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Presidential Documents

Title 3—

The President

Proclamation 8881 of October 5, 2012

Fire Prevention Week, 2012

By the President of the United States of America

A Proclamation

Every year, fires in and around homes nationwide put thousands of Americans in harm's way. From the loss of a home to the tragic passing of a loved one, the devastation these disasters leave in their wake is heartbreaking. During Fire Prevention Week, we resolve to protect ourselves, our families, and our communities from fires, and we honor the courageous first responders who put their lives at risk to keep us safe.

All of us can take meaningful steps to reduce the risk of fire in our homes. I encourage all Americans to install and maintain smoke alarms, test smoke alarm batteries regularly, and follow safe practices in the kitchen and when using electrical appliances. Families should also develop and practice a fire escape plan that includes at least two ways out of every room. To learn more about these and other simple precautions against home fires, visit www.Ready.gov.

This year, wildfires caused profound damage to communities across our country, and our Nation mourned the loss of life that followed. These events reminded us that wildfires are often unpredictable, which is why it is essential for people in areas at risk to practice proper fire prevention and preparedness. Those who live in regions prone to wildfire can take action by clearing flammable vegetation, preparing an emergency supply kit, and sharing evacuation routes and a communications plan with their family in case of emergency. Individuals who see a wildfire should report it by calling 911, and if advised, evacuate immediately.

As we mark Fire Prevention Week by recommitting to preparedness, we also extend our thoughts and prayers to all those who have been affected by fires this year—including the brave first responders who fought them. Summoning courage in crisis and bringing discipline and professionalism to the job each and every day, America's firefighters are heroes in every sense. This week, we express our deepest gratitude for their service to our communities and our Nation, and we pay solemn tribute to the men and women who gave their lives to protect our own. Their sacrifice will never be forgotten, and in their memory, let us rededicate ourselves to preventing tragedy before it strikes.

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 October 7 through October 13, 2012, as Fire Prevention Week. On Sunday, October 7, 2012, in accordance with Public Law 107–51, the flag of the United States will be flown at half-staff on all Federal office buildings in honor of the National Fallen Firefighters Memorial Service. I call on all Americans to participate in this observance with appropriate programs and activities and by renewing their efforts to prevent fires and their tragic consequences.

IN WITNESS WHEREOF, I have hereunto set my hand this fifth day of October, 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. 2012–25228
Filed 10–11–12; 8:45 am]
Billing code 3295–F3

Presidential Documents

Proclamation 8882 of October 5, 2012

Columbus Day, 2012

By the President of the United States of America

A Proclamation

As dawn broke over the Atlantic on October 12, 1492, a perilous 10-week journey across an ocean gave way to encounters and events that would dramatically shape the course of history. Today, we recall the courage and the innovative spirit that carried Christopher Columbus and his crew from a Spanish port to North America, and we celebrate our heritage as a people born of many histories and traditions.

When the explorers laid anchor in the Bahamas, they met indigenous peoples who had inhabited the Western hemisphere for millennia. As we reflect on the tragic burdens tribal communities bore in the years that followed, let us commemorate the many contributions they have made to the American experience, and let us continue to strengthen the ties that bind us today.

In the centuries since that fateful October day in 1492, countless pioneering Americans have summoned the same spirit of discovery that drove Christopher Columbus when he cast off from Palos, Spain, to pursue the unknown. Engineers and entrepreneurs, sailors and scientists, explorers of the physical world and chroniclers of the human spirit—all have worked to broaden our understanding of the time and space we live in and who we are as a people. On this 520th anniversary of Columbus's expedition to the West, let us press forward with renewed determination toward tomorrow's new frontiers.

As a native of Genoa, Italy, Christopher Columbus also inspired generations of Italian immigrants to follow in his footsteps. Today, we take time to celebrate the innumerable contributions that generations of Italian Americans have made to our country. Throughout 2013, Italy will also commemorate this rich heritage and the enduring bonds between our countries with the Year of Italian Culture in the United States, which Americans will join in celebrating.

In commemoration of Christopher Columbus's historic voyage 520 years ago, the Congress, by joint resolution of April 30, 1934, and modified in 1968 (36 U.S.C. 107), as amended, has requested the President proclaim the second Monday of October of each year as ''Columbus Day.''

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, do hereby proclaim October 8, 2012, as Columbus Day. I call upon the people of the United States to observe this day with appropriate ceremonies and activities. I also direct that the flag of the United States be displayed on all public buildings on the appointed day in honor of our diverse history and all who have contributed to shaping this Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this fifth day of October, 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. 2012–25229
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Presidential Documents

Proclamation 8883 of October 5, 2012

German-American Day, 2012

By the President of the United States of America

A Proclamation

United by dreams of freedom, opportunity, and better lives for their families, generations of immigrants have crossed land and sea to pursue the American promise. With unfailing hope for the future they knew was possible here, German Americans have shared in that promise and contributed immeasurably to our Nation.

During the more than three centuries since the first German settlers arrived in North America, German immigrants and their descendants have played a vital role in every part of our society. With each generation, they have passed on to their children and grandchildren an enduring commitment to hard work, civic engagement, and family. Many German traditions are so ingrained in our Nation's story that many people are unaware of their origins, but the indelible mark they have left on the character of our country is unmistakable.

The United States is proud to count Germany as one of our closest and strongest allies. At its core, the alliance between our nations is a partnership between our peoples. For many years, citizens of both our countries—entrepreneurs, innovators, students, scientists, and soldiers—have worked together to forge a brighter future at home and around the world. Those bonds continue to grow stronger with lifelong connections cultivated through educational exchanges and valuable partnerships between our two nations. Today, we celebrate that spirit of collaboration, and we reflect on the innumerable ways generations of German Americans have enriched the American story.

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 October 6, 2012, as German-American Day. I encourage all Americans to learn more about the history of German Americans and reflect on the many contributions they have made to our Nation.

IN WITNESS WHEREOF, I have hereunto set my hand this fifth day of October, 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. 2012–25231
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Presidential Documents

Executive Order 13628 of October 9, 2012

Authorizing the Implementation of Certain Sanctions Set Forth in the Iran Threat Reduction and Syria Human Rights Act of 2012 and Additional Sanctions With Respect to Iran

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), the Iran Sanctions Act of 1996 (Public Law 104–172) (50 U.S.C. 1701 note), as amended (ISA), the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Public Law 111–195) (22 U.S.C. 8501 *et seq.*), as amended (CISADA), the Iran Threat Reduction and Syria Human Rights Act of 2012 (Public Law 112–158) (ITRSHRA), section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code, and in order to take additional steps with respect to the national emergency declared in Executive Order 12957 of March 15, 1995,

I, BARACK OBAMA, President of the United States of America, hereby order:

Section 1. (a) When the President, or the Secretary of State or the Secretary of the Treasury pursuant to authority delegated by the President and in accordance with the terms of such delegation, has determined that sanctions shall be imposed on a person pursuant to ISA, CISADA, or ITRSHRA and has, in accordance with those authorities, selected one or more of the sanctions set forth in section 6 of ISA to impose on that person, the Secretary of the Treasury, in consultation with the Secretary of State, shall take the following actions with respect to the sanctions selected and maintained by the President, the Secretary of State, or the Secretary of the Treasury:

(i) with respect to section 6(a)(3) of ISA, prohibit any United States financial institution from making loans or providing credits to the sanctioned person consistent with that section;

(ii) with respect to section 6(a)(6) of ISA, prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the sanctioned person has any interest;

(iii) with respect to section 6(a)(7) of ISA, prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the sanctioned person;

(iv) with respect to section 6(a)(8) of ISA, block all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, including any foreign branch, of the sanctioned person, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in;

(v) with respect to section 6(a)(9) of ISA, prohibit any United States person from investing in or purchasing significant amounts of equity or debt instruments of a sanctioned person;

(vi) with respect to section 6(a)(11) of ISA, impose on the principal executive officer or officers, or persons performing similar functions and with

similar authorities, of a sanctioned person the sanctions described in sections 6(a)(3), 6(a)(6), (6)(a)(7), 6(a)(8), 6(a)(9), or 6(a)(12) of ISA, as selected by the President, Secretary of State, or Secretary of the Treasury, as appropriate; or

(vii) with respect to section 6(a)(12) of ISA, restrict or prohibit imports of goods, technology, or services, directly or indirectly, into the United States from the sanctioned person.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 2. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State:

(i) to have knowingly, on or after August 10, 2012, transferred, or facilitated the transfer of, goods or technologies to Iran, any entity organized under the laws of Iran or otherwise subject to the jurisdiction of the Government of Iran, or any national of Iran, for use in or with respect to Iran, that are likely to be used by the Government of Iran or any of its agencies or instrumentalities, or by any other person on behalf of the Government of Iran or any of such agencies or instrumentalities, to commit serious human rights abuses against the people of Iran;

(ii) to have knowingly, on or after August 10, 2012, provided services, including services relating to hardware, software, or specialized information or professional consulting, engineering, or support services, with respect to goods or technologies that have been transferred to Iran and that are likely to be used by the Government of Iran or any of its agencies or instrumentalities, or by any other person on behalf of the Government of Iran or any of such agencies or instrumentalities, to commit serious human rights abuses against the people of Iran;

(iii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the activities described in subsection (a)(i) or (a)(ii) of this section or any person whose property and interests in property are blocked pursuant to this section; or

(iv) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this section.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 3. (a) All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch, of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in: any person determined by the Secretary of the Treasury, in consultation with or at the recommendation of the Secretary of State:

(i) to have engaged in censorship or other activities with respect to Iran on or after June 12, 2009, that prohibit, limit, or penalize the exercise of freedom of expression or assembly by citizens of Iran, or that limit access to print or broadcast media, including the facilitation or support

of intentional frequency manipulation by the Government of Iran or an entity owned or controlled by the Government of Iran that would jam or restrict an international signal;

(ii) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the activities described in subsection (a)(i) of this section or any person whose property and interests in property are blocked pursuant to this section; or

(iii) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this section.

(b) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 4. (a) No entity owned or controlled by a United States person and established or maintained outside the United States may knowingly engage in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran, if that transaction would be prohibited by Executive Order 12957, Executive Order 12959 of May 6, 1995, Executive Order 13059 of August 19, 1997, Executive Order 13599 of February 5, 2012, section 5 of Executive Order 13622 of July 30, 2012, or section 12 of this order, or any regulation issued pursuant to the foregoing, if the transaction were engaged in by a United States person or in the United States.

(b) Penalties assessed for violations of the prohibition in subsection (a) of this section, and any related violations of section 12 of this order, may be assessed against the United States person that owns or controls the entity that engaged in the prohibited transaction.

(c) Penalties for violations of the prohibition in subsection (a) of this section shall not apply if the United States person that owns or controls the entity divests or terminates its business with the entity not later than February 6, 2013.

(d) The prohibitions in subsection (a) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 5. The Secretary of State, in consultation with the Secretary of the Treasury, the Secretary of Commerce, and the United States Trade Representative, and with the President of the Export-Import Bank of the United States, the Chairman of the Board of Governors of the Federal Reserve System, and other agencies and officials as appropriate, is hereby authorized to impose on a person any of the sanctions described in section 6 or 7 of this order upon determining that the person:

(a) knowingly, between July 1, 2010, and August 10, 2012, sold, leased, or provided to Iran goods, services, technology, information, or support with a fair market value of $1,000,000 or more, or with an aggregate fair market value of $5,000,000 or more during a 12-month period, and that could directly and significantly facilitate the maintenance or expansion of Iran's domestic production of refined petroleum products, including any direct and significant assistance with respect to the construction, modernization, or repair of petroleum refineries;

(b) knowingly, between July 1, 2010, and August 10, 2012, sold or provided to Iran refined petroleum products with a fair market value of $1,000,000 or more, or with an aggregate fair market value of $5,000,000 or more during a 12-month period;

(c) knowingly, between July 1, 2010, and August 10, 2012, sold, leased, or provided to Iran goods, services, technology, information, or support with a fair market value of $1,000,000 or more, or with an aggregate fair market value of $5,000,000 or more during a 12-month period, and that could directly and significantly contribute to the enhancement of Iran's ability to import refined petroleum products;

(d) is a successor entity to a person determined by the Secretary of State in accordance with this section to meet the criteria in subsection (a), (b), or (c) of this section;

(e) owns or controls a person determined by the Secretary of State in accordance with this section to meet the criteria in subsection (a), (b), or (c) of this section, and had knowledge that the person engaged in the activities referred to in that subsection; or

(f) is owned or controlled by, or under common ownership or control with, a person determined by the Secretary of State in accordance with this section to meet the criteria in subsection (a), (b), or (c) of this section, and knowingly participated in the activities referred to in that subsection.

Sec. 6. (a) When the Secretary of State, in accordance with the terms of section 5 of this order, has determined that a person meets any of the criteria described in section 5 and has selected any of the sanctions set forth below to impose on that person, the heads of relevant agencies, in consultation with the Secretary of State, shall take the following actions where necessary to implement the sanctions imposed by the Secretary of State:

(i) the Board of Directors of the Export-Import Bank shall deny approval of the issuance of any guarantee, insurance, extension of credit, or participation in an extension of credit in connection with the export of any goods or services to the sanctioned person;

(ii) agencies shall not issue any specific license or grant any other specific permission or authority under any statute that requires the prior review and approval of the United States Government as a condition for the export or reexport of goods or technology to the sanctioned person;

(iii) with respect to a sanctioned person that is a financial institution:

(1) the Chairman of the Board of Governors of the Federal Reserve System and the President of the Federal Reserve Bank of New York shall take such actions as they deem appropriate, including denying designation, or terminating the continuation of any prior designation of, the sanctioned person as a primary dealer in United States Government debt instruments; or

(2) agencies shall prevent the sanctioned person from serving as an agent of the United States Government or serving as a repository for United States Government funds; or

(iv) agencies shall not procure, or enter into a contract for the procurement of, any goods or services from the sanctioned person.

(b) The prohibitions in subsections (a)(i)–(a)(iv) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 7. (a) When the Secretary of State, in accordance with the terms of section 5 of this order, has determined that a person meets any of the criteria described in section 5 and has selected any of the sanctions set forth below to impose on that person, the Secretary of the Treasury, in consultation with the Secretary of State, shall take the following actions where necessary to implement the sanctions imposed by the Secretary of State:

(i) prohibit any United States financial institution from making loans or providing credits to the sanctioned person totaling more than

$10,000,000 in any 12-month period, unless such person is engaged in activities to relieve human suffering and the loans or credits are provided for such activities;

(ii) prohibit any transactions in foreign exchange that are subject to the jurisdiction of the United States and in which the sanctioned person has any interest;

(iii) prohibit any transfers of credit or payments between financial institutions or by, through, or to any financial institution, to the extent that such transfers or payments are subject to the jurisdiction of the United States and involve any interest of the sanctioned person;

(iv) block all property and interests in property that are in the United States, that come within the United States, or that are or come within the possession or control of any United States person, including any foreign branch, of the sanctioned person, and provide that such property and interests in property may not be transferred, paid, exported, withdrawn, or otherwise dealt in; or

(v) restrict or prohibit imports of goods, technology, or services, directly or indirectly, into the United States from the sanctioned person.

(b) The prohibitions in subsections (a)(i)–(a)(v) of this section apply except to the extent provided by statutes, or in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the date of this order.

Sec. 8. I hereby determine that, to the extent that section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) may apply, the making of donations of the types of articles specified in such section by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order would seriously impair my ability to deal with the national emergency declared in Executive Order 12957, and I hereby prohibit such donations as provided by subsections 1(a)(iv), 2(a), 3(a), and 7(a)(iv) of this order.

Sec. 9. The prohibitions in subsections 1(a)(iv), 2(a), 3(a), and 7(a)(iv) of this order include but are not limited to:

(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and

(b) the receipt of any contribution or provision of funds, goods, or services from any such person.

