk habitat (discussed below), but critical habitat has not yet been formally designated under the Species at Risk Act (NGRT 2008, p. 31).

The Species at Risk Act requires development of a recovery strategy, which identifies the scientific framework for recovery. The NGRT, which includes experts from Provincial and Federal (U.S. and Canadian) government agencies, private consultants, nongovernmental organizations, industry, and First Nations, has produced a recovery strategy summarizing natural history, threats, knowledge gaps, and recovery approach (NGRT 2008). A recovery action plan, to define and guide implementation of the recovery strategy, is anticipated, but not yet available (NGRT 2008, pp. i, 34).

The recovery strategy identifies many legal mechanisms for protecting habitat at various scales. Land use planning is perhaps the most broad-scale method used by the British Columbia Provincial Government for establishing protected areas and limits on development to conserve biodiversity across the Province. Approximately 13 percent of the landscape across coastal British Columbia is protected from logging in various parks and reserves. These reserves average approximately 50 percent cover by productive forest (USFWS 2010, Table A–23), so on average they appear to provide high-quality habitat. Special management zones, where timber harvest is allowed but non-timber values such as wildlife and recreation are given additional consideration, are also designated in some areas (BC 2000, p. 30).

Logging on Crown (Provincial) lands is regulated by the Forest and Range Practices Act (FRPA). This statute and its companion regulations set objectives for many resources, and require Forest Stewardship Plans describing how each objective will be met. The FRPA is also supported by the Identified Wildlife Management Strategy (IWM Strategy), which provides direction, policy, procedures and guidelines for managing species at risk and regionally important wildlife; the strategy addresses only forest and range practices regulated by the FRPA. It is one fine-filter tool British Columbia uses for conservation of species at risk; it complements coarse-filter mechanisms, such as protected areas and regulations governing timber harvest generally, that manage multiple species and habitats. Wildlife Habitat Areas and associated General Wildlife Measures (legal terms) may be implemented under a FRPA regulation to protect important habitat elements (e.g., goshawk nests). The IWM Strategy provides guidance for their establishment (BCMWLAP 2004, pp. 1–4).

Where nests are identified, Wildlife Habitat Areas are proposed, usually by Provincial biologists although anyone may make a proposal. The proposed Area is reviewed and may be modified by the Ministry of Environment; comments are solicited from affected parties; a Timber Supply Impact Analysis is conducted; the proposal is

reviewed by a Provincial Committee; and a final decision is made by the Ministry of Environment (BCMWLAP 2004, pp. 4–10). The final decision may reflect compromises intended to reduce impacts on timber operators or others.

Wildlife Habitat Areas designated for goshawks are designed primarily to protect a core area that supports the active nest, alternate nests, and post-fledging area. Timber harvest is generally prohibited within these core areas. Wildlife Habitat Areas for goshawks average approximately 500 acres (200 ha) although they vary in size depending on site characteristics and overlap with other special management areas such as riparian zones, old growth management areas, etc. Prohibitions and constraints also vary among sites. For example, management plans may be developed to guide timber harvesting and road construction in the surrounding management zone to protect foraging habitat. Nonbinding recommendations have been developed to help guide these management plans (McClaren 2004, pp. 10–11). Currently there are 27 Wildlife Habitat Areas: 24 on Vancouver Island, 1 on the mainland coast, and 2 on the Queen Charlotte Islands. Ten additional reserves (not Wildlife Habitat Areas) are proposed under the draft Haida Gwaii Land Use Objectives Order, Schedule 12.

Provincial policy limits the impact of land protection under the IWM Strategy on the timber supply to one percent of the Timber Harvesting Land Base, which is the productive forest available for logging outside protected parks and other reserves. The Timber Harvesting Land Base also excludes forested areas outside reserves that are inoperable (e.g., too steep or wet to log), or retained to protect other resources (e.g., stream banks, deer winter ranges, or archaeological sites). To the extent possible, Wildlife Habitat Areas are designated on lands protected under other authorities. The one percent cap may be waived with adequate justification, and does not have legal force of law, but is considered a goal of government (BCMWLAP 2004, p. 4; FPB 2004, pp. 7–8).

The one percent cap is calculated and tracked separately for each forest district, with further limitations on the amount of mature and old forest that may be designated, using ''budgets'' for the short term timber supply (stands greater than 60 years old) and long-term timber supply (stands less than 60 years old) (BCMWLAP 2004, p. 4; FPB 2004, pp. 7–8).

Another limitation of the one percent cap on goshawk conservation is apparent in areas with high numbers of other at-risk species and continuing threats to those species (Wood and Flahr 2004, pp. 394–395). Southern Vancouver Island, for example, is a biodiversity ''hot spot,'' with a large number of rare and endemic species (Scudder 2003, pp. 15–31). Some of these species have habitat needs that differ from those of the goshawk, yet their legitimate conservation needs are to be accommodated along with the goshawk within the one percent limit, under this policy. In the South Island Forest District, Wildlife Habitat Areas are approaching, and may have already exceeded, the one percent cap (Wood *et al.* 2003, p. 53). Other areas within the Coast region with lower levels of human impact and fewer endemic species may have greater flexibility to protect important forest stands for goshawks and other species.

Coast Land Use Orders issued in March 2009 establish legal requirements to maintain habitat for goshawks and other focal wildlife species within areas set aside for old growth retention. Across the province, there is an effort to co-locate various protection tools under the Forest and Range Practices Act to minimize impacts to timber harvests and local economies.

In 2004, the British Columbia Ministry of Sustainable Resource Management established ''Provincial Non-Spatial Old Growth Objectives'' that must be addressed in Forest Stewardship Plans (Abbott 2004, pp. 1–6). The order established ''Landscape Units'' and old-growth-forest retention objectives for each of those units. Individual Landscape Units are assigned to low, intermediate, or high biodiversity emphasis, with lower percentages of old-growth retention identified for lower-emphasis units. The exact amount of old growth that must be retained depends on the forest type (biogeoclimatic zone) and the ''natural disturbance regime'' identified for each biogeoclimatic zone variant. Within the Coastal Western Hemlock (*Tsuga heterophylla*) Zone, old-growth retention objectives range from 9 to 13 percent; in the Mountain Hemlock (*T. mertensiana*) Zone, objectives range from 19 to 28 percent; and in the Coastal Douglas-fir (*Pseudotsuga menziesii*) Zone, 9 to 13 percent. The objectives are termed ''nonspatial'' because they describe amounts but not specific areas to be retained, unlike other orders that establish protection of specified areas. In order to meet the non-spatial, old-growth objectives, tenure-holders and Timber Supply Area managers can rely on existing protected areas such as Wildlife Habitat Areas, riparian reserves, inoperable lands, and other designations that result in retention of old-growth stands.

The Province does not maintain detailed inventories of forest resources on private lands, where there is little government oversight or regulation. For the purpose of developing a seamless forest cover inventory for the whole province, the Ministry of Forests and Range used baseline thematic mapping, based on satellite imagery from the 1990s, and biogeographic ecosystem classification to characterize forest cover on private lands (BCMFR 2006, p. 138). Private lands are estimated to cover approximately 4.1 million ac (1.7 million ha) within the Coast region (Niemann 2006, attachment 1). Much of the private land is concentrated on the southern portions of Vancouver Island and the mainland coast.

The Province of British Columbia has made significant progress in implementation of several elements of its conservation program for goshawks, as described above. A recovery strategy has been released. Several of the actions identified in the draft strategy have begun; others are likely to be implemented once the Recovery Implementation Group completes an action plan (NGRT 2008, pp. 21–32).

To help guide evaluation of conservation efforts that are either planned but not yet implemented, or underway but not yet proven effective, the Service published a ''Policy for Evaluation of Conservation Efforts When Making Listing Decisions'' (PECE Policy) (68 FR 15100, March 28, 2003). The policy directs us to consider (1) the certainty that a conservation effort will be implemented, and (2) the certainty that the effort will be effective.