Sec. 10. I hereby find that the unrestricted immigrant and nonimmigrant entry into the United States of aliens who meet one or more of the criteria in subsections 2(a) and 3(a) of this order would be detrimental to the interests of the United States, and I hereby suspend the entry into the United States, as immigrants or nonimmigrants, of such persons. Such persons shall be treated as persons covered by section 1 of Proclamation 8693 of July 24, 2011 (Suspension of Entry of Aliens Subject to United Nations Security Council Travel Bans and International Emergency Economic Powers Act Sanctions).

Sec. 11. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and sections 6(a)(6), 6(a)(7), 6(a)(8), 6(a)(9), 6(a)(11), and 6(a)(12) of ISA, and to employ all powers granted to the United States Government by section 6(a)(3) of ISA, as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law.

Sec. 12. (a) Any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of

the prohibitions set forth in this order or in Executive Order 12957, Executive Order 12959, Executive Order 13059, or Executive Order 13599 is prohibited.

(b) Any conspiracy formed to violate any of the prohibitions set forth in this order or in Executive Order 12957, Executive Order 12959, Executive Order 13059, or Executive Order 13599 is prohibited.

Sec. 13. For the purposes of this order:

(a) the term ''entity'' means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(b) the term ''Government of Iran'' includes the Government of Iran, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran;

(c) the term ''Iran'' means the Government of Iran and the territory of Iran and any other territory or marine area, including the exclusive economic zone and continental shelf, over which the Government of Iran claims sovereignty, sovereign rights, or jurisdiction, provided that the Government of Iran exercises partial or total de facto control over the area or derives a benefit from economic activity in the area pursuant to international arrangements;

(d) the terms ''knowledge'' and ''knowingly,'' with respect to conduct, a circumstance, or a result, mean that a person has actual knowledge, or should have known, of the conduct, the circumstance, or the result;

(e) the term ''person'' means an individual or entity;

(f) the term ''sanctioned person'' means a person that the President, or the Secretary of State or the Secretary of the Treasury pursuant to authority delegated by the President and in accordance with the terms of such delegation, has determined is a person on whom sanctions shall be imposed pursuant to IEEPA, ISA, CISADA, or ITRSHRA, and on whom the President, the Secretary of State, or the Secretary of the Treasury has imposed any of the sanctions in section 6 of ISA;

(g) for the purposes of section 4 of this order, the term ''subject to the jurisdiction of the Government of Iran'' means a person organized under the laws of Iran or any jurisdiction within Iran, ordinarily resident in Iran, or in Iran, or owned or controlled by any of the foregoing;

(h) the term ''United States financial institution'' means a financial institution (including its foreign branches) organized under the laws of the United States or any jurisdiction within the United States or located in the United States; and

(i) the term ''United States person'' means any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.

Sec. 14. For those persons whose property and interests in property are blocked pursuant to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or other assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render those measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 12957, there need be no prior notice of an action taken pursuant to subsections 1(a)(iv), 2(a), 3(a), and 7(a)(iv) of this order.

Sec. 15. Executive Order 13622 is hereby amended as follows:

(a) Subsection (1)(c)(ii) is amended by deleting the words ''with respect to the country with primary jurisdiction over the foreign financial institution.''

(b) Subsection (2)(b)(ii) is amended by deleting the words ''with respect to the country with primary jurisdiction over the person.''

(c) Subsection 1(d) is amended by inserting the words ''agricultural commodities,'' after the words ''sale of.''

Sec. 16. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA, as may be necessary to carry out section 104A of CISADA (22 U.S.C. 8514). The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United States Government consistent with applicable law.

Sec. 17. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 18. 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.

Sec. 19. The measures taken pursuant to this order are in response to actions of the Government of Iran occurring after the conclusion of the 1981 Algiers Accords, and are intended solely as a response to those later actions.

THE WHITE HOUSE,
Washington, October 9, 2012.

[FR Doc. 2012–25236
Filed 10–11–12; 8:45 am]
Billing code 3295–F3

Rules and Regulations

Federal Register

Vol. 77, No. 198

Friday, October 12, 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 TRANSPORTATION

Federal Aviation Administration

14 CFR Part 1

[Docket No. FAA–2012–1043; Amdt. Nos. 1–1]

Night Definition; Technical Amendment

AGENCY: Federal Aviation Administration, DOT.

ACTION: Technical amendment.

SUMMARY: The FAA is correcting the title of the publication ''American Air Almanac'' to its current title ''Air Almanac''. This document corrects this minor technical error in the codified regulations.

DATES: Effective October 12, 2012.

FOR FURTHER INFORMATION CONTACT: For technical questions concerning this action, contact Ida M. Klepper, Airmen and Airspace Rules Division, Office of Rulemaking, ARM–100, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: 202–267–9677; email: *Ida.Klepper@faa.gov.*

Background

The former ''American Air Almanac'' was created to meet the general requirements for air navigation in the United Kingdom, the United States, and Canada. In 14 CFR 1.1 the definition of night refers to twilight times as published in the ''American Air Almanac''. The ''American Air Almanac'' publication ceased in 1953 and is currently called the ''Air Almanac''. This technical amendment corrects the title of the publication.

Technical Amendment

This technical amendment makes one revision to the codified text § 1.1. The language in § 1.1incorrectly uses the title ''American Air Almanac'' when it should read ''Air Almanac''.

Because the change in this technical amendment results in no substantive change, we find good cause exists under 5 U.S.C. 553(d)(3) to make the amendment effective in less than 30 days.

List of Subjects in 14 CFR Part 1

Air transportation.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 1—DEFINITIONS AND ABBREVIATIONS

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

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

■ 2. In § 1.1, revise the definition of ''Night'' to read as follows:

§ 1.1 General definitions.

* * * * *

Night means the time between the end of evening civil twilight and the beginning of morning civil twilight, as published in the Air Almanac, converted to local time.

* * * * *

Issued in Washington, DC, on September 20, 2012.

Lirio Liu,

Acting Director, Office of Rulemaking.

[FR Doc. 2012–25032 Filed 10–11–12; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2012–0370; FRL–9738–3]

Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Pittsburgh-Beaver Valley Nonattainment Area Determinations of Attainment of the 1997 Annual Fine Particulate Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is making two determinations regarding the Pittsburgh-Beaver Valley fine particulate matter ($PM_{2.5}$) nonattainment area (hereafter referred to as ''the Pittsburgh Area'' or ''the Area''). First, EPA determines that the Area has attained the 1997 annual $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS). This determination of attainment is based upon quality-assured, quality-controlled and certified ambient air monitoring data for the 2008–2010 and 2009–2011 monitoring periods, showing that the Pittsburgh Area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS. In accordance with the EPA's applicable $PM_{2.5}$ implementation rule, this determination of attainment suspends the requirements for the Area to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other planning State Implementation Plan (SIP) revisions related to the attainment of the standard for so long as the Area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. EPA also determines, based on quality-assured, quality-controlled, and certified monitoring data for the 2007–2009 monitoring period, that the Area attained the 1997 annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010. These actions are being taken under the Clean Air Act (CAA).

DATES: This final rule is effective on October 12, 2012.

ADDRESSES: EPA has established a docket for this action under Docket ID Number EPA–R03–OAR–2012–0370. All documents in the docket are listed in the *www.regulations.gov* Web site. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through *www.regulations.gov* or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Emlyn Vélez-Rosa, (215) 814–2038, or by email at *velez-rosa.emlyn@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, we mean EPA. This supplementary information section is arranged as follows:

I. Background
II. Summary of Actions
III. Final Action
IV. Effective Date
V. Statutory and Executive Order Reviews

I. Background

On July 16, 1997, EPA established an annual $PM_{2.5}$ NAAQS at 15.0 micrograms per cubic meter (μg/m³) (hereafter referred to as ''the 1997 annual $PM_{2.5}$ NAAQS'' or ''the annual $PM_{2.5}$ standard''), based on a 3-year average of annual mean $PM_{2.5}$ concentrations (62 FR 38652, July 18, 1997). On January 5, 2005, 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 (70 FR 944). These designations, effective on April 5, 2005, included the Pittsburgh Area as a nonattainment area for the 1997 annual $PM_{2.5}$ NAAQS. On March 29, 2007, EPA issued a detailed 1997 $PM_{2.5}$ implementation rule, codified at 40 CFR part 51, subpart Z, in which EPA provided guidance for state and tribal plans to implement the 1997 annual $PM_{2.5}$ NAAQS (72 FR 20586, April 25, 2007).

On June 11, 2012 (77 FR 34297), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania, proposing two determinations of attainment of the 1997 annual $PM_{2.5}$ NAAQS for the Pittsburgh Area. First, EPA proposed to determine that the Pittsburgh Area has attained the 1997 annual $PM_{2.5}$ NAAQS, based upon quality-assured, quality-controlled, and certified ambient air monitoring data for the 2008–2010 period and preliminary data for 2009–2011. The 2011 data have now been quality-assured and certified, and show that the area continues to attain based on certified data for 2009–2011. *See* Table 1. In accordance with 40 CFR 51.1004(c), EPA's final determination of attainment suspends the requirements for the Pittsburgh Area to submit an attainment demonstration and RACM, a RFP plan, contingency measures, and other planning SIP revisions related to the attainment of the 1997 annual $PM_{2.5}$ NAAQS for so long as the Area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. In the NPR, EPA also proposed to determine that the Area attained the 1997 annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010, based on quality-assured, quality-controlled, and certified monitoring data for the 2007–2009 monitoring period.

II. Summary of Actions

EPA has previously determined that the $PM_{2.5}$ monitoring network for the Pittsburgh Area is adequate.[1] EPA found that the number of $PM_{2.5}$ monitors in the Area meets the minimum regulatory requirements given in 40 CFR part 58, appendix D, and that monitoring is in accordance with Pennsylvania's most recent annual monitoring network plan approved by EPA, as required by 40 CFR 58.10.

In this final rulemaking, EPA is determining that the Pittsburgh Area has attained the 1997 annual $PM_{2.5}$ NAAQS, based on the most recent three years of quality-assured, quality-controlled, and certified data, and is also determining that the Area attained the 1997 annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010. In accordance with the requirements of 40 CFR part 50, EPA has reviewed the quality-assured, quality-controlled, certified $PM_{2.5}$ data recorded in the EPA's Air Quality System (AQS) database for the Pittsburgh Area during 2007–2009, 2008–2010, and 2009–2011 monitoring periods.

Monitoring data for 2011, which was recently quality-assured, quality-controlled, and certified, show that the area continues to attain based on certified data for 2009–2011. Table 1 below shows the $PM_{2.5}$ annual design values for the Pittsburgh Area during the 2009–2011 period. The $PM_{2.5}$ annual design value for the Pittsburgh Area during 2009–2011 is 14.7 μg/m³, based on the Orchard monitoring site, located in Allegheny County. The $PM_{2.5}$ monitoring data for 2007–2009 and 2008–2010 were set forth in EPA's June 11, 2012 NPR (77 FR 34297).

TABLE 1—PITTSBURGH AREA 2009–2011 ANNUAL $PM_{2.5}$ DATA

[In μg/m³]

County	Site ID	Site name	Annual mean			2009–2011 Design value	Completeness status[1]
			2009	2010	2011		
Allegheny	42–003–0002	Orchard	.....	16.3	13.1	14.7	Incomplete[2]
Allegheny	42–003–0008	Lawrence	11.6	12.2	11.1	11.6	Complete
Allegheny	42–003–0067	South Fayette	10.8	11.7	10.6	11.0	Complete
Allegheny	42–003–0093	North Park	9.6	10.5	9.0	9.7	Max. Quarter
Allegheny	42–003–0095	Moon	9.4	11.5	.....	10.5	Incomplete[2]
Allegheny	42–003–1008	Harrison	12.7	13.0	11.6	12.4	Max. Quarter
Allegheny	42–003–1301	N. Braddock	12.1	13.7	12.3	12.7	Collocated
Armstrong	42–005–0001	Kittaning	11.0	13.2	12.1	12.1	Incomplete[2]
Beaver	42–007–0014	Beaver Falls	13.0	12.5	11.7	12.4	Complete
Washington	42–125–0005	Charleroi	12.6	13.2	12.0	12.6	Max. Quarter
Washington	42–125–0200	Washington	11.1	12.1	10.8	11.3	Complete
Washington	42–125–5001	Florence	12.2	8.9	5.9	9.0	Complete
Westmoreland	42–129–0008	Greensburg	13.5	14.0	13.7	13.7	Statistical

[1] This column indicates if the design value for the monitor is: valid and complete (''Complete'') or incomplete (''Incomplete''). It also indicates which data substitution method, if any, was used to deem an incomplete design value valid and ''Complete'': ''Max. Quarter'' denotes the maximum quarter data substitution test; ''Collocated'' denotes the collocated data substitution test; ''Statistical'' denotes that EPA's statistical procedure has been applied to address the missing data. Note that these techniques are discretionary.

[2] These monitors did not collect sufficient data during 2009–2011 due to shut-downs or startups.

[1] The Commonwealth of Pennsylvania's August 4, 2011 annual ambient monitoring network plan was approved by EPA in a December 6, 2011 letter from Shawn M. Garvin, Regional Administrator of EPA Region III, to Michael L. Krancer, Secretary of the Pennsylvania Department of Environmental Protection.

Several monitors did not meet the completeness requirement for one or more quarters during 2009–2011. EPA addressed the missing data of each of the monitors in order to determine if the monitors were attaining the 1997 annual $PM_{2.5}$ NAAQS, by applying one of these methods: Maximum quarter data substitution test, collocated data substitution test, and EPA's statistical method. Additional information about the monitoring network and air quality data used in this determination can be found in the Technical Support Document for this final rulemaking notice (FRN) which is available online at *www.regulations.gov,* Docket number EPA–R03–OAR–2012–0370.

The quality-assured, quality-controlled, certified data for 2008–2010 and 2009–2011 show that the Pittsburgh Area has monitored attainment of the 1997 annual $PM_{2.5}$ NAAQS. Additionally, preliminary $PM_{2.5}$ data available for 2012 is consistent with continued attainment of the 1997 annual $PM_{2.5}$ NAAQS in the Pittsburgh Area. EPA's evaluation of the quality-assured, quality-controlled, certified monitoring data from 2007–2009 show that the Pittsburgh Area attained the 1997 annual $PM_{2.5}$ NAAQS by its applicable attainment date.

No public comments were submitted in response to the NPR. Additional information about the monitoring network and air quality data used in this determination is available in the Technical Support Documents for the NPR and the FRN. Relevant support documents for this action are available online at *www.regulations.gov,* Docket number EPA–R03–OAR–2012–0370.

III. Final Action

EPA is making two final determinations. First, EPA determines that the Area has attained the 1997 annual $PM_{2.5}$ NAAQS, based upon quality-assured and certified ambient air monitoring data for the 2008–2010 and 2009–2011 periods. Pursuant to 40 CFR 51.1004(c), this determination of attainment will suspend the requirements for the Area to submit an attainment demonstration and associated RACM, RFP plan, contingency measures, and other planning SIP revisions related to the attainment of the standard, for so long as the Area continues to attain the 1997 annual $PM_{2.5}$ NAAQS. Second, EPA determines that the Area attained the 1997 annual $PM_{2.5}$ NAAQS by its applicable attainment date of April 5, 2010, based on quality-assured, quality-controlled and certified monitoring data for the 2007–2009 monitoring period. This determination of attainment fulfills EPA's obligation pursuant to section 179(c)(1) of the CAA.

Finalizing these determinations or either of them does not constitute a redesignation of the Pittsburgh Area to attainment for the 1997 annual $PM_{2.5}$ NAAQS under CAA section 107(d)(3). Neither determination of attainment involves approving a maintenance plan for the Pittsburgh Area, nor determines that the Area has met all the requirements for redesignation under the CAA, including that attainment be due to permanent and enforceable emission reductions.[2] Therefore, the designation status of the Pittsburgh Area will remain nonattainment for the 1997 annual $PM_{2.5}$ NAAQS until such time as EPA takes final rulemaking action to determine that such portions meet the CAA requirements for redesignation to attainment.

IV. Effective Date

EPA finds that there is good cause for this approval to become effective on the date of publication because this action suspends the requirements for the Pittsburgh Area to submit an attainment demonstration and associated RACM, RFP plans, contingency measures and other SIPs related to attainment of the 1997 annual $PM_{2.5}$ NAAQS required by CAA Section 172(c). *See* 40 CFR 51.1004(c). The expedited effective date for this action is authorized under both 5 U.S.C. 553(d)(1), which provides that rule actions may become effective less than 30 days after publication if the rule ''grants or recognizes an exemption or relieves a restriction'' and section 5 U.S.C. 553(d)(3), which allows an effective date less than 30 days after publication ''as otherwise provided by the agency for good cause found and published with the rule.'' The relief from these SIP planning obligations in CAA Section 172(c) is sufficient reason to allow an expedited effective date of this rule under 5 U.S.C. 553(d)(1) and (3).

V. Statutory and Executive Order Reviews

A. General Requirements

This action, which makes determinations of attainment based on air quality, will result in the suspension of certain Federal requirements and/or will not impose any additional requirements beyond those imposed by state law. For that reason, this action:

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

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

B. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a

[2] The monitoring data for the 2008–2010 and 2009–2011 monitoring periods that are relied on in this notice may be impacted by reductions associated with the Clean Air Interstate Rule (CAIR), which was remanded to EPA in 2008. *North Carolina* v. *EPA,* 531 F.3d 896, *as modified on reh'g,* 550 F.3d 1176 (DC Cir. 2008). Nonetheless, because these determinations address only whether the monitoring data show attainment, at this time EPA need not address whether such attainment was due to the remanded CAIR.

report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 11, 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, in which EPA determines that the Pittsburgh Area has attained the 1997 annual $PM_{2.5}$ NAAQS and attained the 1997 annual $PM_{2.5}$ NAAQS by its attainment date, 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, Particulate matter, Reporting and recordkeeping requirements.

Shawn M. Garvin,

Regional Administrator, Region III.

40 CFR part 52 is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart NN—Pennsylvania

■ 2. Section 52.2056 is amended by adding paragraph (h) to read as follows:

§ 52.2056 Determinations of Attainment.

* * * * *

(h) Based upon EPA's review of the air quality data for the 3-year period 2007 to 2009, EPA determined that the Pittsburgh-Beaver Valley fine particle ($PM_{2.5}$) nonattainment area attained the 1997 annual $PM_{2.5}$ National Ambient Air Quality Standard (NAAQS) by the applicable attainment date of April 5, 2010. Therefore, EPA has met the requirement pursuant to CAA section 179(c) to determine, based on the area's air quality as of the attainment date, whether the area attained the standard. EPA also determined that the Pittsburgh-Beaver Valley $PM_{2.5}$ nonattainment area is not subject to the consequences of failing to attain pursuant to section 179(d).

■ 3. Section 52.2059 is amended by adding paragraph (g) to read as follows:

§ 52.2059 Control strategy: Particulate matter.

* * * * *

(g) Determination of Attainment. EPA has determined, as of October 12, 2012, that based on 2008 to 2010 and 2009 to 2011 ambient air quality data, the Pittsburgh-Beaver Valley fine particle ($PM_{2.5}$) nonattainment area has attained the 1997 annual $PM_{2.5}$ national ambient air quality standards (NAAQS). This determination, in accordance with 40 CFR 52.1004(c), suspends the requirements for the Pittsburgh-Beaver Valley $PM_{2.5}$ nonattainment area to submit an attainment demonstration, associated reasonably available control measures, a reasonable further progress plan, contingency measures, and other planning SIPs related to attainment of the standard for as long as this area continues to meet the 1997 annual $PM_{2.5}$ NAAQS.

[FR Doc. 2012–24782 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2011–0227; FRL–9734–7]

Approval and Promulgation of Implementation Plans; Kentucky; Approval of Revisions to the Jefferson County Portion of the Kentucky SIP; New Source Review; Prevention of Significant Deterioration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to approve multiple changes to the Jefferson County portion of the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ), to EPA in two submittals dated June 1, 2009, and February 8, 2011. These revisions were submitted by KDAQ on behalf of the Louisville Metro Air Pollution Control District (LMAPCD) (also referred to as Jefferson County) and modify the LMAPCD New Source Review (NSR) Prevention of Significant Deterioration (PSD) permitting regulations. EPA is approving Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions because the Agency has determined that these SIP revisions are consistent with the Clean Air Act (CAA or Act) and EPA regulations regarding the PSD permitting program.

DATES: This rule is effective November 13, 2012.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R04–OAR–2011–0227. 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 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding the Jefferson County portion of the Kentucky SIP, contact Ms. Twunjala Bradley, 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. Ms. Bradley's telephone number is (404) 562–9352; email address: *bradley.twunjala@epa.gov.* For information regarding the GHG Tailoring Rule, 2002 NSR Reform and NSR $PM_{2.5}$ Rule, contact Yolanda Adams, Air Permits Section, at the same address above. Ms. Adams' telephone number is (404) 562–9214; email address: *adams.yolanda@epa.gov.* For information regarding the Phase II Rule and ozone NAAQS, contact Jane Spann, Regulatory Development Section, at the same address above. Ms. Spann's telephone number is (404) 562–9029; email address: *spann.jane@epa.gov.* For information regarding the $PM_{2.5}$ NAAQS, contact Mr. Joel Huey, Regulatory Development Section, at the

same address above. Mr. Huey's telephone number is (404) 562–9104; email address: *huey.joel@epa.gov.*

SUPPLEMENTARY INFORMATION:

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I. Background

On June 1, 2009, and February 8, 2011, the Commonwealth of Kentucky through KDAQ (and on behalf of LMAPCD) submitted two SIP revisions to EPA for approval into the Jefferson County portion of the Kentucky SIP to adopt federal NSR PSD permitting requirements. The SIP revisions consist of changes to the LMAPCD Air Quality Regulations, Regulation 2 Permit Requirements: Regulation 2.05—Prevention of Significant Deterioration of Air Quality, and incorporate by reference (IBR) [1] several NSR PSD permitting requirements promulgated at 40 CFR 52.21. Specifically, the June 1, 2009, SIP revision: (1) Incorporates provisions for implementing the PSD program for the $PM_{2.5}$ NAAQS as promulgated in the NSR $PM_{2.5}$ Rule,[2] 73 FR 28321 (May 16, 2008); (2) adopts PSD provisions related to the implementation of the 1997 8-hour ozone Phase II Rule (Phase II Rule), including nitrogen oxides (NO_X) as a precursor to ozone, 70 FR 71612 (November 29, 2005); and (3) adopts federal PSD regulations established in the 2002 NSR Reform Rules, 67 FR 80186 (December 31, 2002), and the NSR Reasonable Possibility Rule, 72 FR 72607 (December 21, 2007). These PSD permitting provisions became effective in Jefferson County on May 20, 2009. The February 8, 2011, SIP revision provides Jefferson County with the authority to regulate greenhouse gas (GHG) emissions under its PSD program and establishes appropriate emission thresholds for determining which new stationary sources and modification projects become subject to LMAPCD's PSD permitting requirements for their GHG emissions as promulgated in the GHG Tailoring Rule, 75 FR 31514 (June 3, 2010). These GHG PSD applicability provisions became effective in Jefferson County on November 17, 2010. In addition, the February 8, 2011, submittal adopts a provision that would automatically render Jefferson County's Regulation 2.05 or a portion thereof invalid in the wake of certain court decisions or other events (the ''automatic rescission clause''). Approval of Jefferson County's GHG permitting regulations also includes a proposal to simultaneously rescind the federal implementation plan (FIP) that EPA promulgated on January 14, 2011. *See* 76 FR 2581.

On June 6, 2012, EPA published a proposed rulemaking to approve the aforementioned changes to Jefferson County's NSR PSD program. *See* 77 FR 33363. Comments on the proposed rulemaking were due on or before July 6, 2012. No comments, adverse or otherwise, were received on EPA's June 6, 2012, proposed rulemaking. Pursuant to section 110 of the CAA, EPA is now taking final action to approve the changes to Jefferson County's NSR PSD program as provided in EPA's June 6, 2012, proposed rulemaking. A summary of the background for today's final action is provided below. EPA's June 6, 2012, proposed rulemaking contains more detailed information regarding the Jefferson County SIP revisions being approved today. Please refer to the relevant sections in the proposed rulemaking for EPA's rationale for this final action. *See* 77 FR 33363.

In addition to incorporating the changes discussed above, Jefferson County's proposed SIP revisions include PSD permitting provisions that: (1) Exclude facilities that produce ethanol through a natural fermentation process from the definition of ''chemical process plants'' in the major NSR source permitting program as amended in the Ethanol Rule, 72 FR 24060 (May 1, 2007); and (2) IBR changes pursuant to EPA's Fugitive Emissions Rule, 73 FR 77882 (December 19, 2008).[3] In today's rulemaking, EPA is not taking action on LMAPCD's changes to its PSD regulations to adopt provisions promulgated in the Ethanol Rule nor is EPA taking action on LMAPCD's changes to incorporate the provisions of the Fugitive Emissions Rule.

Jefferson County's practice for revising its PSD regulations is to IBR into its SIP the version of the Code of Federal Regulations (at 40 CFR 52.21) that is in effect as of a specified date. LMAPCD's Regulation 2.05 contains the preconstruction review program that provides for the prevention of significant deterioration of ambient air quality as required under part C of title I of the CAA (the PSD program). Jefferson County's June 1, 2009, SIP revision, which provided version 9 of LMAPCD's Regulation 2.05, IBR the federal PSD regulations as set forth at 40 CFR 52.21, and as amended as of July 1, 2008. Subsequently, the February 8, 2011, SIP revision, which provided version 10 of LMAPCD's Regulation 2.05, IBR federal PSD regulations as set forth at 40 CFR 52.21, and as amended as of July 1, 2010, thereby superseding version 9 of Regulation 2.05. Throughout this rulemaking, EPA will refer to the June 1, 2009, and February 8, 2011, SIP revisions as ''Jefferson County's SIP revisions.'' In effect, the Jefferson County SIP revisions change the LMAPCD's IBR date for Regulation 2.05 to July 1, 2010.

II. EPA's Action on Jefferson County's SIP Revision To Adopt the GHG Tailoring Rule

As mentioned above, on February 8, 2011, KDAQ, on behalf of LMAPCD, submitted to EPA a revision to the Jefferson County portion of Kentucky's SIP to IBR NSR PSD requirements for GHG. Specifically, the February 8, 2011, SIP revision includes changes to LMAPCD's Regulation 2.05—Prevention of Significant Deterioration of Air Quality (version 10) to provide authority to LMAPCD to regulate GHG under the PSD program, and establishes appropriate PSD applicability thresholds for GHGs, consistent with EPA's Tailoring Rule.

[1] Throughout this document IBR means incorporate or incorporates by reference.

[2] With respect to the NSR $PM_{2.5}$ Rule, Phase II Rule and NSR Reform, Jefferson County's SIP revisions only address PSD requirements at Regulation 2.05. The nonattainment NSR provisions for Jefferson County (Regulation 2.04) for these provisions are still under development by LMAPCD.

[3] On March 31, 2010, EPA stayed the Fugitive Emissions Rule (73 FR 77882) for 18 months to October 3, 2011, to allow the Agency time to propose, take comment and issue a final action regarding the inclusion of fugitive emissions in NSR applicability determinations. This stay was established as a result of EPA granting the Natural Resource Defense Council's petition for reconsideration on the original Fugitive Emissions Rule. *See* 73 FR 77882 (December 19, 2008). On March 30, 2011 (76 FR 17548), EPA proposed an interim rule which superseded the March 31, 2010, stay and clarified and extended the stay of the Fugitive Emission Rule until EPA completes its reconsideration. The interim rule simply reverts the CFR text back to the language that existed prior to the Fugitive Emissions Rule changes in the December 19, 2008, rulemaking. EPA plans to issue a final rule affirming the interim rule as final. The final rule will remain in effect until EPA completes its reconsideration.

LMAPCD is currently the SIP-approved permitting authority for the PSD program in Jefferson County, Kentucky, and does not interpret its current SIP-approved PSD regulations at Regulation 2.05 (i.e., version 9), which IBR the federal PSD regulations, to be applicable to GHG. In letters dated October 4, 2010, and October 19, 2010, LMAPCD notified EPA that it did not have the authority to regulate GHG under the PSD program, and thus was in the process of revising its regulations (the subject of this final action) to provide LMAPCD with this authority. The February 8, 2011, SIP revision IBR the federal PSD regulations at 40 CFR 52.21 as of July 2010 into Jefferson County Regulation 2.05 to include the relevant federal GHG Tailoring Rule changes that provide LMAPCD with the authority to regulate GHG under the PSD program and establish the thresholds for GHG permitting applicability. The GHG Tailoring Rule changes that this final action incorporates into the Jefferson County portion of Kentucky's SIP define the term ''subject to regulation'' for the PSD program and define ''greenhouse gases'' and ''tons per year (tpy) carbon dioxide equivalent emissions'' (CO_2e). Additionally, the changes specify the methodology for calculating an emissions increase for GHG, the applicable thresholds for GHG emissions subject to PSD, and the schedule for when the applicability thresholds take effect. *See* 75 FR at 31606–31607. EPA has determined that these provisions, which provide LMAPCD with the authority to regulate GHG under the PSD program and establish the thresholds for GHG permitting applicability, are consistent with EPA's PSD regulations for GHG emitting sources as promulgated in the GHG Tailoring Rule and section 110 of the CAA. Therefore, EPA is approving the GHG PSD permitting revision into the Jefferson County portion of Kentucky's SIP. In addition, EPA is rescinding the FIP promulgated January 14, 2011, codified in 40 CFR 52.37(b)(7), that ensures the availability of a PSD-permitting authority for GHG-emitting sources in Jefferson County, Kentucky. This FIP is no longer necessary since the GHG PSD permitting revision is being approved into the Jefferson County portion of Kentucky's SIP. Therefore, this final action removes Jefferson County from the list at 40 CFR section 52.37.

III. EPA's Action on Jefferson County's SIP Revision To Adopt the NSR $PM_{2.5}$ PSD Permitting Requirements

Jefferson County's Regulation 2.05—*Prevention of Significant Deterioration of Air Quality* IBR the provisions at 40 CFR 52.21, as amended in the NSR $PM_{2.5}$ Rule for PSD. Specifically, Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions IBR the following NSR $PM_{2.5}$ provisions for PSD: (1) Requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) significant emission rates for direct $PM_{2.5}$ and precursor pollutants (SO_2 and NO_X); (3) PSD and NNSR requirement of states to address condensable PM in establishing enforceable emission limits for PM_{10} or $PM_{2.5}$; and (4) $PM_{2.5}$ emission offsets regarding the PM_{10} ''grandfathering'' provision. In the February 8, 2011, SIP revision, LMAPCD elected to IBR the grandfathering provision at 40 CFR 52.21(i)(1)(xi) in its PSD regulations at Regulation 2.05. EPA took final action to repeal the PM_{10} grandfathering provision on May 18, 2011. *See* 76 FR 28646. Therefore, EPA is not taking action to approve this provision into the Jefferson County portion of the Kentucky SIP. Jefferson County will need to update its PSD provisions to reflect the repeal of the PM_{10} grandfathering provision in federal regulations at 40 CFR 52.21. At this time Jefferson County's PSD regulations are approvable because they are at least as stringent as the current federal regulations and are consistent with section 110 of the CAA.