British Columbia's recovery strategy identifies several broad strategies and recommended approaches to address threats to the goshawk, with specific actions listed to address each approach (NGRT 2008, pp. 26–30). Many of the actions listed in the recovery strategy have been implemented and warrant evaluation as formalized conservation efforts. We also evaluate actions identified in the recovery strategy that have not yet been implemented, because we believe that the NGRT intends to pursue them.

Among the actions that have not yet been completed are predictions of habitat changes resulting from climate change, monitoring and modeling of West Nile Virus impacts, and monitoring of edge–adapted competitors and predators. The recovery strategy is a broad-scale document that does not provide details on who would be responsible for implementing the identified actions, the source and

security of funding, legal authorities, procedural and legal requirements (permits, authorizations and permissions, etc.), and volunteer (e.g., landowner or timber tenure holder) participation necessary to implement the actions, as required for us to conclude with a high level of certainty that the actions will be implemented (PECE Policy, 68 FR 15114–15115).

Among the actions identified in the draft strategy that have already begun, the most highly developed is protection of habitat using existing authorities and mechanisms. These are described in NGRT (2008) Appendix 1, and are evaluated above. We consider habitat protection an effective strategy, but cannot conclude that implementation under existing mechanisms adequately removes the threat posed to the Queen Charlotte goshawk from habitat loss.

Other actions listed in the recovery strategy have been implemented (or have begun and are ongoing), but have not yet been proven effective. Included in this category are:

- Development of general wildlife measures to ensure sufficient foraging habitat outside Wildlife Habitat Areas,
- Landscape modeling to identify habitat availability,
- Research and implementation of silviculture methods to promote prey populations,
- Development and implementation of management plans for introduced species,
- Development and implementation of outreach and education for landowners and resource managers,
- Effectiveness monitoring of habitat management,
- Development and use of spatially explicit population models and genetic samples to define population and distribution objectives,
- Use of habitat conservation tools to conserve and recover populations in each conservation region, and
- Identification and monitoring of prey populations.

The PECE Policy lists six criteria necessary to establish that a conservation effort will be effective in adequately reducing threats to a level that listing a species as threatened or endangered is not necessary. These criteria include (1) a description of the threats addressed by the conservation effort, (2) explicit, incremental objectives for the conservation effort and dates for achieving the objectives, (3) the steps necessary to implement the conservation effort, (4) quantifiable measures to demonstrate progress toward, and achievement of, objectives, (5) provisions for monitoring and reporting progress on implementation and effectiveness, and (6) incorporation of adaptive management principles (68 FR 15115). The recovery strategy is a broad-level planning document that describes threats to the goshawk and provides recommendations for addressing those threats. It lacks detail on implementation of the recommended actions. A recovery action plan, which will likely provide much of the detail described in the PECE Policy, is expected soon. Meanwhile, we are not aware of currently available documents that provide the information (criteria 1 through 6, immediately above) necessary to ascertain with a high level of certainty that the actions will be effective.

A major conservation effort recently announced by the Province of British Columbia is Ecosystem Based Management for lands managed for multiple uses in the Central Coast, North Coast, and Haida Gwaii regions (BCMAL 2006, pp. 1–3; BCOP 2007, pp. 1–2). Ecosystem Based Management ''is a new adaptive approach to managing human activities that ensures the coexistence of healthy ecosystems and communities. The intent of 'Ecosystem Based Management' is to support a sustainable economy while protecting a healthy ecosystem'' (BCMAL 2006, p. 2). Key elements include establishment of protected areas; higher standards for key environmental values; use of traditional, local, and scientific knowledge to develop management targets; recognition of aboriginal and other local interests in land use planning and management; and promotion of stability, certainty, and long-term resource use (BCMAL 2006, p. 2).

The British Columbia Government has moved to implement Ecosystem Based Management on the mainland coast and, more recently, the Queen Charlotte Islands. Land use agreements have been reached with various First Nations, and efforts are underway to identify lands for protection or other management regimes. We have a high level of certainty that Ecosystem Based Management will be implemented in some form, although details are not yet available on which lands, if any, will be protected and how timber harvest will be regulated. We expect that protection of additional areas may reduce logging in some areas, although the rate of logging on the remaining lands is not known. We, therefore, cannot be sufficiently certain that the program will reduce threats to goshawks to a level that listing as threatened or endangered is no longer necessary.

Management of British Columbia's forests is currently in a period of change. This increases the uncertainties inherent in our projections of future conditions. We believe that the current trend toward policies that reduce impacts to goshawks from timber harvest will continue in the short term, as commitments made in recent land use agreements are implemented. We expect these conditions to persist for at least 10 to 15 years. Beyond that, we expect that political and economic considerations could force reevaluations of forest management.

In summary, 13 percent (5.4 million ac, or 2.3 million ha) of the land area (42 million ac, or 17 million ha), and 13 percent (3.0 million ac, or 1.2 million ha) of the productive forest (22 million ac, or 8.8 million ha) is protected in parks and other reserves within the range of the British Columbia DPS (USFWS 2010, Table A–9 and Table A–23). Management of timber lands within the province includes retention of additional forest cover to protect various non-timber values associated with forests, including goshawks. Designations of Wildlife Habitat Areas to protect species at risk, including goshawks, however, are limited by a policy-level cap of one percent of the Timber Harvesting Land Base. We acknowledge that much work is underway in the Province to address the threats and conservation needs of Queen Charlotte goshawks. Because much of the regulatory framework is relatively new, some key elements of the recovery effort have not yet been fully developed or implemented, so it is difficult at this time to assess their potential effectiveness (see *Evaluation of Conservation Efforts,* below).

We conclude that continued development and implementation of regulatory mechanisms will be required to minimize the risk of extinction for the British Columbia DPS of the Queen Charlotte goshawk. Existing regulatory mechanisms do not appear to adequately reduce the threat posed to goshawk habitat from timber harvest. Consequently, we conclude that inadequacy of regulatory mechanisms is a threat to the Queen Charlotte goshawk in the foreseeable future.

Factor E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

Competition for prey or nest sites: We are not aware of current population-level threats to Queen Charlotte goshawks due to competition for either prey or nest sites. The NGRT rates this threat as low across the DPS (NGRT 2008, p. 16). Competition among herbivores has been implicated in grouse declines on the Queen Charlotte Islands where introduced deer have

reportedly overbrowsed blueberries and other important grouse foods, resulting in grouse population declines (Golumbia *et al.* 2003, pp. 10–11; Doyle 2004, pp. 15–16). This has probably reduced goshawk nesting effort (number of pairs attempting to nest) on the Queen Charlotte Islands during periods of low squirrel density, when goshawks might otherwise have nested if grouse had been more abundant. Predation on sooty grouse eggs and nestlings by introduced raccoons may also be a factor contributing to grouse population declines on the Queen Charlotte Islands (Golumbia *et al.* 2003, pp. 13–15). We expect this condition to persist indefinitely, unless deer or raccoons are eliminated or reduced by some action or agent.