Jefferson County's February 11, 2011, SIP revision also IBR, into the Jefferson County portion of the Kentucky SIP, PSD regulations regarding the requirement to address condensable PM in applicability determinations and in establishing enforceable emission limits in PSD and nonattainment NSR permits, as established in the NSR $PM_{2.5}$ Rule. As discussed above in Section III.B, under a separate action, EPA has proposed to correct the inadvertent inclusion of ''particulate matter emissions'' in the definition of ''regulated NSR pollutant'' as an indicator for which condensable emissions must be addressed. *See* 77 FR 75656 (March 16, 2012). Further, on May 14, 2012, the Commonwealth of Kentucky, on behalf of LMAPCD, provided a letter to EPA with clarification of Jefferson County's intent in light of EPA's March 12, 2012, proposed rulemaking. Specifically, in the letter Kentucky requested that EPA not approve (into the Jefferson County portion of the SIP) the term ''particulate matter emissions'' (at Regulation 2.05) as part of the definition for ''regulated NSR pollutant'' that condensable emissions be accounted for in applicability determinations and in establishing emissions limitations for PM. Therefore, given the Commonwealth's and LMAPCD's request and EPA's intention to amend the definition of ''regulated NSR pollutant,'' EPA is not taking action to approve the terminology ''particulate matter emissions'' into the Jefferson County portion of the Kentucky SIP (at Regulation 2.05) for the condensable provision at the definition of ''regulated NSR pollutant.'' EPA is, however, approving into the SIP at Regulation 2.05 the remaining condensable requirement at 40 CFR 51.166(b)(49)(vi) that condensable emissions be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and $PM_{10.}$ EPA has determined that Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions are consistent with the NSR $PM_{2.5}$ Rule for PSD and with section 110 of the CAA. *See* NSR $PM_{2.5}$ Rule, 75 FR 31514.

IV. EPA's Analysis of Jefferson County's SIP Revisions To Adopt the Phase II Rule

Jefferson County's June 1, 2009, SIP revision updated LMAPCD's PSD program to include NO_X as an ozone precursor for PSD permitting, consistent with changes to the federal regulations set forth in the Phase II Rule at 40 CFR 52.21. Subsequently, on February 8, 2011, KDAQ submitted a SIP revision which included the June 1, 2009, changes in addition to other federal PSD permitting updates to the Jefferson County portion of the Kentucky SIP. Jefferson County's SIP revisions IBR the federal PSD regulations (at 40 CFR 52.21) to include the NO_X as a precursor PSD-only permitting provisions promulgated in the Phase II Rule into the Jefferson County portion of the Kentucky SIP at Regulation 2.05—*Prevention of Significant Deterioration of Air Quality* (version 10) as of July 1, 2010. EPA has determined that Jefferson County's SIP revisions are consistent with the PSD Phase II Rule permitting requirements and section 110 of the CAA.

V. EPA's Action on Jefferson County's SIP Revision To Adopt the Federal NSR Reform and Reasonable Possibility Provisions

As mentioned in Section I, LMAPCD's PSD Program at Regulation 2.05—*Prevention of Significant Deterioration for Air Quality* establishes the preconstruction review program as

required under part C of title I of the CAA. The changes to LMAPCD's PSD rules, which EPA is now approving into the Jefferson County portion of the Kentucky SIP, were established to update the existing PSD Program to meet the requirements of the 2002 NSR Reform Rules. Jefferson County's SIP revisions IBR the 2002 NSR Reform PSD changes regarding baseline actual emissions, actual-to-projected-actual applicability tests, and plantwide applicability limit provisions. Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions both address the federal PSD requirements promulgated in the 2002 NSR Reform Rules. The proposed revisions explicitly exclude the pollution control projects and clean unit portions of the 2002 NSR Reform Rules that were vacated by the D.C. Circuit Court. *See New York* v. *EPA,* 413 F.3d 3 (D.C. Cir. 2005).

With regard to the remanded portions of the 2002 NSR Reform Rules related to recordkeeping and EPA's December 21, 2007, clarification of the term ''reasonable possibility'' (72 FR 72607), Jefferson County's SIP revisions IBR the federal revised ''reasonable possibility'' provisions at 40 CFR 52.21(r)(6). Thus, LMAPCD's recordkeeping and reporting provisions are the same as the federal requirements promulgated in EPA's December 21, 2007, final action.

In addition to incorporating the federal PSD regulations, Jefferson County's February 8, 2011, SIP revision includes a technical support document (TSD), which assesses the impact of adopting the 2002 NSR Reform provisions into Jefferson County's PSD permitting program and the air quality impacts. As mentioned above, LMAPCD has a SIP-approved PSD program. However, due to the limited number of sources in Jefferson County, the permitting program does not assess many major PSD permits. In fact, in nearly ten years, LMAPCD has only analyzed two projects under PSD. Most sources in Jefferson County are permitted through LMAPCD's minor source program, which allows sources to take emission limits to avoid PSD permitting. Additionally, regarding criteria pollutants, the TSD explains that sources typically subject to PSD permitting (i.e., point sources) have not been the primary driver for past or current nonattainment NAAQS designations in Jefferson County. *See* the TSD in the Docket ID No. EPA–R04–OAR–2011–0227.

LMAPCD's TSD concluded that adoption of the 2002 NSR Reform improvements would not impede the LMAPCD's ability to comply with the NAAQS or any reasonable progress towards continued maintenance. After evaluating Jefferson County's SIP revision and the TSD provided with the February 8, 2011, SIP revision, EPA has determined that the SIP revisions to adopt NSR Reform and reasonable possibility provisions are consistent with the requirements for the preparation, adoption and submittal of implementation plans for the federal PSD program at 40 CFR 52.21 and the 2002 NSR Reform Rule.

VI. EPA's Action for Jefferson County's Automatic Rescission Clause

Jefferson County's February 8, 2011, SIP revision adds a new section to Regulation 2.05, Section 2 ''Effect of Stay, Vacatur, or Withdrawal,'' also known as an automatic rescission clause. This clause provides that in the event that EPA or a federal court stays, vacates, or withdraws any section or subsection of 40 CFR 52.21, that section or subsection shall automatically be deemed stayed, vacated or withdrawn from Jefferson County's SIP-approved PSD program at Regulation 2.05. The period of delay resulting from a stay would begin and end for purposes of Jefferson County's SIP on the date specified by EPA in a **Federal Register** notice announcing the stay. Likewise, any provision that is vacated or withdrawn shall be null and void for purposes of Jefferson County's SIP as of the date specified in the notice of vacatur or withdrawal published by EPA in a **Federal Register** notice.

EPA has determined that Jefferson County's automatic rescission clause is approvable. In assessing the approvability of this provision, EPA considered two key factors: (1) Whether the public will be given reasonable notice of any change to the SIP that occurs as a result of the automatic rescission clause, and (2) whether any future change to the SIP that occurs as a result of the automatic rescission clause would be consistent with EPA's interpretation of the effect of the triggering EPA or federal court action (e.g., the extent of an administrative or judicial stay). These criteria are derived from the SIP revision procedures set forth in the CAA and federal regulations.

Regarding public notice, CAA section 110(l) provides that any revision to a SIP submitted by a state to EPA for approval ''shall be adopted by such State after reasonable notice and public hearing.'' In accordance with CAA section 110(l), the LMAPCD followed applicable notice-and-comment procedures prior to adopting the automatic rescission clause. Thus, the public is on notice that the Jefferson County portion of the Kentucky SIP will automatically update to reflect any EPA or federal action that stays, withdraws, or vacates any portion of 40 CFR 52.21. In addition, the automatic rescission clause provides that no change to the SIP will occur until EPA publishes a **Federal Register** notice announcing that a portion of 40 CFR 52.21 has been stayed, vacated, or withdrawn. Thus, the timing and extent of any future SIP change resulting from the automatic rescission clause will be clear to both the regulated community and the general public.

EPA's consideration of whether any SIP change resulting from the proposed automatic rescission clause would be consistent with EPA's interpretation of the effect of the triggering action on federal regulations is based on 40 CFR 51.105. Under 40 CFR 51.105, ''[r]evisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.'' *See* 40 CFR 51.105. While EPA is approving the automatic updating of the Jefferson County portion of the Kentucky SIP to reflect the stay, withdrawal or vacatur of any section or subsection of 40 CFR 52.21, there could be varying interpretations of the timing and extent of changes to 40 CFR 52.21 resulting from a given EPA or federal court action. By tying the automatic updating of the SIP to EPA's publication of a **Federal Register** notice announcing the change to 40 CFR 52.21, the automatic rescission clause ensures that any change to the SIP will be consistent with EPA's interpretation of the triggering action.

VII. Final Action

Pursuant to section 110 of the CAA, EPA is taking final action to approve Jefferson County's June 1, 2009, and February 8, 2011, SIP revisions which IBR (into the Jefferson County portion of the Kentucky SIP) federal requirements for NSR PSD permitting. Jefferson County's SIP revisions consist of changes to the LMAPCD Air Quality Regulation 2.05—*Prevention of Significant Deterioration of Air Quality* and address several NSR PSD permitting requirements promulgated at 40 CFR 52.21. Specifically, Jefferson County's June 1, 2009, SIP revision adopts federal regulations relating to PSD requirements for the NSR $PM_{2.5}$ Rule, the Phase II Rule, the 2002 NSR Reform Rule, and the NSR Reasonable Possibility Rule into the Jefferson County portion of the Kentucky SIP. Jefferson County's February 8, 2011, SIP revision includes all of the aforementioned updates to

LMAPCD's PSD regulations but also provides Jefferson County with the authority to regulate GHG emissions under its PSD program, establishes appropriate emissions thresholds for determining PSD applicability with respect to new and modified GHG-emitting sources (in accordance with EPA's Tailoring Rule), and incorporates an automatic rescission clause for 40 CFR 52.21 regulations. EPA has determined that these SIP revisions are approvable because they are consistent with the CAA and EPA regulations regarding PSD permitting. In addition, EPA is rescinding the FIP promulgated on January 14, 2011, at 40 CFR 52.37(b)(7); therefore, this final rule removes Jefferson County from the PSD GHG FIP listing at 40 CFR section 52.37.

VIII. 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 Commonwealth law. For that reason, this action:

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

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

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 December 11, 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, Greenhouse gases, Incorporation by reference, Intergovernmental relations, Particulate matter, Nitrogen Oxides, Reporting and recordkeeping requirements and Volatile organic compounds.

Dated: September 12, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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 A—General Provisions

§ 52.37 [Amended]

■ 2. Section 52.37 is amended by removing and reserving paragraph (b)(7).

Subpart S—Kentucky

■ 3. Section 52.920(c) Table 2 is revised to read as follows:

§ 52.920 Identification of plan.

* * * * *

(c) * * *

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY

Reg	Title/subject	EPA approval date	**Federal Register** notice	District effective date	Explanation
	Reg 1—General Provisions				
1.01	General Application of Regulations and Standards.	10/23/01	66 FR 53660	03/17/99	
1.02	Definitions	11/19/02	67 FR 69688	12/19/01	
1.03	Abbreviations and Acronyms	11/19/02	67 FR 69688	05/15/02	
1.04	Performance Tests	10/23/01	66 FR 53660	11/19/97	
1.05	Compliance with Emission Standards and Maintenance Requirements.	10/23/01	66 FR 53660	11/18/92	

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY—Continued

Reg	Title/subject	EPA approval date	Federal Register notice	District effective date	Explanation
1.06	Source Self-Monitoring and Reporting.	10/23/01	66 FR 53660	12/15/93	
1.07	Emissions During Startups, Shutdowns, Malfunctions and Emergencies.	10/23/01	66 FR 53660	01/17/96	
1.08	Administrative Procedures	11/03/03	68 FR 62236	06/19/02	
1.09	Prohibition of Air Pollution	10/23/01	66 FR 53660	11/16/83	
1.10	Circumvention	10/23/01	66 FR 53660	04/19/72	
1.11	Control of Open Burning	10/23/01	66 FR 53660	02/22/90	
1.14	Control of Fugitive Particulate Emissions.	10/23/01	66 FR 53660	01/20/88	
1.18	Rule Effectiveness	10/23/01	66 FR 53689	09/21/94	
1.19	Administrative Hearings	11/19/02	67 FR 69688	05/15/02	
Reg 2—Permit Requirements					
2.01	General Application	10/23/01	66 FR 53660	04/21/82	
2.02	Air Pollution Regulation Requirements and Exemptions.	10/23/01	66 FR 53660	06/21/95	
2.03	Permit Requirements—Non-Title V Construction and Operating Permits and Demolition/Renovation Permits.	10/23/01	66 FR 53660	12/15/93	
2.04	Construction or Modification of Major Sources in or Impacting Upon Non-Attainment Areas (Emission Offset Requirements).	10/23/01	66 FR 53660	03/17/93	
2.05	Prevention of Significant Deterioration of Air Quality.	10/12/12	[Insert citation of publication]	11/17/10	This approval does not include Jefferson County's revisions to incorporate by reference the Ethanol Rule (72 FR 24060, May 1, 2007), Fugitives Emissions Rule (73 FR 77882, December 19, 2008), the PM_{10} Grandfathering Provision and the term "particulate matter emissions" (at 40 CFR 52.21(i)(1)(xi) and 51.166(b)(49)(vi) respectively in the NSR $PM_{2.5}$ Rule (73 FR 28321, May 16, 2008).
2.06	Permit Requirements—Other Sources.	10/23/01	66 FR 53660	11/16/83	
2.07	Public Notification for Title V, PSD, and Offset Permits; SIP Revisions; and Use of Emission Reduction Credits.	10/23/01	66 FR 53660	06/21/95	
2.09	Causes for Permit Suspension	11/03/03	68 FR 62236	06/19/02	
2.10	Stack Height Considerations	10/23/01	66 FR 53660	07/19/89	
2.11	Air Quality Model Usage	10/23/01	66 FR 53660	05/19/99	
2.17	Federally Enforceable District Origin Operating Permits.	11/03/03	68 FR 62236	06/19/02	
Reg 3—Ambient Air Quality Standards					
3.01	Purpose of Standards and Expression of Non-Degradation Intention.	10/23/01	66 FR 53660	06/13/79	
3.02	Applicability of Ambient Air Quality Standards.	10/23/01	66 FR 53660	06/13/79	
3.03	Definitions	10/23/01	66 FR 53660	06/13/79	
3.04	Ambient Air Quality Standards	10/23/01	66 FR 53660	04/20/88	
3.05	Methods of Measurement	10/23/01	66 FR 53660	04/20/88	
Reg 4—Emergency Episodes					
4.01	General Provisions for Emergency Episodes.	10/23/01	66 FR 53660	06/13/79	
4.02	Episode Criteria	10/23/01	66 FR 53660	04/20/88	
4.03	General Abatement Requirements	10/23/01	66 FR 53660	02/16/83	
4.04	Particulate and Sulfur Dioxide Reduction Requirements.	10/23/01	66 FR 53660	04/19/72	