Prey Diversity: Prey choices are limited within the range of the Queen Charlotte goshawk. Red squirrels, sooty grouse, and a variety of smaller forest birds form much of the diet (Ethier 1999, pp. 21–22 and 32–47; Lewis 2001, pp. 81–107; Lewis *et al.* 2004, pp. 378–382; Doyle 2005, pp. 30–31). Squirrel and sooty grouse populations fluctuate (Doyle 2004, p. 5; Doyle 2007, p. 2), forcing goshawks to switch to alternate prey during times of low squirrel and grouse populations. Species that are commonly taken by goshawks in areas adjacent to coastal British Columbia are missing from much of the Queen Charlotte goshawk's range. For example, snowshoe hares are limited to portions of the mainland, where they are considered rare (Nagorsen 2002, pp. 92–93; Nagorsen 2005, p. 89). Ground squirrels (*Spermophilus parryii*) are also limited to the mainland, but are missing from rainforest habitats along the coast (Nagorsen 2002, pp. 106–109). Cottontail rabbits (*Sylvilagus floridans*) have been introduced to southern Vancouver Island, but are not widespread and have not been documented in goshawk diets there. The Queen Charlotte Islands generally have lower diversity of prey than either the mainland or Vancouver Island, so the NGRT considers threats due to low prey diversity low on the mainland, moderate on Vancouver Island, and high on the Queen Charlotte Islands (NGRT 2008, pp. 16, 18).

Additional species could be introduced, or colonize the region, particularly if climate change (discussed below) alters habitat conditions, which could potentially benefit goshawks. However, we have very limited ability to reliably predict the timing of any changes in prey communities. We believe, therefore, that low prey diversity will remain a localized stressor likely to act in combination with other threats such that Queen Charlotte goshawks become in danger of extinction in the foreseeable future in some areas of the DPS.

Contaminants: We know of no contaminants that pose current or potential future threats to goshawks within the British Columbia DPS.

Natural disasters and catastrophic events: Natural disasters such as windstorms, landslides, avalanches, earthquakes, tsunamis, and volcanic eruptions could affect localized areas within the British Columbia DPS, but are not believed to pose population-level threats, either now or in the foreseeable future. Large, landscape-altering forest fires, insect infestations, or tree diseases could pose population-level threats to Queen Charlotte goshawks in the British Columbia DPS if they affect major portions of the DPS. The likelihood that any of these occurrences would be of such magnitude, however, is unknown. While fires, insect infestations and forest disease epidemics are likely to occur in the foreseeable future, we cannot reliably predict that the magnitude of these events is likely to be great enough to exert population-level effects. Therefore, we cannot conclude that they pose threats in the foreseeable future.

Climate Change: ''Climate'' refers to an area's long-term average weather statistics (typically for at least 20- or 30-year periods), including the mean and variation of surface variables such as temperature, precipitation, and wind; ''climate change'' refers to a change in the mean or variability or both of climate properties that persists for an extended period (typically decades or longer), whether due to natural processes or human activity (Intergovernmental Panel on Climate Change (IPCC) 2007a, p. 78). Although changes in climate occur continuously over geological time, changes are now occurring at an accelerated rate. For example, at continental, regional, and ocean basin scales, recent observed changes in long-term trends include: A substantial increase in precipitation in eastern parts of North America and South America, northern Europe, and northern and central Asia, and an increase in intense tropical cyclone activity in the North Atlantic since about 1970 (IPCC 2007a, p. 30); and an increase in annual average temperature of more than 2 °Fahrenheit (1.1 °Celsius) across the United States since 1960 (Global Climate Change Impacts in the United States (GCCIUS) 2009, p. 27). Examples of observed changes in the physical environment include: An increase in global average sea level, and declines in mountain glaciers and average snow cover in both the northern and southern hemispheres (IPCC 2007a, p. 30); substantial and accelerating reductions in Arctic sea-ice (e.g., Comiso *et al.* 2008, p. 1); and a variety of changes in ecosystem processes, the distribution of species, and the timing of seasonal events (e.g., GCCIUS 2009, pp. 79–88).

The IPCC used Atmosphere-Ocean General Circulation Models and various greenhouse gas emissions scenarios to make projections of climate change globally and for broad regions through the 21st century (Meehl *et al.* 2007, p. 753; Randall *et al.* 2007, pp. 596–599), and reported these projections using a framework for characterizing certainty (Solomon *et al.* 2007, pp. 22–23). Examples include: (1) It is virtually certain there will be warmer and more frequent hot days and nights over most of the earth's land areas; (2) it is very likely there will be increased frequency of warm spells and heat waves over most land areas, and the frequency of heavy precipitation events will increase over most areas; and (3) it is likely that increases will occur in the incidence of extreme high sea level (excludes tsunamis), intense tropical cyclone activity, and the area affected by droughts (IPCC 2007b, p. 8, Table SPM.2). More recent analyses using a different global model and comparing other emissions scenarios resulted in similar projections of global temperature change across the different approaches (Prinn *et al.* 2011, pp. 527, 529).

All models (not just those involving climate change) have some uncertainty associated with projections due to assumptions used, data available, and features of the models; with regard to climate change this includes factors such as assumptions related to emissions scenarios, internal climate variability, and differences among models. Despite this, however, under all global models and emissions scenarios, the overall projected trajectory of surface air temperature is one of increased warming compared to current conditions (Meehl *et al.* 2007, p. 762; Prinn *et al.* 2011, p. 527). Climate models, emissions scenarios, and associated assumptions, data, and analytical techniques will continue to be refined, as will interpretations of projections, as more information becomes available. For instance, some changes in conditions are occurring more rapidly than initially projected, such as melting of Arctic sea-ice (Comiso *et al.* 2008, p. 1; Polyak *et al.* 2010, p. 1797), and since 2000 the observed emissions of greenhouse gases, which are a key influence on climate

change, have been occurring at the mid- to higher levels of the various emissions scenarios developed in the late 1990's and used by the IPPC for making projections (e.g., Raupach *et al.* 2007, Figure 1, p. 10289; Manning *et al.* 2010, Figure 1, p. 377; Pielke *et al.* 2008, entire). Also, the best scientific and commercial data available indicate that average global surface air temperature is increasing and several climate-related changes are occurring and will continue for many decades even if emissions are stabilized soon (e.g., Meehl *et al.* 2007, pp. 822–829; Church *et al.* 2010, pp. 411–412; Gillett *et al.* 2011, entire).

Changes in climate can have a variety of direct and indirect impacts on species, and can exacerbate the effects of other threats. Rather than assessing ''climate change'' as a single threat in and of itself, we examine the potential consequences to species and their habitats that arise from changes in environmental conditions associated with various aspects of climate change. For example, climate-related changes to habitats, predator-prey relationships, disease and disease vectors, or conditions that exceed the physiological tolerances of a species, occurring individually or in combination, may affect the status of a species. Vulnerability to climate change impacts is a function of sensitivity to those changes, exposure to those changes, and adaptive capacity (IPCC 2007, p. 89; Glick *et al.* 2011, pp. 19–22). As described above, in evaluating the status of a species, the Service uses the best scientific and commercial data available, and this includes consideration of direct and indirect effects of climate change. As is the case with all potential threats, if a species is currently affected or is expected to be affected by one or more climate-related impacts, this does not necessarily mean the species should be listed as an endangered or threatened species as defined under the Act. If a species is listed as endangered or threatened, this knowledge regarding its vulnerability to, and impacts from, climate-associated changes in environmental conditions can be used to help devise appropriate strategies for its recovery.

While projections from global climate model simulations are informative and in some cases the only or the best scientific information available, various downscaling methods are being used to provide higher-resolution projections that are more relevant to the spatial scales used to assess impacts to a given species (see Glick et al. 2011, pp. 58–61). With regard to the area of analysis for the Queen Charlotte goshawk, we are not aware of downscaled projections for coastal British Columbia. In adjacent Southeast Alaska, we expect warmer, wetter conditions that will likely favor increased forest cover. More of the annual precipitation is likely to be rain, rather than snow, and spring runoff is likely to be earlier than it currently is (Kelly *et al.* 2007, pp. 31–42).

The mean number of frost days is predicted to be particularly sensitive in coastal British Columbia and Southeast Alaska, where the National Center for Atmospheric Research's Parallel Climate Model predicts 50 to 70 fewer frost days per year by 2080 to 2099 (Meehl et al. 2004, p. 498). We expect this trend to encourage encroachment of forest into alpine areas and to accelerate growth of trees in currently forested areas (Hamann and Wang 2006, pp. 2780–2782). This trend is likely to improve habitat conditions for goshawks.

Gains of forest habitat from climate change could be offset, to an unknown degree, by decreases in forest cover as a result of increases in the frequency and severity of large fires, forest pests, or forest diseases (Bachelet *et al.* 2005, pp. 2244–2248). Increases in severe weather events, which are predicted to occur, could have localized effects, impacting nesting effort and productivity, which appear to be sensitive to spring weather (Fairhurst and Bechard 2005, pp. 231–232; Finn *et al.* 1998, p. 1; Patla 1997, pp. 34–35; McClaren *et al.* 2002, p. 350).

Another potential threat related to climate change is increased competition from the mainland form of the goshawk *(A. g. atricapillus).* This threat is difficult to assess, as we are uncertain of the adaptive advantages conferred by the two phenotypes. Changes in prey communities might also occur. Again, it is unclear if such changes would favor one subspecies over the other.

We conclude that climate change is likely to have mixed effects on goshawks. Landscape-level changes due to climate change are likely, and some of these changes could negatively affect the British Columbia DPS of the Queen Charlotte goshawk. We do not believe that such changes currently place the DPS in danger of extinction, nor, based on climate models that project out approximately 100 years, do we expect them to in the foreseeable future.

Demographic Considerations: The small goshawk population on the Queen Charlotte Islands appears to be genetically distinct from goshawks elsewhere and may be genetically isolated (Gust et al. 2003, p. 22; Talbot *et al.* 2005, pp. 2–3; Talbot 2006, p. 1, Talbot *et al., in press*). Isolated populations such as the one on the Queen Charlotte Islands are typically at greater risk of extinction or genetic problems such as inbreeding depression and loss of genetic diversity, particularly where populations are small (Lande 1988, pp. 1456–1457; Frankham *et al.* 2002, pp. 312–317). Inbreeding depression is a reduction in viability and fecundity that occurs as large populations decline and rapid inbreeding produces increased prevalence of harmful genes that are typically rare in larger populations (Lande 1988, p. 1456). Loss of genetic diversity occurs as populations are reduced, and can diminish future adaptability to a changing environment.

Effects of low genetic diversity can be minimized through actions such as carefully planned captive breeding and translocations among wild and/or captive populations. The NGRT considers threats from genetic isolation to be high for the Queen Charlotte Islands, and low to none elsewhere in British Columbia (NGRT 2008, pp. 16, 18–19). We concur with this assessment. We believe that the greatest threats from inbreeding depression or other impacts associated with low genetic diversity would come as populations adjust to reduced habitat availability, which we believe will be lowest in about 120 years on the Queen Charlotte Islands, and in about 50 years for the rest of the DPS, when conversion of available old growth to second growth forest will be nearly complete (except on a few timber tenures), and timber harvests will be composed primarily of second growth (see discussion under *Factor A,* above).

Hybridization can be a threat when related species or subspecies interbreed, diluting the genetics of the smaller population. Populations on Vancouver Island apparently display genetic affinities with the subspecies of goshawk that inhabits much of mainland North America, *Accipiter gentilis atricapillus* (Gust *et al.* 2003, p. 22; Talbot *et al.* 2005, pp. 2–3; Talbot 2006, p. 1, Talbot *et al.* 2011, p. 27).

A cline is a gradation in a measurable characteristic across a geographic area. Such variation is typically believed to reflect a species' response to variation in an environmental variable, and may result in development of distinct species or subspecies (Endeler 1977, pp. 5–7). Such clinal variation has been noted in body size of goshawks, with North America's smallest goshawks on Vancouver Island and larger birds through Southeast Alaska to the north and through western United States and Canada to the south and east (Whaley and White 1994, pp. 179–187, 193; Flatten *et al.* 2002, p. 2; Flatten and McClaren 2003, p. 1). These observations suggest that if body size is

genetically controlled, hybridization that may be occurring among goshawks on Vancouver Island has not overwhelmed the expression of small body size that we believe could be an adaptation to prey and habitat limitations.

On the mainland, the Queen Charlotte goshawk *(A. g. laingi)* inhabits wet coastal forests, but likely interbreeds with the interior subspecies *(A. g. atricapillus)* within the drier coastal western hemlock zones between coastal and interior forests. The NGRT considers this a transition zone between the two subspecies, where genetic delineations will likely be blurred (NGRT 2008, pp. 3, 6, and 18).

Goshawks are highly mobile, and sometimes use different nesting areas in subsequent years (Flatten *et al.* 2001, pp. 9–14; Lewis and Flatten 2004, p. 2). This characteristic likely increases genetic diversity. Following the breeding season, females often leave their breeding territory, while males apparently stay within and adjacent to the nesting area in most but not all cases (Flatten *et al.,* 2001, pp. 9–14; Lewis and Flatten 2004, p. 2; Iverson *et al.* 1996, pp. 28–29). Lewis and Flatten (2004, p. 2) documented a radio-tagged male in Southeast Alaska that moved greater than 50 mi (80 km) following its nesting season, and a female that moved greater than 27 mi (44 km) and returned to its nesting area during the breeding season.

Transition zones between *laingi* and *atricapillus* forms have not been well sampled, so we have no information indicating whether *A. g. atricapillus* goshawks are expanding into the range of the Queen Charlotte goshawk. We recognize that range boundaries for the subspecies are somewhat imprecise and may represent a clinal variation without a distinct demarcation in some areas. Until we have evidence that suggests otherwise, though, we consider the transition zones between the subspecies to be stable. We recognize, however, that hybridization may be occurring in some areas, notably Vancouver Island and on the mainland. We conclude that hybridization could pose a risk to the subspecies in some areas, but it does not rise to the level that places the species in danger of extinction. We expect this threat to be greatest as climate changes over the next 50 to 100 years.

Population estimates for Queen Charlotte goshawks are imprecise because the birds are difficult to census. They are often secretive, and spread at low densities across forested landscapes. Survival and recruitment rates are also difficult to measure. The best available population estimates are based on estimates of habitat capability (the number of territories that can be supported by the available habitat), which is adjusted to reflect annual occupancy rates. Using such techniques, the NGRT estimated the breeding population across the British Columbia DPS to be about 352 to 374 pairs (NGRT 2008, p. 8). Small populations such as this are at greater risk of extinction than larger populations from environmental stochasticity (random or otherwise unpredictable events such as disease epidemics, prey population crashes, or environmental catastrophes), which can reduce the population to a density at which it is vulnerable to demographic stochasticity (fluctuations in birth and mortality rates) (Engen *et al.* 2001, p. 794; Adler and Drake, 2008, p. 192). By definition, stochastic events are not predictable, so we are unable to say when we expect such threats to occur. We do believe, though, that such events are likely to occur occasionally over the next 50 to 100 years.

We conclude that the British Columbia DPS of the Queen Charlotte goshawk is not currently in danger of extinction due to other natural and manmade factors (Factor E) such as competition, contaminants, natural disasters, climate change, or genetic problems resulting from hybridization or isolation. However, due to its small population size and limited prey diversity, this DPS is likely to be vulnerable to prey fluctuations, and could face threats from hybridization (on Vancouver Island or the mainland), or inbreeding depression (on the Queen Charlotte Islands) in the foreseeable future. Each of these potential threats would likely become more important if habitat modification causes population declines, exacerbating the impact of the threats.