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY—Continued

Reg	Title/subject	EPA approval date	Federal Register notice	District effective date	Explanation
4.05	Hydrocarbon and Nitrogen Oxides Reduction Requirements.	10/23/01	66 FR 53660	02/16/83	
4.06	Carbon Monoxide Reduction Requirements.	10/23/01	66 FR 53660	02/16/83	
4.07	Episode Reporting Requirements	10/23/01	66 FR 53660	06/13/79	
Reg 6—Standards of Performance for Existing Affected Facilities					
6.01	General Provisions	10/23/01	66 FR 53660	11/16/83	
6.02	Emission Monitoring for Existing Sources.	10/23/01	66 FR 53660	11/16/83	
6.07	Standards of Performance for Existing Indirect Heat Exchangers.	10/23/01	66 FR 53660	06/13/79	
6.08	Standard of Performance for Existing Incinerators.	10/23/01	66 FR 53660	06/13/79	
6.09	Standards of Performance for Existing Process Operations.	10/23/01	66 FR 53660	03/17/99	
6.10	Standard of Performance for Existing Process Gas Streams.	10/23/01	66 FR 53660	11/16/83	
6.12	Standard of Performance for Existing Asphalt Paving Operations.	10/23/01	66 FR 53661	05/15/91	
6.13	Standard of Performance for Existing Storage Vessels for Volatile Organic Compounds.	10/23/01	66 FR 53661	05/15/91	
6.14	Standard of Performance for Selected Existing Petroleum Refining Processes and Equipment.	10/23/01	66 FR 53661	04/21/82	
6.15	Standard of Performance for Gasoline Transfer to Existing Service Station Storage Tanks (Stage I Vapor Recovery).	01/25/80	45 FR 6092	06/13/79	
6.16	Standard of Performance for Existing Large Appliance Surface Coating Operations.	10/23/01	66 FR 53661	05/15/91	
6.17	Standard of Performance for Existing Automobile and Truck Surface Coating Operations.	10/23/01	66 FR 53661	11/18/92	
6.18	Standards of Performance for Existing Solvent Metal Cleaning Equipment.	11/19/02	67 FR 69688	05/15/02	
6.19	Standard of Performance for Existing Metal Furniture Surface Coating Operations.	10/23/01	66 FR 53661	05/15/91	
6.20	Standard of Performance for Existing Bulk Gasoline Plants.	10/23/01	66 FR 53661	11/16/83	
6.21	Standard of Performance for Existing Gasoline Loading Facilities at Bulk Terminals.	10/23/01	66 FR 53661	11/16/83	
6.22	Standard of Performance for Existing Volatile Organic Materials Loading Facilities.	10/23/01	66 FR 53661	03/17/93	
6.24	Standard of Performance for Existing Sources Using Organic Materials.	10/23/01	66 FR 53661	03/17/93	
6.26	Standards of Performance for Existing Volatile Organic Compound Water Separators.	10/23/01	66 FR 53661	06/13/79	
6.27	Standards of Performance for Existing Liquid Waste Incinerators.	10/23/01	66 FR 53661	06/13/79	
6.28	Standard of Performance for Existing Hot Air Aluminum Atomization Processes.	10/23/01	66 FR 53661	03/18/81	
6.29	Standard of Performance for Existing Graphic Arts Facilities Using Rotogravure and Flexography.	10/23/01	66 FR 53661	05/15/91	
6.30	Standard of Performance for Existing Factory Surface Coating Operations of Flat Wood Paneling.	10/23/01	66 FR 53661	05/15/91	

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY—Continued

Reg	Title/subject	EPA approval date	Federal Register notice	District effective date	Explanation
6.31	Standard of Performance for Existing Miscellaneous Metal Parts and Products Surface-Coating Operations.	10/23/01	66 FR 53661	04/23/96	
6.32	Standard of Performance for Leaks from Existing Petroleum Refinery Equipment.	10/23/01	66 FR 53661	05/15/91	
6.33	Standard of Performance for Existing Synthesized Pharmaceutical Product Manufacturing Operations.	10/23/01	66 FR 53661	05/15/91	
6.34	Standard of Performance for Existing Pneumatic Rubber Tire Manufacturing Plants.	10/23/01	66 FR 53661	05/15/91	
6.35	Standard of Performance for Existing Fabric, Vinyl and Paper Surface Coating Operations.	10/23/01	66 FR 53661	05/15/91	
6.38	Standard of Performance for Existing Air Oxidation Processes in Synthetic Organic Chemical Manufacturing Industries.	10/23/01	66 FR 53661	12/17/86	
6.39	Standard of Performance for Equipment Leaks of Volatile Organic Compounds in Existing Synthetic Organic Chemical and Polymer Manufacturing Plants.	10/23/01	66 FR 53661	07/17/96	
6.40	Standards of Performance for Gasoline Transfer to Motor Vehicles (Stage II Vapor Recovery and Control).	10/23/01	66 FR 53661	08/18/93	
6.42	Reasonably Available Control Technology Requirements for Major Volatile Organic Compound- and Nitrogen Oxides-Emitting Facilities.	10/23/01	66 FR 53661	03/17/99	
6.43	Volatile Organic Compound Reduction Requirements.	10/23/01	66 FR 53689	05/21/97	
6.45	Standards of Performance for Existing Solid Waste Landfills.	10/23/01	66 FR 53689	02/02/94	
6.44	Standards of Performance for Existing Commercial Motor Vehicle and Mobile Equipment Refinishing Operations.	10/23/01	66 FR 53661	09/20/95	
6.46	Standards of Performance for Existing Ferroalloy and Calcium Carbide Production Facilities.	10/23/01	66 FR 53661	12/21/94	
6.48	Standard of Performance for Existing Bakery Oven Operations.	10/23/01	66 FR 53661	07/19/95	
6.49	Standards of Performance for Reactor Processes and Distillation Operations Processes in the Synthetic Organic Chemical Manufacturing Industry.	10/23/01	66 FR 53664	06/20/01	
6.50	NO_X Requirements for Portland Cement Kilns.	11/19/02	67 FR 69688	03/20/02	
Reg 7—Standards of Performance for New Affected Facilities					
7.01	General Provisions	10/23/01	66 FR 53661	05/17/00	
7.06	Standards of Performance for New Indirect Heat Exchangers.	10/23/01	66 FR 53661	04/21/82	
7.07	Standard of Performance for New Incinerators.	10/23/01	66 FR 53661	09/15/93	
7.08	Standards of Performance for New Process Operations.	10/23/01	66 FR 53661	03/17/99	
7.09	Standards of Performance for New Process Gas Streams.	10/23/01	66 FR 53661	06/18/97	
7.11	Standard of Performance for New Asphalt Paving Operations.	10/23/01	66 FR 53661	05/15/91	
7.12	Standard of Performance for New Storage Vessels for Volatile Organic Compounds.	10/23/01	66 FR 53661	05/15/91	

TABLE 2—EPA-APPROVED JEFFERSON COUNTY REGULATIONS FOR KENTUCKY—Continued

Reg	Title/subject	EPA approval date	Federal Register notice	District effective date	Explanation
7.14	Standard of Performance for Selected New Petroleum Refining Processes and Equipment.	10/23/01	66 FR 53661	06/13/79	
7.15	Standards of Performance for Gasoline Transfer to New Service Station Storage Tanks (Stage I Vapor Recovery).	10/23/01	66 FR 53662	04/20/88	
7.18	Standards of Performance for New Solvent Metal Cleaning Equipment.	10/23/01	66 FR 53662	05/15/91	
7.20	Standard of Performance for New Gasoline Loading Facilities at Bulk Plants.	10/23/01	66 FR 53662	11/16/83	
7.22	Standard of Performance for New Volatile Organic Materials Loading Facilities.	10/23/01	66 FR 53662	03/17/93	
7.25	Standard of Performance for New Sources Using Volatile Organic Compounds.	10/23/01	66 FR 53662	03/17/93	
7.34	Standard of Performance for New Sulfite Pulp Mills.	10/23/01	66 FR 53662	06/13/79	
7.35	Standard of Performance for New Ethylene Producing Plants.	10/23/01	66 FR 53662	06/13/79	
7.36	Standard of Performance for New Volatile Organic Compound Water Separators.	10/23/01	66 FR 53662	06/13/79	
7.51	Standard of Performance for New Liquid Waste Incinerators.	10/23/01	66 FR 53662	01/20/88	
7.52	Standard of Performance for New Fabric, Vinyl, and Paper Surface Coating Operations.	10/23/01	66 FR 53662	05/15/91	
7.55	Standard of Performance for New Insulation of Magnet Wire.	10/23/01	66 FR 53662	03/17/93	
7.56	Standard of Performance for Leaks from New Petroleum Refinery Equipment.	10/23/01	66 FR 53662	05/15/91	
7.57	Standard of Performance for New Graphic Arts Facilities Using Rotogravure and Flexography.	10/23/01	66 FR 53662	05/15/91	
7.58	Standard of Performance for New Factory Surface Coating Operations of Flat Wood Paneling.	10/23/01	66 FR 53662	05/15/91	
7.59	Standard of Performance for New Miscellaneous Metal Parts and Products Surface Coating Operations.	10/23/01	66 FR 53662	04/23/96	
7.60	Standard of Performance for New Synthesized Pharmaceutical Product Manufacturing Operations.	10/23/01	66 FR 53662	05/15/91	
7.77	Standards of Performance for New Blast Furnace Casthouses.	10/23/01	66 FR 53662	10/20/93	
7.79	Standards of Performance for New Commercial Motor Vehicles and Mobile Equipment Refinishing Operations.	10/23/01	66 FR 53690	02/02/94	
7.81	Standard of Performance for New or Modified Bakery Oven Operations.	10/23/01	66 FR 53662	05/17/00	
Reg 8—Mobile Source Emissions Control					

* * * * *

[FR Doc. 2012–24096 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–0019(a); FRL–9741–2]

Approval and Promulgation of Implementation Plans; North Carolina Portion of the Charlotte-Gastonia-Rock Hill, North Carolina-North Carolina 1997 8-Hour Ozone Nonattainment Area; Reasonable Further Progress Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action to approve state implementation plan (SIP) revision, submitted by the North Carolina Department of Environment and Natural Resources (NC DENR), on June 15, 2007, as updated on November 30, 2009, to address the reasonable further progress (RFP) plan requirements for the 1997 8-hour ozone national ambient air quality standards (NAAQS) for the North Carolina portion of the bi-state Charlotte-Gastonia-Rock Hill 1997 8-hour ozone nonattainment area. The Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina 1997 8-hour ozone nonattainment area (hereafter referred to as the ''bi-state Charlotte Area'') is comprised of Cabarrus, Gaston, Lincoln, Mecklenburg, Rowan, Union and a portion of Iredell (Davidson and Coddle Creek Townships) Counties in North Carolina (hereafter referred to as the ''North Carolina portion of the bi-state Charlotte Area''); and a portion of York County in South Carolina. EPA is also providing the status of its adequacy determination for the motor vehicle emissions budgets (MVEB) for volatile organic compounds (VOC) and nitrogen oxide (NOx) that were included in North Carolina's RFP plan. Further, EPA is approving these MVEB. These actions are being taken pursuant to section 110 of the Clean Air Act (CAA or Act). EPA will take action on South Carolina's RFP plan for its portion of the bi-state Charlotte Area, in a separate action.

DATES: This direct final rule is effective December 11, 2012 without further notice, unless EPA receives adverse comment by November 13, 2012. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID Number, ''EPA–R04–OAR–2010–0019,'' by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4–RDS@epa.gov.*
3. *Fax:* 404–562–9019.
4. *Mail:* ''EPA–R04–OAR–2010–0019,'' 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.
5. *Hand Delivery or Courier:* Ms. Lynorae Benjamin, Chief, 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. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's 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 Number, ''EPA–R04–OAR–2010–0019.'' 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 through *www.regulations.gov* or email, information that you consider to be CBI or otherwise protected. 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 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 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 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 to 4:30, excluding federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Sara Waterson of the Regulatory Development Section, in the 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) 562–9061. Ms. Sara Waterson can be reached via electronic mail at *waterson.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

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VI. What is the status of EPA's adequacy determination for the 2008 VOC MVEB for the North Carolina portion of the bi-state Charlotte area?
VII. Final Action
VIII. Statutory and Executive Order Reviews

I. What action is EPA taking?

EPA is approving revisions to the North Carolina SIP, submitted by the State of North Carolina through NC DENR, on June 15, 2007, as updated on November 30, 2009, to meet RFP requirements of the CAA for the North

Carolina portion of the bi-state Charlotte Area for the 1997 8-hour ozone NAAQS. The RFP plan demonstrates that VOC emissions will be reduced by at least 15 percent for the period of 2002 through 2008. Additionally, EPA is approving the required 2008 VOC MVEB and optional 2008 NOx MVEB which were included in the RFP plan for the North Carolina portion of the bi-state Charlotte Area. EPA is taking these actions because they are consistent with CAA requirements for the requirements for RFP. The MVEB for the North Carolina portion of the bi-state Charlotte Area, expressed in kilograms per day (kgd), are provided in Table 1 below.

TABLE 1—MVEB FOR THE NORTH CAROLINA PORTION OF THE 1997 8-HOUR BI-STATE CHARLOTTE AREA

	VOC	NO_X
2008 County-level Subarea MVEB (kg/d)		
Carbarrus	6,941	7,324
Gaston	5,132	7,647
Iredell*	3,601	5,637
Lincoln	2,726	2,948
Mecklenburg	26,368	34,526
Rowan	6,149	7,193
Union	6,299	5,660

* Represents only the portion of Iredell County that is in the nonattainment area for the bi-state Charlotte Area.

EPA is also describing the status of its transportation conformity adequacy determination for the 2008 MVEB.

II. What is the background for EPA's action?

A. General Background

On July 18, 1997, EPA promulgated a revised 8-hour ozone NAAQS of 0.08 parts per million (ppm). Under EPA's regulations at 40 CFR part 50, the 1997 8-hour ozone NAAQS is attained when the 3-year average of the annual fourth highest daily maximum 8-hour average ambient air quality ozone concentrations is less than or equal to 0.08 ppm (i.e., 0.084 ppm when rounding is considered) (69 FR 23857, April 30, 2004). Ambient air quality monitoring data for the 3-year period must meet the data completeness requirement as determined in 40 CFR part 50, appendix I. The ambient air quality monitoring data completeness requirement is met when the average percent of days with valid ambient monitoring data is greater than 90 percent, and no single year has less than 75 percent data completeness.

Upon promulgation of a new or revised NAAQS, the CAA requires EPA to designate as nonattainment any area that is violating the NAAQS, based on the three most recent years of ambient air quality data at the conclusion of the designation process. The bi-state Charlotte Area was designated nonattainment for the 1997 8-hour ozone NAAQS on April 30, 2004 (effective June 15, 2004) using 2001–2003 ambient air quality data (69 FR 23857, April 30, 2004). At the time of designation the bi-state Charlotte Area was classified as a moderate nonattainment area for the 1997 8-hour ozone NAAQS. In the April 30, 2004, Phase I Ozone Implementation Rule, EPA established ozone nonattainment area attainment dates based on Table 1 of section 181(a) of the CAA. This established an attainment date six years after the June 15, 2004, effective date for areas classified as moderate areas for the 1997 8-hour ozone nonattainment designations. Section 181 of the CAA explains that the attainment date for moderate nonattainment areas shall be as expeditiously as practicable, but no later than six years after designation, or June 15, 2010. Therefore, the bi-state Charlotte Area's original attainment date was June 15, 2010. *See* 69 FR 23951, April 30, 2004.

The bi-state Charlotte Area did not attain the 1997 8-hour ozone NAAQS by June 15, 2010 (the applicable attainment date for moderate nonattainment areas); however, the Area qualified for an extension of the attainment date. Under certain circumstances, the CAA allows for extensions of the attainment dates prescribed at the time of the original nonattainment designation. In accordance with CAA section 181(a)(5), EPA may grant up to 2 one-year extensions of the attainment date under specified conditions. On May 31, 2011, EPA determined that North Carolina and South Carolina met the CAA requirements to obtain a one-year extension of the attainment date for the 1997 8-hour ozone NAAQS for the bi-state Charlotte Area. *See* 76 FR 31245. As a result, EPA extended the bi-state Charlotte Area's attainment date from June 15, 2010, to June 15, 2011, for the 1997 8-hour ozone NAAQS.

On November 15, 2011 (76 FR 70656), EPA determined the bi-state Charlotte Area attained the 1997 8-hour ozone NAAQS; and subsequently, on March 7, 2012 (77 FR 13493), EPA determined that the bi-state Charlotte Area attained the 1997 8-hour ozone NAAQS by the applicable attainment date. The determination of attaining data was based upon complete, quality-assured and certified ambient air monitoring data for the 2008–2010 period, showing that the bi-state Charlotte Area had monitored attainment of the 1997 8-hour ozone NAAQS. The requirements for the bi-state Charlotte Area to submit an attainment demonstration and associated reasonably available control measures (RACM), RFP plan, contingency measures, and other planning SIP revisions related to attainment of the standard were suspended as a result of the determination of attainment, so long as the bi-state Charlotte Area continues to attain the 1997 8-hour ozone NAAQS.[1] *See* 40 CFR 52.1779(a).