Summary of Factors

In summary, we believe that continued habitat loss from logging (Factor A) will result in declines of prey populations and foraging habitat, and place the Queen Charlotte goshawk at risk of extinction in the foreseeable future. We do not expect overutilization for commercial, recreational, scientific, or educational purposes (Factor B) to contribute to population declines or extinction risk. We do not believe that disease and predation (Factor C) currently place the Queen Charlotte goshawk at risk of extinction, although there is moderate risk that either could affect population viability once the goshawk population has declined in response to expected habitat loss, which is anticipated to peak in approximately 50 years. Continued development and implementation of regulatory mechanisms (Factor D) will be required to eliminate the long-term risk of extinction for the British Columbia DPS of the Queen Charlotte goshawk. No other natural and manmade factors such as competition, contaminants, natural disasters, climate change, or genetic problems resulting from hybridization or isolation (Factor E) appear to rise to a level that places the goshawk in danger of extinction at this time. Due to its small population size and limited prey diversity, however, this DPS is likely to be vulnerable to prey fluctuations, and could face threats from hybridization or inbreeding depression. If habitat modification causes population declines, then prey fluctuations, hybridization, or inbreeding depression could have substantially greater influence.

Determination

As required by the Act, we considered each of the five factors under section 4(a)(1)(A) in assessing whether the Queen Charlotte goshawk is endangered or threatened throughout all or a significant portion of its range. We carefully examined the best scientific and commercial information available regarding the past, present, and future threats faced by the Queen Charlotte goshawk. We considered the information provided by the petitioners; information available in our files; other available published and unpublished information; and information submitted to the Service in response to our **Federal Register** notice of November 3, 2009.

Our analysis of threats suggests that as additional forest is logged, habitat quality will continue to decline for the British Columbia DPS of the Queen Charlotte goshawk and its prey. With reduced prey populations, and less favorable habitats in which to hunt, we expect that Queen Charlotte goshawks within the British Columbia DPS would have reduced nesting success. Ultimately, this is expected to result in even smaller populations than currently occur (best available estimate: 352 to 374 breeding pairs). It is possible that goshawks could persist in low numbers indefinitely, in spite of the expected declines in habitat quality. Smaller populations, though, likely would become increasingly vulnerable to factors such as predation, disease, prey fluctuations, hybridization, and inbreeding depression. We conclude, therefore, that although the subspecies is not in danger of extinction now, it is in danger of becoming so in the foreseeable future within the British Columbia DPS. Therefore, listing the Queen Charlotte goshawk in British

Columbia as a threatened species under the Act is warranted.

Significant Portions of the British Columbia DPS's Range

The Act defines ''endangered species'' as any species which is ''in danger of extinction throughout all or a significant portion of its range,'' and ''threatened species'' as any species which is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' The definition of ''species'' is also relevant to this discussion. The Act defines ''species'' as follows: ''The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment [DPS] of any species of vertebrate fish or wildlife which interbreeds when mature.'' The phrase ''significant portion of its range'' (SPR) is not defined by the statute, and we have never addressed in our regulations: (1) The consequences of a determination that a species is either endangered or likely to become so throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as ''significant.''

Two recent district court decisions have addressed whether the SPR language allows the Service to list or protect less than all members of a defined ''species'': *Defenders of Wildlife* v. *Salazar,* 729 F. Supp. 2d 1207 (D. Mont. 2010), concerning the Service's delisting of the Northern Rocky Mountain gray wolf (74 FR 15123, April 2, 2009); and *WildEarth Guardians* v. *Salazar,* 2010 U.S. Dist. LEXIS 105253 (D. Ariz. September 30, 2010), concerning the Service's 2008 finding on a petition to list the Gunnison's prairie dog (73 FR 6660, February 5, 2008). The Service had asserted in both of these determinations that it had authority, in effect, to protect under the Act only some members of a ''species,'' as defined by the Act (i.e., species, subspecies, or DPS). Both courts ruled that the determinations were arbitrary and capricious on the grounds that this approach violated the plain and unambiguous language of the Act. The courts concluded that reading the SPR language to allow protecting only a portion of a species' range is inconsistent with the Act's definition of ''species.'' The courts concluded that once a determination is made that a species (i.e., species, subspecies, or DPS) meets the definition of ''endangered species'' or ''threatened species,'' it must be placed on the list in its entirety and the Act's protections applied consistently to all members of that species (subject to modification of protections through special rules under sections 4(d) and 10(j) of the Act).

Consistent with that interpretation, and for the purposes of this finding, we interpret the phrase ''significant portion of its range'' in the Act's definitions of ''endangered species'' and ''threatened species'' to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: A species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is in danger of extinction throughout an SPR, then that species is an ''endangered species.'' The same analysis applies to ''threatened species.'' Based on this interpretation and supported by existing case law, the consequence of finding that a species is endangered or threatened in only a significant portion of its range is that the entire species shall be listed as endangered or threatened, respectively, and the Act's protections shall be applied across the species' entire range.

We conclude, for the purposes of this finding, that interpreting the SPR phrase as providing an independent basis for listing is the best interpretation of the Act because it is consistent with the purposes and the plain meaning of the key definitions of the Act and with the judicial opinions that have most closely examined this issue. Having concluded that the phrase ''significant portion of its range'' provides an independent basis for listing and protecting the entire species, we next turn to the meaning of ''significant'' to determine the threshold for when such an independent basis for listing exists.

Although there are potentially many ways to determine whether a portion of a species' range is ''significant,'' we conclude, for the purposes of this finding, that the significance of the portion of the range should be determined based on its biological contribution to the conservation of the species. For this reason, we describe the threshold for ''significant'' in terms of an increase in the risk of extinction for the species. We conclude that a biologically based definition of ''significant'' best conforms to the purposes of the Act, is consistent with judicial interpretations, and best ensures species' conservation. Thus, for the purposes of this finding, and as explained further below, a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction.

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation. Resiliency describes the characteristics of a species and its habitat that allow it to recover from periodic disturbance. Redundancy (having multiple populations distributed across the landscape) may be needed to provide a margin of safety for the species to withstand catastrophic events. Representation (the range of variation found in a species) ensures that the species' adaptive capabilities are conserved. Redundancy, resiliency, and representation are not independent of each other, and some characteristic of a species or area may contribute to all three. For example, distribution across a wide variety of habitat types is an indicator of representation, but it may also indicate a broad geographic distribution contributing to redundancy (decreasing the chance that any one event affects the entire species), and the likelihood that some habitat types are less susceptible to certain threats, contributing to resiliency (the ability of the species to recover from disturbance). None of these concepts is intended to be mutually exclusive, and a portion of a species' range may be determined to be ''significant'' due to its contributions under any one or more of these concepts.

For the purposes of this finding, we determine whether a portion qualifies as ''significant'' by asking whether without that portion, the representation, redundancy, or resiliency of the species would be so impaired that the species would have an increased vulnerability to threats to the point that the overall species would be in danger of extinction (i.e., would be ''endangered''). Conversely, we would not consider the portion of the range at issue to be ''significant'' if there is sufficient resiliency, redundancy, and representation elsewhere in the species' range that the species would not be in danger of extinction throughout its range if the population in that portion of the range in question became extirpated (extinct locally).

We recognize that this definition of ''significant'' (a portion of the range of a species is ''significant'' if its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction) establishes a threshold that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in an SPR would be listing the species throughout its entire range, it is important to use a threshold for

''significant'' that is robust. It would not be meaningful or appropriate to establish a very low threshold whereby a portion of the range can be considered ''significant'' even if only a negligible increase in extinction risk would result from its loss. Because nearly any portion of a species' range can be said to contribute some increment to a species' viability, use of such a low threshold would require us to impose restrictions and expend conservation resources disproportionately to conservation benefit: Listing would be rangewide, even if only a portion of the range of minor conservation importance to the species is imperiled. On the other hand, it would be inappropriate to establish a threshold for ''significant'' that is too high. This would be the case if the standard were, for example, that a portion of the range can be considered ''significant'' only if threats in that portion result in the entire species being currently endangered or threatened. Such a high bar would not give the SPR phrase independent meaning, as the Ninth Circuit held in *Defenders of Wildlife* v. *Norton,* 258 F.3d 1136 (9th Cir. 2001).