On December 21, 2011, North Carolina withdrew the attainment demonstration submissions (except RFP, emissions statements, and the emissions inventory) as allowed by 40 CFR 51.918 for the North Carolina portion of the bi-state Charlotte Area.[2] Subsequently, EPA approved North Carolina's SIP revisions related to the emissions statements and emissions inventory requirements for the North Carolina portion of the bi-state Charlotte Area for the 1997 8-hour ozone NAAQS. For the EPA action related to the emissions statements requirements for the 1997 8-hour ozone NAAQS, see 77 FR 24382 (April 24, 2012) and 64 FR 41277 (August 1, 1997). For the EPA action related to the emissions inventory requirements for the 1997 8-hour ozone NAAQS, see 77 FR 26441 (May 4, 2012). Despite the determination of attainment, North Carolina opted to leave the SIP submissions related to the RFP requirements for the 1997 8-hour ozone NAAQS before EPA for action. As such, EPA is taking action to approve revisions to North Carolina's SIP submitted on June 15, 2007, as updated on November 30, 2009, as it relates to the RFP requirements for the 1997 8-hour ozone NAAQS.

B. Background for RFP

On November 29, 2005 (70 FR 71612), as revised on June 8, 2007 (72 FR

[1] Originally, North Carolina submitted SIP revisions, including an attainment demonstration, on June 15, 2007, to address nonattainment requirements related to the 1997 8-hour ozone NAAQS. Specifically, North Carolina submitted an attainment demonstration and associated RACM, a RFP plan, contingency measures, emissions statement, a 2002 base year emissions inventory and other planning SIP revisions related to attainment of the 1997 8-hour ozone NAAQS for the North Carolina portion of the bi-state Charlotte Area. North Carolina withdrew the June 15, 2007, attainment demonstration SIP for the North Carolina portion of the bi-state Charlotte Area on December 19, 2008. On November 12, 2009, North Carolina resubmitted the attainment demonstration SIP, and on November 30, 2009, North Carolina provided an update for the June 15, 2007, RFP plan for the North Carolina portion of the bi-state Charlotte Area.

[2] North Carolina did not withdraw any elements related to reasonably available control technology (RACT) requirements, to the extent that these requirements were addressed in the attainment demonstration submissions.

31727), EPA published a rule entitled ''Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule To Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter and Ozone NAAQS; Final Rule for Reformulated Gasoline'' (hereafter referred to as the Phase 2 Rule). Section 182(b)(1) of the CAA and EPA's Phase 2 Rule [3] require a state, for each 1997 8-hour ozone nonattainment area that is classified as moderate, to submit an emissions inventory and a RFP plan to show how the state will reduce emissions of VOC.

The bi-state Charlotte Area had an attainment date of June 15, 2010 (i.e., that is beyond five years after designation), that was later extended to June 15, 2011. *See* 76 FR 31245 (May 31, 2011). For a moderate area with an attainment date of more than five years after designation, the RFP plan must obtain a 15 percent reduction in ozone precursor emissions for the first six years after the baseline year (2002 through 2008). Since the North Carolina portion of the bi-state Charlotte Area did not have a previous plan to address RFP requirements,[4] the initial RFP requirement for the Area must be met through VOC reductions as required by the 1990 CAA Amendments.

Pursuant to CAA section 172(c)(9), RFP plans must include contingency measures that will take effect without further action by the state or EPA, which includes additional controls that would be implemented if the area fails to reach the RFP milestones. While the CAA does not specify the type of measures or quantity of emissions reductions required, EPA provided guidance interpreting the CAA that implementation of these contingency measures would provide additional emissions reductions of up to 3 percent of the adjusted base year inventory in the year following the RFP milestone year (i.e., in this case 2008). For more information on contingency measures please see the April 16, 1992 General Preamble (57 FR 13498, 13510) and the November 29, 2005 Phase 2 8-hour ozone standard implementation rule (70 FR 71612, 71650). Finally, RFP plans must also include a MVEB for the precursors for which the plan is developed. The State also had the option of developing MVEB for other precursors. See Section V of this rulemaking for more information on MVEB requirements.

On June 15, 2007, and later updated on November 30, 2009, North Carolina submitted the RFP plan for the North Carolina portion of the bi-state Charlotte Area to address the CAA's requirements for the 1997 8-hour ozone NAAQS. The June 15, 2007, SIP revision (as updated on November 30, 2009) included an attainment demonstration plan, RFP plan for 2008, contingency measures, RACT, RACM requirements, on-road VOC and NOx MVEB, and the 2002 base year emissions inventory. These revisions to the SIP were subject to notice and comment by the public and the State addressed the comments received on the proposed SIP revisions. Today's rulemaking is approving only the RFP plan, including the associated MVEB. The remainder of North Carolina's June 15, 2007, submittal was addressed by previous EPA actions, or by the State's withdrawal of submissions that were no longer necessary.[5]

III. What is EPA's analysis of the RFP plan for the North Carolina portion of the bi-state Charlotte area?

On June 15, 2007, and later updated on November 30, 2009, North Carolina submitted the RFP plan for the North Carolina portion of the bi-state Charlotte Area to address the CAA's requirements for the 1997 8-hour ozone NAAQS. Below provides EPA's analysis of North Carolina's RFP submission.

A. Base Year Emissions Inventory

An emissions inventory is a comprehensive, accurate, current inventory of actual emissions from all sources and is required by section 182(a)(1) of the CAA. Because the North Carolina portion of the bi-state Charlotte Area as part of the bi-state Charlotte Area did not implement the 15 percent VOC reductions for the 1-hour ozone NAAQS, the requirement for North Carolina to meet RFP is a 15 percent VOC reduction between 2002 and 2008 with continued progress toward attainment through attainment.[6] EPA recommended 2002 as the base year emissions inventory, and is therefore the starting point for calculating RFP. North Carolina submitted its 2002 base year emissions inventory on June 15, 2007. In an action on May 4, 2012, EPA approved North Carolina's 2002 base year emissions inventory for the North Carolina portion of the bi-state Charlotte Area for the 1997 8-hour ozone NAAQS. *See* 77 FR 26441. A summary of the North Carolina portion of the bi-state Charlotte Area 2002 base year emissions inventories is included in Table 2 below.

TABLE 2—2002 POINT AND AREA SOURCES ANNUAL EMISSIONS FOR THE NORTH CAROLINA PORTION OF THE BI-STATE CHARLOTTE AREA

[Tons per summer day]

County	Point		Area		Non-Road		Mobile	
	NO_X	VOC	NO_X	VOC	NO_X	VOC	NO_X	VOC
Cabarrus	2.6	2.2	0.8	6.0	5.4	2.7	17.2	21.5
Gaston	34.8	2.5	1.3	8.9	4.9	2.9	20.0	13.5
Iredell*	10.8	2.1	0.9	5.8	4.4	2.7	29.9	17.6
Lincoln	0.3	2.1	0.5	3.1	1.9	1.3	6.1	7.1
Mecklenburg	2.1	5.7	7.0	29.4	32.1	24.1	78.7	68.0
Rowan	11.0	6.3	0.8	5.6	4.1	2.3	19.7	14.8
Union	0.2	1.0	1.0	6.4	7.7	4.7	11.3	13.0

* Represents only the portion of Iredell County that is in the nonattainment area for the bi-state Charlotte Area.

[3] RFP regulations are at 40 CFR 51.910.

[4] Some areas that were designated as moderate or above for the 1-hour ozone NAAQS may have implemented Rate of Progress plans (i.e., plans similar to the RFP requirements) by which the area would have achieved at least a 15 percent reduction in VOC from an initial baseline. Such areas have the flexibility to meet RFP requirements through a reduction in VOC or nitrogen oxides, after the initial achievement in a reduction of at least 15 percent for VOC emissions for the area.

[5] North Carolina's November 30, 2009, SIP revision only addressed RFP and is being acted on in its entirety in this action.

[6] The bi-state Charlotte Area attained the 1997 8-hour ozone NAAQS by June 15, 2011, based on 2008- 2010 data.

As mentioned above, EPA has already approved this emissions inventory in a prior action.

B. Adjusted Base Year Inventory and 2008 RFP Target Levels

The process for determining the emissions baseline from which the RFP reductions are calculated is described in section 182(b)(1) of the CAA and 40 CFR 51.910. This baseline value is the 2002 adjusted base year inventory. Sections 182(b)(1)(B) and (D) require the exclusion from the base year inventory of emissions benefits resulting from the Federal Motor Vehicle Control Program (FMVCP) regulations promulgated by January 1, 1990, and the Reid Vapor Pressure (RVP) regulations promulgated June 11, 1990 (55 FR 23666). The FMVCP and RVP emissions reductions are determined by the State using EPA's on-road mobile source emissions modeling software, MOBILE6. The FMVCP and RVP emission reductions are then removed from the base year inventory by the State, resulting in an adjusted base year inventory. The emission reductions needed to satisfy the RFP requirement are then calculated from the adjusted base year inventory. These reductions are then subtracted from the adjusted base year inventory to establish the emissions target for the RFP milestone year (2008).

For moderate areas like the North Carolina portion of the bi-state Charlotte Area (as part of the bi-state Charlotte Area), the CAA specifies a 15 percent reduction in ozone precursor emissions over an initial six year period following the baseline inventory year. In the Phase 2 Rule, EPA interpreted this requirement for areas that were also designated nonattainment and classified as moderate or higher for the 1-hour ozone NAAQS. In the Phase 2 Rule, EPA provided that an area classified as moderate or higher that has the same boundaries as an area, or is entirely composed of several areas or portions of areas, for which EPA fully approved a 15 percent plan for the 1-hour NAAQS, is considered to have met the requirements of section 182(b)(1) of the CAA for the 8-hour NAAQS. In this situation, a moderate nonattainment area is subject to RFP under section 172(c)(2) of the CAA and shall submit, no later than 3 years after designation for the 8-hour NAAQS, a SIP revision that meets the requirements of 40 CFR 51.910(b)(2). The RFP SIP revision must provide for a 15 percent emission reduction (either nitrogen oxides (NO_X) and/or VOC) accounting for any growth that occurs during the six year period following the baseline emissions inventory year, that is, 2002–2008.

The portion of the bi-state Charlotte Area that was classified as moderate under the 1-hour ozone NAAQS contained the counties of Gaston and Mecklenburg in North Carolina. Gaston and Mecklenburg counties were also designated nonattainment as a part of the 1997 8-hour ozone moderate bi-state Charlotte Area. Although a portion of this bi-state Charlotte Area was classified as moderate for the 1-hour ozone NAAQS, a 15 percent rate of progress (ROP) [7] plan was not submitted due to its change in attainment status. Specifically, North Carolina submitted a redesignation and maintenance plan request instead before the due date of the 1-hour ozone NAAQS ROP plan. Therefore, because the bi-state Charlotte Area did not implement a 15 percent ROP plan under the 1-hour ozone NAAQS, the Area must have VOC reductions totaling at least 15 percent for the first six years following the baseline inventory year of 2002 in order for the RFP plan to be approved.

As mentioned earlier and according to section 182(b)(1)(D) of the CAA, emission reductions that resulted from the FMVCP and RVP rules promulgated prior to 1990 are not creditable for achieving RFP emission reductions. Therefore, the 2002 base year inventory is adjusted by subtracting the VOC and NOx emission reductions that are expected to occur between 2002 and the future milestone years due to the FMVCP and RVP rules.

In the Phase 2 Rule, promulgated on November 29, 2005 (70 FR 71612), EPA outlines Method 1 as the process that states should use to show compliance with RFP for areas like the North Carolina portion of the bi-state Charlotte Area. A summary of the steps for Method 1 is provided below.

- Step A is the actual anthropogenic base year VOC emissions inventory in 2002.
- Step B is to account for creditable emissions for RFP.
- Step C is to calculate non-creditable emissions for RFP. Non-creditable emissions include emissions from: (1) Motor vehicle exhaust or evaporative emissions regulations promulgated by January 1, 1990; (2) regulations concern RVP promulgated by November 15, 1990; (3) RACT corrections required prior to November 1990; and (4) corrective inspection and maintenance (I/M) plan required prior to November 1990.
- Step D is the 2002 base year emissions (Step A) minus the non-creditable emissions (Step C).
- Step E is to calculate the 2008 target level VOC emissions. This is calculated by reducing the emissions from Step D by 15 percent.
- The estimated 2008 VOC emissions are then compared to the 2008 target level VOC emissions (Step E).

As provided in North Carolina's RFP SIP revision, the State utilized the steps from Method 1 of the Phase 2 Rule. Specifically, North Carolina's November 30, 2009, SIP revision sets out the State's calculations.

1. Step A: Estimate the actual anthropogenic base year VOC inventory in 2002 with all 2002 control programs in place for all sources.

North Carolina provided this emission inventory in Table 3–1 of the November 30, 2009, RFP plan for the North Carolina portion of the bi-state Charlotte Area, and as shown in Table 3, below. As mentioned above, EPA has already approved this inventory. *See* 77 FR 26441 (May 4, 2012).

TABLE 3—2002 VOC EMISSIONS INVENTORY FOR THE NORTH CAROLINA PORTION OF THE BI-STATE CHARLOTTE AREA

[Tons per summer day]

County	Point	Area	Non-road mobile	On-road mobile	Total
Cabarrus	2.2	6.0	2.7	20.5	31.4
Gaston	2.5	8.9	2.9	13.3	27.6
Iredell*	0.9	1.9	0.9	6.6	10.3
Lincoln	2.1	3.1	1.3	6.7	13.2
Mecklenburg	5.7	29.4	24.1	66.1	125.3

[7] For the 1-hour ozone NAAQS, the plan to demonstrate progress towards attainment was known as the ROP plan. For the 8-hour ozone NAAQS, this same plan is known as the RFP plan.

TABLE 3—2002 VOC EMISSIONS INVENTORY FOR THE NORTH CAROLINA PORTION OF THE BI-STATE CHARLOTTE AREA—Continued

[Tons per summer day]

County	Point	Area	Non-road mobile	On-road mobile	Total
Rowan	6.3	5.6	2.3	14.2	28.4
Union	1.0	6.4	4.7	12.3	24.4
Total	20.7	61.3	38.9	139.7	260.6

* Represents only the portion of Iredell County that is in the nonattainment area for the bi-state Charlotte Area

2. Step B: Using the same highway vehicle activity inputs used to calculate the actual 2002 inventory, run the appropriate motor vehicle emissions model for 2002 and for 2008 with all post-1990 CAA measures turned off. Any other local inputs for vehicle I/M programs should be set according to the program that was required to be in place in 1990. Fuel RVP should be set at 9.0 or 7.8 pounds per square inch (psi) depending on the RVP required in the local area as a result of fuel RVP regulations promulgated in June, 1990.

For the North Carolina portion of the bi-state Charlotte Area, the RACT and I/M program corrections and the 1992 RVP requirements were completely in place by 1996 and therefore are already accounted for in the 2002 baseline. As a result, these measures would produce no additional reductions between 2002 and 2008 or later milestone years.

3. Step C: Calculate the difference between the 2002 and 2008 VOC emission factors calculated in Step B and multiply by the 2002 vehicle miles traveled. The result is the VOC emission calculation that will occur between 2002 and 2008 without the benefits of any post-1990–CAA measures. These are the non-creditable reductions that occur over this period.

North Carolina calculated the non-creditable emission reductions between 2002 and 2008 by modeling its 2002 and 2008 motor vehicle emissions with all post-1990 CAA measures turned off, and calculating the difference. The table below (as present in Table 4–8 of North Carolina's November 30, 2009, SIP revision) shows that there is approximately a 10.0 tons per day (tpd) difference.

TABLE 4—TOTAL BI-STATE CHARLOTTE AREA NON-CREDITABLE VOC EMISSION ESTIMATES (TPD)

County	Non-creditable VOC emissions
Cabarrus	1.688
Gaston	0.912
Iredell*	0.822
Lincoln	0.633
Mecklenburg	3.384
Rowan	1.315
Union	1.230
Total	9.984 or 10.0

* Represents only the portion of Iredell County that is in the nonattainment area for the bi-state Charlotte Area

4. Step D: Subtract the non-creditable reductions calculated in Step C from the actual anthropogenic 2002 inventory estimated in Step A. This adjusted VOC inventory is the basis for calculating the target level of emissions in 2008.