The definition of ''significant'' used in this finding carefully balances these concerns. By setting a relatively high threshold, we minimize the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. But we have not set the threshold so high that the phrase ''in a significant portion of its range'' loses independent meaning. Specifically, we have not set the threshold as high as it was under the interpretation presented by the Service in the *Defenders* litigation. Under that interpretation, the portion of the range would have to be so important that current imperilment there would mean that the species would be currently imperiled everywhere. Under the definition of ''significant'' used in this finding, the portion of the range need not rise to such an exceptionally high level of biological significance. (We recognize that if the species is imperiled in a portion that rises to that level of biological significance, then we should conclude that the species is in fact imperiled throughout all of its range, and that we would not need to rely on the SPR language for such a listing.) Rather, under this interpretation we ask whether the species would be endangered everywhere without that portion, *i.e.,* if that portion were completely extirpated. In other words, the portion of the range need not be so important that even the species being in danger of extinction in that portion would be sufficient to cause the species in the remainder of the range to be endangered; rather, the complete extirpation (in a hypothetical future) of the species in that portion would be required to cause the species in the remainder of the range to be endangered.

The range of a species can theoretically be divided into portions in an infinite number of ways. However, there is no purpose to analyzing portions of the range that have no reasonable potential to be significant or to analyzing portions of the range in which there is no reasonable potential for the species to be endangered or threatened. To identify only those portions that warrant further consideration, we determine whether there is substantial information indicating that: (1) The portions may be ''significant,'' and (2) the species may be in danger of extinction there or likely to become so within the foreseeable future.

Depending on the biology of the species, its range, and the threats it faces, it might be more efficient for us to address the significance question first or the status question first. Thus, if we determine that a portion of the range is not ''significant,'' we do not need to determine whether the species is endangered or threatened there; if we determine that the species is not endangered or threatened in a portion of its range, we do not need to determine if that portion is ''significant.'' In practice, a key part of the determination that a species is in danger of extinction in a significant portion of its range is whether the threats are geographically concentrated in some way. If the threats to the species are essentially uniform throughout its range, no portion is likely to warrant further consideration. Moreover, if any concentration of threats to the species occurs only in portions of the species' range that clearly would not meet the biologically based definition of ''significant,'' such portions will not warrant further consideration.

Below we consider the contribution of three portions of the range of the British Columbia DPS to determine if these areas are significant, as described above. Portions considered significant are then evaluated to determine if goshawks there are currently in danger of extinction (i.e., endangered) vs. likely to become in danger of extinction in the foreseeable future (i.e., threatened).

Vancouver Island: We previously found that Vancouver Island was a significant portion of the Queen Charlotte goshawk's entire range (Response to Court, 72 FR 63128; November 8, 2007) and that it was threatened (74 FR 56757). This determination was based on the amount of habitat and proportion of the rangewide population still occurring on Vancouver Island, and the importance of the population there to redundancy and resilience of the subspecies, rangewide.

The NGRT estimates that Vancouver Island supports 165 (44 to 47 percent) of the 352 to 374 breeding pairs within British Columbia (NGRT 2008, p. 8). Geographically, Vancouver Island covers 27 percent of the DPS's range (NGRT 2008, p. 6). Thus, although Vancouver Island comprises about a quarter of the DPS's range in British Columbia, it supports nearly half of the breeding pairs. Loss of this large percentage of the small population would clearly result in a meaningful decrease in representation, resilience, and redundancy across the DPS.

Approximately half of the original goshawk habitat remains on Vancouver Island (USFWS 2010, Table A–17). Goshawks there nest in both old-growth and mature second-growth forest. Nesting densities (as measured by mean distance between nesting areas) are higher on Vancouver Island than on the Queen Charlotte Islands or in Southeast Alaska (NGRT 2008, p. 8), suggesting that prey availability is good and other necessary resources are available. Because the remaining habitat appears to be of high quality, we believe that the habitat on Vancouver Island contributes significantly to the resiliency of the DPS, as defined above.

Goshawks on Vancouver Island appear to be genetically distinct from goshawks on the Queen Charlotte Islands, with affinities to the mainland *atricapillus* subspecies (Talbot *et al.* 2005, pp. 2–3; Talbot 2006, p. 1, Talbot *et al., in press).* While this might suggest dilution of the *laingi* genotype on Vancouver Island, it is also possible that the genetic diversity in this population, expressed as a cline, could help the subspecies respond and adapt to future environmental changes, particularly as warmer-adapted forest communities move northward in response to climate change. We conclude that the population contributes to representation and resilience.

Without Vancouver Island, the Queen Charlotte goshawk population in British Columbia would be limited to the Queen Charlotte Islands and the mainland. Overall, the population would be reduced by nearly half, and a probable source of immigrants to the mainland population would be gone. We do not have a demographic model to evaluate viability prospects for the

population that would remain on the mainland and the Queen Charlotte Islands, but we expect that loss of the densest population, inhabiting the most productive habitat in the DPS, would increase extinction risk for the remaining population. Without the redundancy and resiliency of the Vancouver Island population, the DPS would likely include fewer than 200 breeding pairs (NGRT 2008, p. 8). We, therefore, expect that the DPS would be in danger of extinction, and conclude that Vancouver Island is a significant portion of the DPS's range. Having established significance, we now determine if Queen Charlotte goshawk is endangered in this significant portion of the range.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Habitat or Range

Approximately 13 percent of the landscape, but only 9 percent of the productive forest, on Vancouver Island is protected in reserves (USFWS 2010, Tables A–9 and A–23). Mature and old-growth forest currently covers approximately 42 percent of Vancouver Island (USFWS 2010, Table A–21), suggesting that habitat, on average, is adequate to support goshawks. Clearly, habitat quality varies across the island. Some areas have been heavily impacted by timber harvest or urban development, and other areas have extensive stands of mature and old-growth forest that provide higher quality habitat. These local differences are masked by calculations of forest cover across the island.

Smith and Sutherland (2008, p. 33) found that habitat on Vancouver Island could potentially support approximately 310 goshawk territories. Only 55 percent of the known goshawk territories on Vancouver Island have been occupied, on average, leading the NGRT to suggest that the island may have approximately 165 breeding pairs (2008, pp. 7–8).

We estimate that approximately 170,000 ac (418,000 ha) of old-growth forest on Vancouver Island is likely to be harvested over the next 50 years (USFWS 2010, Table A–9), resulting in a landscape with approximately 35 percent cover by mature and old-growth forest (USFWS 2010, Table A–24). We consider this low-quality habitat, on average, although many individual territories are likely to have higher quality habitat. Although habitat loss (Factor A) does not appear to pose a threat to the goshawk population on Vancouver Island at this time, it is likely to become a significant threat within the foreseeable future. The NGRT considers threats from habitat loss and fragmentation high on Vancouver Island (NGRT 2008, p. 16). We agree with this assessment and conclude that habitat loss is a threat to the Queen Charlotte goshawk in the foreseeable future, but does not place goshawks in the Vancouver Island portion of the subspecies' range in danger of extinction at this time.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

As discussed above for the entire DPS, the Queen Charlotte goshawk is protected from direct take by several laws and regulations in British Columbia. No Queen Charlotte goshawks from Vancouver Island are used for commercial, recreational, or educational purposes, including falconry; therefore, no element of this Factor is a threat to the species, now or in the foreseeable future.

Factor C. Disease or Predation

Neither disease nor predation has been identified as a current threat to Queen Charlotte goshawks on Vancouver Island. As discussed above, for the entire DPS, there is what we believe to be a low risk of disease in the future from West Nile virus or other emerging diseases, but these threats do not currently place the goshawk on Vancouver Island in danger of extinction.