The adjusted VOC inventory for calculating the target level of VOC emissions reductions for 2008 is 250.6 tpd (i.e., 260.6 tpd (i.e., result of Step A) and 10.0 tpd (i.e., the result of Step C)).

5. Step E: Reduce the adjusted VOC inventory calculated in Step D by 15 percent. The result is the target level of VOC emissions in 2008 in order to meet the 2008 RFP requirement. The actual projected 2008 inventory for all sources with all control measures in place, including projected 2008 growth in activity, must be at or lower than this target level of emissions.

The targeted level of emissions reductions for the North Carolina portion of the bi-state Charlotte Area to meet RFP requirements is 37.6 tpd of VOC (i.e, 250.6 tpd multiplied by 15 percent). Thus the required targeted level of VOC emissions is 213.0 tpd for the North Carolina portion of the bi-state Charlotte Area.

C. Final Analysis of North Carolina's RFP Analysis for the North Carolina Portion of the Bi-State Charlotte Area

As mentioned above, the required target level for the North Carolina portion of the bi-state Charlotte Area to meet the initial RFP plan requirement is a 15 percent reduction in VOC emissions for 2008 from the VOC emissions in 2002 (as adjusted per CAA requirements). Specifically, to meet this requirement, North Carolina needed to demonstrate a reduction of at least 37.6 tpd. Table 5 below summarizes the results of North Carolina's calculations for this RFP analysis.

TABLE 5—15 PERCENT RFP ANALYSIS FOR NORTH CAROLINA PORTION OF BI-STATE CHARLOTTE AREA

Step from method 1	Matrix	VOC (tpd)
Step A	Total 2002 Base Year Anthropogenic VOC Emissions	260.6
Step C	Non-Creditable VOC reductions	10.0
Step D	2002 Base Year minus the Non-Creditable Emissions	250.6
Step E	2008 Target Level of VOC Emissions	213.0

In its November 30, 2009, SIP revision, North Carolina calculated the 2008 VOC emissions inventory for the North Carolina portion of the bi-state Charlotte Area. This emissions inventory is provided in Table 6 below.

TABLE 6—2008 BASELINE VOC EMISSIONS (TPD) FOR NORTH CAROLINA PORTION OF BI-STATE CHARLOTTE AREA

County	Point	Area	Non-road mobile	On-road mobile	Total
Cabarrus	2.3	5.9	1.5	10.4	20.1
Gaston	2.7	9.4	2.0	7.5	21.6
Iredell*	0.7	1.8	0.5	5.4	8.4
Lincoln	2.1	2.9	0.8	4.2	10.0
Mecklenburg	5.9	30.1	13.0	38.0	87.0
Rowan	6.0	5.6	1.5	14.2	22.3
Union	1.2	5.7	1.7	9.9	18.5
Total	20.9	61.4	21.0	84.6	187.9

* Represents only the portion of Iredell County that is in the nonattainment area for the bi-state Charlotte Area

As discussed above, the required target for VOC emissions for the year 2008 for North Carolina to meet the RFP requirements for the North Carolina portion of the bi-state Charlotte Area is 213.0 tpd (i.e., 15 percent reduction from the adjusted 2002 baseline). As revealed in Table 6, North Carolina calculated an emissions inventory of 187.9 tpd of VOC for the North Carolina portion of the bi-state Charlotte Area in 2008, which is well below the 213.0 tpd required target. Thus, EPA is making the determination that North Carolina's SIP revision demonstrates the required progress towards attainment for the North Carolina portion of the bi-state Charlotte Area. In today's action, EPA is approving North Carolina's RFP SIP revision submitted on June 15, 2007 (as updated on November 30, 2009) as meeting the CAA and EPA's regulations regarding RFP.

IV. What is the 2008 NO_X emissions inventory for the North Carolina portion of the bi-state Charlotte area?

In support of its development of a NOx MVEB for the 2008, North Carolina, in its November 30, 2009, SIP revision, developed the NOx emissions inventory for the North Carolina portion of the bi-state Charlotte Area. This inventory is not required for the RFP plan but is necessary for the development of the MVEB. This emissions inventory is provided in Table 7 below.

TABLE 7—2008 BASELINE NOX EMISSIONS (TPD) FOR THE NORTH CAROLINA PORTION OF BI-STATE CHARLOTTE AREA

County	Point	Area	Non-road mobile	On-road mobile	Total
Cabarrus	2.6	1.5	4.1	9.6	17.8
Gaston	32.8	2.2	4.8	10.0	49.8
Iredell*	0.5	0.4	0.9	6.9	8.7
Lincoln	9.3	0.7	1.4	3.7	15.1
Mecklenburg	2.0	11.3	20.9	45.6	79.8
Rowan	22.4	1.3	4.6	9.5	37.8
Union	0.2	1.5	3.3	7.4	12.4
Total	69.8	18.9	40.0	92.7	221.4

* Represents only the portion of Iredell County that is in the nonattainment area for the bi-state Charlotte Area

V. What is EPA's analysis of the 2008 MVEB for the North Carolina portion of the bi-state Charlotte area?

Under section 176(c) of the CAA, new transportation plans, programs, and projects, such as the construction of new highways, must ''conform'' to (i.e., be consistent with) the part of the state's air quality plan that addresses pollution from cars and trucks. Conformity to the SIP means that transportation activities will not cause new air quality violations, worsen existing violations, or delay timely attainment of the NAAQS or any interim milestones. If a transportation plan does not conform, most new projects that would expand the capacity of roadways cannot go forward. Regulations at 40 CFR part 93 set forth EPA policy, criteria, and procedures for demonstrating and assuring conformity of such transportation activities to a SIP. The regional emissions analysis is one, but not the only, requirement for implementing transportation conformity. Transportation conformity is a requirement for nonattainment and maintenance areas. Maintenance areas are areas that were previously nonattainment for a particular NAAQS but have since been redesignated to attainment with an approved maintenance plan for that NAAQS.

Under the CAA, states are required to submit, at various times, control strategy SIPs and maintenance plans for nonattainment areas. These control strategy SIPs (including RFP and attainment demonstrations) and maintenance plans create MVEB for criteria pollutants and/or their precursors to address pollution from cars and trucks. Per 40 CFR part 93, an MVEB must be established for the target year and precursor pollutant of the RFP (i.e., in this case, for the target year of 2008 and for VOC). A state may adopt MVEB for other precursors as well. North Carolina also opted to establish a MVEB for NO_X for the year 2008. The MVEB is the portion of the total allowable emissions in the maintenance demonstration that is allocated to highway and transit vehicle use and emissions. *See* 40 CFR 93.101. The MVEB serves as a ceiling on emissions from an area's planned transportation system. The MVEB concept is further explained in the preamble to the November 24, 1993, Transportation Conformity Rule (58 FR 62188). The preamble also describes how to

establish the MVEB in the SIP and how to revise the MVEB.

After interagency consultation with the transportation partners for the North Carolina portion of the bi-state Charlotte Area, North Carolina developed VOC and NO_X MVEB for the year 2008. Specifically, North Carolina developed these MVEB, as required, for the target year and precursor—2008 and VOC—for the RFP plan, and chose to establish an additional MVEB for NO_X for the year 2008. The MVEB for the North Carolina portion of the bi-state Charlotte Area for North Carolina's 2008 RFP plan are based on the projected 2008 mobile source emissions accounting for all mobile control measures. The 2008 MVEB are defined in Table 8 below.

TABLE 8—MVEB FOR NORTH CAROLINA PORTION OF THE 1997 8-HOUR BI-STATE CHARLOTTE AREA

	VOC	NOx
2008 County-level Subarea MVEB (kg/d)		
Carbarrus	6,941	7,324
Gaston	5,132	7,647
Iredell*	3,601	5,637
Lincoln	2,726	2,948
Mecklenburg	26,368	34,526
Rowan	6,149	7,193
Union	6,299	5,660

* Represents only the portion of Iredell County that is in the nonattainment area for the bi-state Charlotte Area.

Through this rulemaking, EPA is approving the 2008 VOC and NO_X MVEB for the North Carolina portion of the bi-state Charlotte Area because EPA has made the determination that the Area maintains the 1997 8-hour ozone NAAQS with the emissions at the levels of the budgets. Once the MVEB for the North Carolina portion of the bi-state Charlotte Area are approved or found adequate (whichever is completed first), they must be used for future conformity determinations for the 1997 8-hour ozone NAAQS for Metropolitan Planning Organizations' long-range transportation plans and transportation improvement programs. After thorough review, EPA has previously determined that the budgets meet the adequacy criteria, as outlined in 40 CFR 93.118(e)(4) (*see* 75 FR 7474, February 19, 2010), and is now approving the budgets because they are consistent with RFP for the 1997 8-hour ozone NAAQS for the year 2008.

VI. What is the status of EPA's adequacy determination for the 2008 MVEB for the North Carolina portion of the bi-state Charlotte area?

When reviewing a submitted ''control strategy'' SIP, RFP or maintenance plan containing a MVEB, EPA may affirmatively find the MVEB contained therein adequate for use in determining transportation conformity. Once EPA affirmatively finds the submitted MVEB is adequate for transportation conformity purposes, that MVEB must be used by state and federal agencies in determining whether proposed transportation projects conform to the SIP as required by section 176(c) of the CAA.

EPA's substantive criteria for determining adequacy of a MVEB are set out in 40 CFR 93.118(e)(4). The process for determining adequacy consists of three basic steps: public notification of a SIP submission, a public comment period, and EPA's adequacy determination. This process for determining the adequacy of submitted MVEB for transportation conformity purposes was initially outlined in EPA's May 14, 1999, guidance, ''Conformity Guidance on Implementation of March 2, 1999, Conformity Court Decision.'' EPA adopted regulations to codify the adequacy process in the Transportation Conformity Rule Amendments for the ''New 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards and Miscellaneous Revisions for Existing Areas; Transportation Conformity Rule Amendments—Response to Court Decision and Additional Rule Change,'' on July 1, 2004 (69 FR 40004). Additional information on the adequacy process for transportation conformity purposes is available in the proposed rule entitled, ''Transportation Conformity Rule Amendments: Response to Court Decision and Additional Rule Changes,'' 68 FR 38974, 38984 (June 30, 2003).

As discussed earlier, North Carolina's RFP plan submission includes VOC and NOx MVEB for the North Carolina portion of the bi-state Charlotte Area for the year 2008. EPA reviewed the MVEB through the adequacy process. The North Carolina SIP submission, including the 2008 MVEB for the North Carolina portion of the bi-state Charlotte Area, was open for public comment on EPA's adequacy Web site on December 3, 2009, found at: *http://www.epa.gov/otaq/stateresources/transconf/currsips.htm.* The EPA public comment period on adequacy of the 2008 MVEB for the North Carolina portion of the bi-state Charlotte Area, closed on January 3, 2010. EPA did not receive any comments, adverse or otherwise, during the adequacy process. In a letter sent on January 12, 2010, EPA notified NC DENR that the MOBILE6.2-based 2008 VOC MVEB for the North Carolina portion of the bi-state Charlotte Area were determined to be adequate for transportation conformity purposes. On February 19, 2010, EPA published its adequacy notice in the **Federal Register** (75 FR 7474). When EPA found the 2008 MVEB adequate, this triggered a requirement that the new MVEB are used for future transportation conformity determinations. For required regional emissions analysis years beyond 2008, the applicable budgets are the 2008 MVEB. The 2008 MVEB are defined in sections I and V of this rulemaking.

VII. Final Action

EPA is taking direct final action to approve portions of a SIP revision, submitted on June 15, 2007 (as later updated on November 30, 2009), by the State of North Carolina, through the NC DENR to meet the RFP requirements for the North Carolina portion of the bi-state Charlotte Area for the 1997 8-hour ozone NAAQS. Additionally, EPA is approving the VOC MVEB for the North Carolina portion of the bi-state Charlotte Area that were included in North Carolina's RFP plan. These actions are being taken pursuant to section 110 of the CAA.

EPA is publishing this rule without prior proposal because the Agency views this as a non-controversial amendment and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comment be filed. This rule will be effective on December 11, 2012 without further notice unless the Agency receives adverse comment by November 13, 2012. If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time. If no such comments are received, the public is advised this rule will be effective on *December 11, 2012* and no further action will be taken on the proposed rule.

VIII. 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 final action:

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

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

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

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 11, 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. 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, Ozone, Reporting and recordkeeping requirements, and Volatile organic compounds.

Dated: October 2, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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 II—North Carolina

■ 2. Section 52.1770(e), is amended by adding a new entry for ''1997 8-hour ozone reasonable further progress plan for North Carolina portion of the bi-state Charlotte Area'' to the end of the table to read as follows:

§ 52. 1770 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED NORTH CAROLINA NON-REGULATORY PROVISIONS

Provision	State effective date	EPA Approval date	Federal Register citation
* * *	*	*	* * *
1997 8-hour ozone reasonable further progress plan for North Carolina portion of the bi-state Charlotte Area.	11/30/09	10/12/12	[Insert citation of publication].

[FR Doc. 2012–25181 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Part 88

[Docket No. CDC–2012–0007; NIOSH–257]

RIN 0920–AA49

World Trade Center Health Program; Addition of Certain Types of Cancer to the List of WTC-Related Health Conditions

AGENCY: Centers for Disease Control and Prevention, HHS.

ACTION: Final rule; correction.

SUMMARY: On September 12, 2012, HHS published a final rule in the **Federal Register** adding certain types of cancer to the List of WTC-Related Health Conditions. The final rule has an effective date of October 12, 2012. Several ICD coding errors were made in Table 1, which identifies each added cancer type by name and ICD–9 and –10 codes. This correction includes the corrected Table 1, in full. No types of cancer are being added or removed from Table 1 by this action.

DATES: Effective October 12, 2012.

FOR FURTHER INFORMATION CONTACT: Frank J. Hearl, PE, Chief of Staff, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Patriots Plaza, Suite 9200, 395 E St. SW., Washington, DC 20201. Telephone: (202) 245–0625 (this is not a toll-free number). Email: *WTCpublicinput@cdc.gov.*

SUPPLEMENTARY INFORMATION: On September 12, 2012, HHS published a final rule in the **Federal Register** adding certain types of cancer to the List of WTC-Related Health Conditions in 42 CFR 88.1 [77 FR 56138]. Several errors were made in the listing of ICD codes for Table 1, which identifies each type of cancer added to the List of WTC-Related Health Conditions in 42 CFR 88.1. The errors and their corrections are as indicated below. No types of cancer are being added or removed from Table 1. The following list, organized by ''region'' category, notes each error and identifies the correction made:

Head and Neck

- The ICD–9 heading code for ''malignant neoplasm of palate'' included an incorrectly identified code, 149.9; that code is stricken from the heading. The ICD–9 subcode for ''palate, unspecified'' was incorrectly reported as 145.9 and instead should be 145.5.
- The ICD–9 subcode for ''mouth, unspecified'' was incorrectly reported as 149.9 and instead should be 145.9.
- The ICD–9 heading code for ''malignant neoplasm of tonsil'' included an incorrectly identified code, 146.5; that code is stricken from the heading. The ICD–9 subcode for ''overlapping lesion of tonsil'' was incorrectly reported as 146.5 and instead should be 146.0.
- The ICD–9 heading codes for ''malignant neoplasm of oropharynx'' included an incorrectly excluded 146.5; the header now includes it. The ICD–9 subcode for ''branchial cleft'' was incorrectly reported as 146.9 and instead should be 146.8. The ICD–9 subcode 146.5 should have been included for ''overlapping lesion or oropharynx.''
- The ICD–9 heading code 148.2 was added to correct the range provided for ''malignant neoplasm of hypopharynx.''
- The ICD–9 subcode 149.9 should have been included for ''overlapping lesion of lip, oral cavity and pharynx.''
- The ICD–10 heading code for ''malignant neoplasm of nasal cavity'' was incorrectly reported as C30 and instead should be C30.0. To avoid redundancy and improve clarity, the subcode line for ''nasal cavity'' is stricken.