Factor D. Inadequacy of Existing Regulatory Mechanisms

Several factors reduce the effectiveness of regulatory mechanisms on Vancouver Island, as compared to the rest of coastal British Columbia. First, a much higher percentage of the land is in private ownership (approximately 27 percent, as compared to 1 percent on the Queen Charlotte Islands and 6 percent on the mainland coast) (USFWS 2010, Table A–3). Laws and regulations intended to protect goshawk habitat in the province, notably the Forest and Range Practices Act and its associated regulations and strategies, apply primarily or exclusively to Crown lands, not private lands. This leaves a significant portion of the island without regulatory protection of important goshawk habitat.

Threats to habitat loss from urban development are also greatest in the Vancouver Island and South Coast Conservation Regions. Finally, the Vancouver Island Summary Land Use Plan (BC 2000) does not specifically address goshawk habitat, whereas land use plans for both the Queen Charlotte Islands (BC 2007, pp. 22) and the Central Coast (BCMAL 2009, not numbered) make provisions for protecting goshawk habitat. We do not believe that the somewhat higher threat posed by this lower level of regulatory oversight rises to a level that places goshawks on Vancouver Island in danger of extinction now, but does pose risks to the population in the foreseeable future, as discussed above for the entire DPS.

Factor E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

There is evidence that goshawks on Vancouver Island hybridize (interbreed) with the mainland *(atricapillus)* form of the northern goshawk (Gust *et al.* 2003, p. 22; Talbot *et al.* 2005, pp. 2–3; Talbot 2006, p. 1; Talbot *et al. in press).* We consider Vancouver Island a ''stable hybrid zone'' (Haig *et al.* 2006, p. 7), where the *laingi* phenotype will continue to be represented in the population.

We believe that climate change is likely to cause changes in habitat and possibly prey communities on Vancouver Island in the foreseeable future, as discussed above for the entire DPS. Hybridization with, and competition from, the mainland form of the goshawk (*A. g. atricapillus*) seem likely, as well. We are not certain what effects these threats may have on Queen Charlotte goshawk populations, but we do not believe that they place the subspecies in danger of extinction, now or in the foreseeable future, because we expect the small, dark phenotype to persist in the forests of Vancouver Island. Nor are we aware of any current threats from contaminants, natural disasters, or genetic problems resulting from demographic isolation. Prey fluctuations may affect the population periodically in the future, as discussed above for the entire DPS, but we do not consider the population to be currently at risk of extinction.

We do not believe that any of the factors considered in this section place the goshawk in danger of extinction in the Vancouver Island portion of its range.

Summary of Factors for Vancouver Island

None of the threats discussed above place the Queen Charlotte goshawk in current danger of extinction. Habitat loss (Factor A), inadequacy of regulatory mechanisms (Factor D), hybridization, competition, prey fluctuations, or other climate change-induced risks (Factor E) are all chronic and, acting collectively, are likely to result in the goshawk becoming in danger of extinction in the

foreseeable future. Overutilization (Factor B) and predation (Factor C) are not expected to affect the population now or in the future. Disease (Factor C) could be a factor in the future, but we judge the risk now to be relatively low. Therefore, listing the species on Vancouver Island as threatened is appropriate.

Queen Charlotte Islands: When we published our proposed rule, the Queen Charlotte Islands were believed to support about 10 to 18 breeding pairs, though few nested during poor prey years (Doyle 2005, p. 18; Doyle 2007, p. 8; McClaren 2006, p. 8; NGRT 2008, p. 8). More recent habitat modeling suggests that the Queen Charlotte Islands may currently have adequate habitat for about 65 territories (Smith and Sutherland 2008, p. 41). If we apply the observed local territory occupancy rate of 43 percent, following the methodology of NGRT (2008, pp. 7–8), the Queen Charlotte Islands might currently support about 28 breeding pairs, or about seven percent of the estimated breeding population in British Columbia.

Currently available genetic analyses suggest that the Queen Charlotte Islands population may be unique (Talbot 2006, p. 1, Talbot *et al.* in press) and genetically isolated (Talbot *et al.* 2005, p. 3; Talbot *et al.* in press). Birds from this population are apparently more consistently dark than birds from Vancouver Island or Southeast Alaska (Taverner 1940, p. 160; Beebe 1974, p. 54; Webster 1988, pp. 46–47). We believe that this phenotype may represent adaptations favoring darker birds in the relatively dark rainforest habitat where there are few prey in open habitats, and smaller body size to maximize agility for capturing primarily avian prey, and to allow survival on smaller rations during periodic prey population declines. The strength of this phenotypic expression likely reflects genetic isolation of this population in recent time (Talbot *et al.* 2005, p. 3; Talbot *et al.* in press). This population may represent a small but possibly important pool of the genetic diversity and perhaps genetic purity (genetic coding for the small, dark phenotype) within the subspecies, contributing to the subspecies' representation and environmental resilience.

In the proposed rule, we concluded that this apparent isolation and uniqueness was adequate to consider the Queen Charlotte Islands a significant portion of the DPS' range. Because we have modified our interpretation of the term ''significant portion of the range'', as described above, we no longer believe this to be the case. Despite the possible genetic uniqueness of this population, we conclude the loss of this population would not likely affect survival prospects for birds in the remainder of the DPS because there appears to be little or no gene flow from the Queen Charlotte Islands to the adjacent island and mainland populations, (Gust *et al.* 2003, p. 22; Talbot *et al.* 2005, pp. 2–3; Talbot 2006, p. 1; Talbot *et al.* in press). In addition, this population is very small. Loss of this population, therefore, is unlikely to place the remainder of the DPS in danger of extinction. While we continue to believe that the genetics of the goshawks on the Queen Charlotte Islands may be important, we conclude that the Queen Charlotte Islands do not meet our criteria as a significant portion of the DPS's range.

Mainland British Columbia: The NGRT estimates that the British Columbia coastal mainland covers 64 percent of the subspecies' geographic range in the DPS, and supports approximately half of the breeding population in the DPS (NGRT 2008, pp. 6–8). Goshawks from this portion of the range likely provide immigrants to Vancouver Island, as goshawks have been documented moving between Vancouver Island and the mainland (McClaren 2004, p. 3). The mainland could represent a potential source population, should populations on Vancouver Island decline. Loss of Queen Charlotte goshawks on the mainland would result in a significant gap in the subspecies' distribution, and a significant reduction in the resiliency and redundancy of the British Columbia DPS.

Without the mainland habitat, the Queen Charlotte goshawk population in British Columbia would be limited to the Queen Charlotte Islands and Vancouver Island. Overall, the population would be reduced by about half, and a probable source of immigrants to Vancouver Island would be gone. We do not have a demographic model to evaluate viability of the population that would remain, but we expect that loss of the mainland population would increase extinction risk for the remaining population. Without the redundancy and resiliency of the mainland population, the DPS would likely number approximately 187 to 209 breeding pairs (NGRT 2008, p. 8), which is precariously small from a conservation perspective. We expect that the DPS would probably be in danger of extinction, and conclude, therefore, that the British Columbia mainland is a significant portion of the DPS's range. Having established significance, we now determine if Queen Charlotte goshawk is endangered, rather than threatened, in this significant portion of the range.

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of the Habitat or Range

We agree with the NGRT that threats from habitat loss and fragmentation are moderate in the southern portion of the mainland and low to moderate in the northern portion (NGRT 2008, p. 16). These threats are chronic and do not currently place goshawks on the mainland in danger of extinction. Establishment of the Great Bear Rainforest and emergence of Ecosystem Based Management on lands available for development on the mainland appear to have reduced threats somewhat, but continued loss of old-growth habitat is likely to reduce habitat quality and contribute to population declines in the foreseeable future.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Queen Charlotte goshawks on the mainland are protected from direct take by several laws and regulations, and not used for commercial, recreational or educational purposes, including falconry; therefore, no element of this Factor is a threat to the species, now or in the foreseeable future.

Factor C. Disease or Predation

Neither disease nor predation has been identified as a current threat to Queen Charlotte goshawks on the mainland. We believe that there is a low risk of disease in the future from West Nile virus or other emerging diseases, but these threats do not currently place goshawks on the mainland in danger of extinction.

Factor D. Inadequacy of Existing Regulatory Mechanisms

Laws and regulations that protect habitat in the province, notably the Forest and Range Practices Act and its associated regulations and strategies, apply across the mainland range, except on the 6 percent in private ownership (USFWS 2010, Table A–3). Threats to habitat loss from urban development are greatest in the southern portion of the mainland coast, but significant protected areas occur in the northern portion. We do not believe that threats posed by inadequacies in existing regulatory mechanisms place goshawks on the mainland coast in current danger of extinction.

Factor E. Other Natural or Manmade Factors Affecting the Species' Continued Existence

It is likely that Queen Charlotte goshawks on the mainland encounter the mainland *(atricapillus)* subspecies of the northern goshawk, and that some hybridization occurs, although we are aware of no documentation to confirm this hypothesis. The NGRT considers the drier coastal western hemlock zones on the mainland to be transitional areas between subspecies. As on Vancouver Island, we believe these areas to be stable hybrid zones where the *laingi* form will persist unless changes in habitat favoring the *atricapillus* form occur. Such changes could conceivably be caused by factors such as climate change or timber harvest. Our current understanding of climate change effects is inadequate to allow predictions concerning competitive advantages that may result. Likewise, we are unable to conclude that timber harvest will favor one subspecies over another.

We believe that climate change is likely to cause changes in habitat and possibly prey communities on the mainland coast that could affect Queen Charlotte goshawks in ways other than favoring the *atricapillus* subspecies. Any effects these threats may have on Queen Charlotte goshawk populations are likely to be in the future, and thus do not place the subspecies in this portion of its range in danger of extinction at this time.

We are aware of no current threats from contaminants or natural disasters on the mainland. Prey fluctuations may affect the population periodically in the future, as discussed above for the entire DPS, but we do not consider the population to be currently at risk of extinction.

We do not believe that any of the factors considered in this section currently place the goshawk in danger of extinction in the mainland coast portion of its range.

Summary of Factors for Mainland British Columbia

We do not expect overutilization (Factor B), predation or disease (Factor C), inadequacy of regulatory mechanisms (Factor D), or other threats, such as climate change, competition, contaminants, natural disasters, or prey fluctuations (Factor E) to have disproportionately greater impacts on the mainland than elsewhere in the DPS's range. The NGRT considers each of these threats to be low on the mainland, except that they consider threats from low prey availability moderate in the southern portion of the mainland (NGRT 2008, p. 16).

We do not believe that habitat loss (Factor A) or hybridization rates (Factor E) place Queen Charlotte goshawks on the mainland in current danger of extinction because these threats are of a chronic, long-term nature. Continued habitat loss, however, is likely to result in poor-quality habitat across a large portion of the mainland, leading to a progressively smaller, more vulnerable population likely to become in danger of extinction in the foreseeable future. Therefore, listing the entire DPS as threatened is warranted.

Summary of ''Significant Portion of the Range'' Analysis

In summary, we find that Vancouver Island and the coastal mainland of British Columbia are significant portions of the DPS's range, but that the Queen Charlotte Islands are not, using the definition of ''significant portion of the range'' discussed above. Further, we find that threats to the populations on Vancouver Island and the mainland coast do not place the subspecies in these portions in danger of extinction at this time, but are likely to do so in the foreseeable future. Thus, listing the entire DPS as threatened is warranted.

Determination

In consideration of the analyses described above, we find that listing the entire British Columbia DPS of the Queen Charlotte goshawk as threatened is warranted.

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition (through listing), requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and encourages conservation actions by Federal and State governments, private agencies and groups, and individuals.

Section 7(a) of the Act, as amended, and as implemented by regulations at 50 CFR part 402, requires Federal agencies to evaluate their actions within the United States or on the high seas, and consult with the Service with respect to any species that is proposed or listed as endangered or threatened, and with respect to its critical habitat, if any is designated. Because the British Columbia DPS of the Queen Charlotte goshawk is entirely outside the United States, and is not ''on the high seas,'' section 7 of the Act does not apply to this DPS. Therefore, there will be no requirement to evaluate management actions or consult with the Service. Further, we cannot designate critical habitat in foreign countries (50 CFR 424.12(h)), so we are not proposing critical habitat for the DPS.

Section 8(a) of the Act authorizes the provision of limited financial assistance for the development and management of programs that the Secretary of the Interior determines to be necessary or useful for the conservation of endangered and threatened species in foreign countries. Sections 8(b) and 8(c) of the Act authorize the Secretary to encourage conservation programs for foreign threatened and endangered species, and to provide assistance for such programs in the form of personnel and training of personnel.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened wildlife. These prohibitions, under 50 CFR 17.21 and 17.31, in part, make it illegal for any person subject to the jurisdiction of the United States to ''take'' (take includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt any of these) within the United States or upon the high seas; import or export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any endangered or threatened wildlife species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken in violation of the Act. Certain exceptions apply to agents of the Service and State conservation agencies. These prohibitions would not apply to the Queen Charlotte goshawk within the British Columbia DPS, except as they apply to import into the United States or foreign commerce.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife species under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22 for endangered species, and 17.32 for threatened species. Permits may be issued for scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. In addition, permits for threatened species may be issued for zoological exhibition, educational purposes or special purposes consistent with the purposes of the Act.

Required Determinations

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 et seq. The regulation will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

References Cited

A list of the references used to develop this rule is available at *http://www.regulations.gov* at Docket No. FWS–R7–ES–2009–0049 or upon request (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this final rule is Steve Brockmann, Juneau Fish and Wildlife Field Office, U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding a new entry for ''Goshawk, Queen Charlotte'' in alphabetical order under BIRDS to the List of Endangered and Threatened Wildlife as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*	*	
BIRDS							
*	*	*	*	*	*	*	
Goshawk, Queen Charlotte.	*Accipiter gentilis laingi.*	That portion of British Columbia that includes Vancouver Island and its surrounding islands, the mainland coast west of the crest of the Coast Range and adjacent islands, and the Queen Charlotte Islands.	British Columbia, Canada.	T	807	NA	NA
*	*	*	*	*	*	*	

* * * * *

Dated: June 26, 2012.

Gregory E. Siekaniec,

Acting Director, Fish and Wildlife Service.

[FR Doc. 2012–18211 Filed 7–31–12; 8:45 am]

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H.R. 3001/P.L. 112–148

Raoul Wallenberg Centennial Celebration Act (July 26, 2012; 126 Stat. 1140)

S. 2009/P.L. 112–149
Insular Areas Act of 2011 (July 26, 2012; 126 Stat. 1144)

S. 2165/P.L. 112–150
United States-Israel Enhanced Security Cooperation Act of 2012 (July 27, 2012; 126 Stat. 1146)

Last List July 27, 2012

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August 27	Sep 11	Sep 17	Sep 26	Oct 1	Oct 11	Oct 26	Nov 26
August 28	Sep 12	Sep 18	Sep 27	Oct 2	Oct 12	Oct 29	Nov 26
August 29	Sep 13	Sep 19	Sep 28	Oct 3	Oct 15	Oct 29	Nov 27
August 30	Sep 14	Sep 20	Oct 1	Oct 4	Oct 15	Oct 29	Nov 28
August 31	Sep 17	Sep 21	Oct 1	Oct 5	Oct 15	Oct 30	Nov 29