Digestive System

- The ICD–9 heading code 154.8 should have been included for ''malignant neoplasm of rectum.''
- The ICD–9 heading and subcodes for ''malignant neoplasm of other and ill-defined digestive organs'' were incorrectly identified as 154.8 and instead should be 159.0, 159.8, and 159.9. Accordingly, the subcodes for ''intestinal tract, part unspecified,'' ''overlapping lesion of digestive system,'' and ''ill-defined sites within the digestive system'' should be 159.0, 159.8, and 159.9, respectively.

Respiratory System

- The ICD–9 heading codes for ''malignant neoplasm of heart, mediastinum, and pleura'' incorrectly omitted some subcodes in 163; therefore, 163.9 instead should be 163. The ICD–9 subcode for ''pleura'' was incorrectly reported as 163.9 and instead should be 163.0–163.9.

Skin (Non-Melanoma)

- The ICD–9 heading code for ''other malignant neoplasms of skin'' was incorrectly reported as 172 and instead should be 173; the heading code also incorrectly included 187.7, that code is stricken. The ICD–9 subcodes for ''other malignant neoplasms of skin'' should read 173.0—173.9, respectively.

Melanoma

- The ICD–9 subcodes for ''malignant melanoma of lower limb, including hip,'' ''overlapping malignant melanoma of skin,'' and ''malignant melanoma of skin, unspecified,'' were incorrectly reported as 173.7, 173.8, and 173.9, respectively. They should instead be 172.7, 172.8, and 172.9, respectively.

Female Breast

- The description of the region for cancer of the breast is clarified to state ''Female Breast,'' and a note is added to the table to indicate that ''For the purposes of this rule, ICD–10 C50 is limited to cancer of the breast in females.'' At this level of specificity, C50 does not differentiate by sex and includes both male and female breast cancers, whereas ICD–9 code 174 is specific to females.

Urinary System

- The ICD–9 code for ''malignant neoplasm of the bladder'' was incorrectly reported as 183.0 and instead should be 188.

Eye & Orbit

- The ICD–9 subcode 190.7 should have been included for ''lacrimal gland and duct.'' The ICD–9 subcode for ''eye, unspecified'' was incorrectly reported as 190.0 and should instead be 190.9.

Blood & Lymphoid Tissue

- The ICD–9 subcode for ''other specified types of non-Hodgkin lymphoma'' was incorrectly reported as 202.3 and instead should be 202.8.
- In the note (*) under Table 1, ICD–9 code 289.8 was incorrectly identified as correlating with ICD–10 codes C81–96 and is stricken.

This correction properly corrects the errors listed above by replacing Table 1 published in the **Federal Register** on September 12, 2012.

In FR Doc. 2012–22304 published on September 12, 2012 in the **Federal Register**, on pages 56159–56168 the following correction is made:

§ 88.1 [Corrected]

1. On page 56159, in paragraph (4) of the definition of ''List of WTC-Related Health Conditions'' Table 1 is corrected to read as follows:

Table 1 -- List of types of cancer included in the List of WTC-Related Health Conditions

Region	Type of Cancer	ICD-10[1]	ICD-9[2]
Head & Neck	**Malignant neoplasm of lip**	**C00**	**140**
	• External upper lip	• C00.0	• 140.0
	• External lower lip	• C00.1	• 140.1
	• External lip, unspecified	• C00.2	• 140.9
	• Upper lip, inner aspect	• C00.3	• 140.3
	• Lower lip, inner aspect	• C00.4	• 140.4
	• Lip, unspecified, inner aspect	• C00.5	• 140.5
	• Commissure of lip	• C00.6	• 140.6
	• Overlapping lesion of lip	• C00.8	• 140.8
	• Lip, unspecified	• C00.9	• 140.9
	Malignant neoplasm of base of tongue	**C01**	**141.0**
	Malignant neoplasm of other and unspecified parts of tongue	**C02**	**141.1-141.9**
	• Dorsal surface of tongue	• C02.0	• 141.1
	• Border of tongue	• C02.1	• 141.2
	• Ventral surface of tongue	• C02.2	• 141.3
	• Anterior two-thirds of tongue, part unspecified	• C02.3	• 141.4
	• Lingual tonsil	• C02.4	• 141.6
	• Overlapping lesion of tongue	• C02.8	• 141.5, 141.8
	• Tongue, unspecified	• C02.9	• 141.9
	Malignant neoplasm of parotid gland	**C07**	**142.0**
	Malignant neoplasm of other and unspecified major salivary glands	**C08**	**142.1-142.9**
	• Submandibular gland	• C08.0	• 142.1
	• Sublingual gland	• C08.1	• 142.2
	• Overlapping lesion of major salivary glands	• C08.8	• 142.8
	• Major salivary gland, unspecified	• C08.9	• 142.9
	Malignant neoplasm of floor of mouth	**C04**	**144**
	• Anterior floor of mouth	• C04.0	• 144.0
	• Lateral floor of mouth	• C04.1	• 144.1
	• Overlapping lesion of floor of mouth	• C04.8	• 144.8
	• Floor of mouth, unspecified	• C04.9	• 144.9
	Malignant neoplasm of gum	**C03**	**143**
	• Upper gum	• C03.0	• 143.0
	• Lower gum	• C03.1	• 143.1

	• Gum, unspecified	• C03.9	• 143.8-143.9
	Malignant neoplasm of palate	**C05**	**145.2-145.5**
	• Hard palate	• C05.0	• 145.2
	• Soft palate	• C05.1	• 145.3
	• Uvula	• C05.2	• 145.4
	• Overlapping lesion of palate	• C05.8	• 145.5
	• Palate, unspecified	• C05.9	• 145.5
	Malignant neoplasm of other and unspecified parts of mouth	**C06**	**145.0-145.1 145.6, 145.8-145.9**
	• Cheek mucosa	• C06.0	• 145.0
	• Vestibule of mouth	• C06.1	• 145.1
	• Retromolar area	• C06.2	• 145.6
	• Overlapping lesion of other and unspecified parts of mouth	• C06.8	• 145.8
	• Mouth, unspecified	• C06.9	• 145.9
	Malignant neoplasm of tonsil	**C09**	**146.0-146.2**
	• Tonsillar fossa	• C09.0	• 146.1
	• Tonsillar pillar (anterior)(posterior)	• C09.1	• 146.2
	• Overlapping lesion of tonsil	• C09.8	• 146.0
	• Tonsil, unspecified	• C09.9	• 146.0
	Malignant neoplasm of oropharynx	**C10**	**146.3-146.9**
	• Vallecula	• C10.0	• 146.3
	• Anterior surface of epiglottis	• C10.1	• 146.4
	• Lateral wall of oropharynx	• C10.2	• 146.6
	• Posterior wall of oropharynx	• C10.3	• 146.7
	• Branchial cleft	• C10.4	• 146.8
	• Overlapping lesion of oropharynx	• C10.8	• 146.5, 146.8
	• Oropharynx, unspecified	• C10.9	• 146.9
	Malignant neoplasm of nasopharynx	**C11**	**147**
	• Superior wall of nasopharynx	• C11.0	• 147.0
	• Posterior wall of nasopharynx	• C11.1	• 147.1
	• Lateral wall of nasopharynx	• C11.2	• 147.2
	• Anterior wall of nasopharynx	• C11.3	• 147.3
	• Overlapping lesion of nasopharynx	• C11.8	• 147.8
	• Nasopharynx, unspecified	• C11.9	• 147.9
	Malignant neoplasm of piriform sinus	**C12**	**148.1**
	Malignant neoplasm of hypopharynx	**C13**	**148.0, 148.2-148.9**

	• Postcricoid region	• C13.0	• 148.0
	• Aryepiglottic fold, hypopharyngeal aspect	• C13.1	• 148.2
	• Posterior wall of hypopharynx	• C13.2	• 148.3
	• Overlapping lesion of hypopharynx	• C13.8	• 148.8
	• Hypopharynx, unspecified	• C13.9	• 148.9
	Malignant neoplasms of other and ill-defined conditions in the lip, oral cavity and pharynx	**C14**	**149**
	• Pharynx, unspecified	• C14.0	• 149.0
	• Waldeyer's ring	• C14.2	• 149.1
	• Overlapping lesion of lip, oral cavity and pharynx	• C14.8	• 149.8, 149.9
	Malignant neoplasm of nasal cavity	**C30.0**	**160.0**
	Malignant neoplasm of accessory sinuses	**C31**	**160.2-160.9**
	• Maxillary sinus	• C31.0	• 160.2
	• Ethmoidal sinus	• C31.1	• 160.3
	• Frontal sinus	• C31.2	• 160.4
	• Sphenoidal sinus	• C31.3	• 160.5
	• Overlapping lesion of accessory sinuses	• C31.8	• 160.8
	• Accessory sinus, unspecified	• C31.9	• 160.9
	Malignant neoplasm of larynx	**C32**	**161**
	• Glottis	• C32.0	• 161.0
	• Supraglottis	• C32.1	• 161.1
	• Subglottis	• C32.2	• 161.2
	• Laryngeal cartilage	• C32.3	• 161.3
	• Overlapping lesion of larynx	• C32.8	• 161.8
	• Larynx, unspecified	• C32.9	• 161.9
Digestive System	**Malignant neoplasm of the esophagus**	**C15**	**150**
	• Cervical part of esophagus	• C15.0	• 150.0
	• Thoracic part of esophagus	• C15.1	• 150.1
	• Abdominal part of esophagus	• C15.2	• 150.2
	• Upper third of esophagus	• C15.3	• 150.3
	• Middle third of esophagus	• C15.4	• 150.4
	• Lower third of esophagus	• C15.5	• 150.5
	• Overlapping lesion of esophagus	• C15.8	• 150.8
	• Esophagus, unspecified	• C15.9	• 150.9
	Malignant neoplasm of the stomach	**C16**	**151**
	• Cardia	• C16.0	• 151.0
	• Fundus of stomach	• C16.1	• 151.3
	• Body of stomach	• C16.2	• 151.4
	• Pyloric antrum	• C16.3	• 151.2
	• Pylorus	• C16.4	• 151.1
	• Lesser curvature of stomach, unspecified	• C16.5	• 151.5
	• Greater curvature of stomach, unspecified	• C16.6	• 151.6
	• Overlapping lesion of stomach	• C16.8	• 151.8
	• Stomach, unspecified	• C16.9	• 151.9
	Malignant neoplasm of colon	**C18**	**153**
	• Caecum	• C18.0	• 153.4

	• Appendix	• C18.1	• 153.5
	• Ascending colon	• C18.2	• 153.6
	• Hepatic flexure	• C18.3	• 153.0
	• Transverse colon	• C18.4	• 153.1
	• Splenic flexure	• C18.5	• 153.7
	• Descending colon	• C18.6	• 153.2
	• Sigmoid colon	• C18.7	• 153.3
	• Overlapping lesion of colon	• C18.8	• 153.8
	• Colon, unspecified	• C18.9	• 153.9
	Malignant neoplasm of rectosigmoid junction	**C19**	**154.0**
	Malignant neoplasm of rectum	**C20**	**154.1, 154.8**
	Malignant neoplasm of other and ill-defined digestive organs	**C26.0, C26.8-C26.9**	**159.0, 159.8, 159.9**
	• Intestinal tract, part unspecified	• C26.0	• 159.0
	• Overlapping lesion of digestive system	• C26.8	• 159.8
	• Ill-defined sites within the digestive system	• C26.9	• 159.9
	Malignant neoplasm of liver and intrahepatic bile ducts	**C22**	**155**
	• Liver cell carcinoma	• C22.0	• 155.0
	• Intrahepatic bile duct carcinoma	• C22.1	• 155.1
	• Hepatoblastoma	• C22.2	• 155.0
	• Angiosarcoma of liver	• C22.3	• 155.0
	• Other sarcomas of liver	• C22.4	• 155.0
	• Other specified carcinomas of liver	• C22.7	• 155.0
	• Liver, unspecified	• C22.9	• 155.2
	Malignant neoplasm of retroperitoneum and peritoneum	**C48**	**158**
	• Retroperitoneum	• C48.0	• 158.0
	• Specified parts of peritoneum	• C48.1	• 158.8
	• Peritoneum, unspecified	• C48.2	• 158.9
	• Overlapping lesion of retroperitoneum and peritoneum	• C48.8	• 158.8
Respiratory System	**Malignant neoplasm of trachea**	**C33**	**162.0**
	Malignant neoplasm of bronchus and lung	**C34**	**162.2-162.9**
	• Main bronchus	• C34.0	• 162.2
	• Upper lobe, bronchus or lung	• C34.1	• 162.3
	• Middle lobe, bronchus or lung	• C34.2	• 162.4
	• Lower lobe, bronchus or lung	• C34.3	• 162.5
	• Overlapping lesion of bronchus and lung	• C34.8	• 162.8
	• Bronchus or lung, unspecified	• C34.9	• 162.9
	Malignant neoplasm of heart, mediastinum and pleura	**C38**	**164.1-164.9, 163**
	• Heart	• C38.0	• 164.1

	• Anterior mediastinum	• C38.1	• 164.2
	• Posterior mediastinum	• C38.2	• 164.3
	• Mediastinum, part unspecified	• C38.3	• 164.9
	• Pleura	• C38.4	• 163.0-163.9
	• Overlapping lesion of heart, mediastinum and pleura	• C38.8	• 164.8
	Malignant neoplasm of other and ill-defined sites in the respiratory system and intrathoracic organs	**C39**	**165**
	• Upper respiratory tract, part unspecified	• C39.0	• 165.0
	• Overlapping lesion of respiratory and intrathoracic organs	• C39.8	• 165.8
	• Ill-defined sites within the respiratory system	• C39.9	• 165.9
Mesothelium	**Mesothelioma**	**C45**	**158.8, 163.9, 164.1**
	• Mesothelioma of pleura	• C45.0	• 163.9
	• Mesothelioma of peritoneum	• C45.1	• 158.8
	• Mesothelioma of pericardium	• C45.2	• 164.1
	• Mesothelioma of other sites	• C45.7	No Code
	• Mesothelioma, unspecified	• C45.9	No Code
Soft Tissue	**Malignant neoplasm of peripheral nerves and autonomic nervous system**	**C47**	**171**
	• Peripheral nerves of head, face and neck	• C47.0	• 171.0
	• Peripheral nerves of upper limb, including shoulder	• C47.1	• 171.2
	• Peripheral nerves of lower limb, including hip	• C47.2	• 171.3
	• Peripheral nerves of thorax	• C47.3	• 171.4
	• Peripheral nerves of abdomen	• C47.4	• 171.5
	• Peripheral nerves of pelvis	• C47.5	• 171.6
	• Peripheral nerves of trunk, unspecified	• C47.6	• 171.7
	• Overlapping lesion of peripheral nerves and autonomic nervous system	• C47.8	• 171.8
	• Peripheral nerves and autonomic nervous system, unspecified	• C47.9	• 171.9
	Malignant neoplasm of other connective and soft tissue	**C49**	**171**
	• Connective and soft tissue of head, face and neck	• C49.0	• 171.0
	• Connective and soft tissue of upper limb, including shoulder	• C49.1	• 171.2
	• Connective and soft tissue of lower limb, including hip	• C49.2	• 171.3
	• Connective and soft tissue of thorax	• C49.3	• 171.4
	• Connective and soft tissue of abdomen	• C49.4	• 171.5
	• Connective and soft tissue of pelvis	• C49.5	• 171.6
	• Connective and soft tissue of trunk, unspecified	• C49.6	• 171.7
	• Overlapping lesion of connective and soft tissue	• C49.8	• 171.8
	• Connective and soft tissue, unspecified	• C49.9	• 171.9
Skin (Non-Melanoma)	**Other malignant neoplasms of skin**	**C44**	**173**

	• Skin of lip	• C44.0	• 173.0
	• Skin of eyelid, including canthus	• C44.1	• 173.1
	• Skin of ear and external auricular canal	• C44.2	• 173.2
	• Skin of other and unspecified parts of face	• C44.3	• 173.3
	• Skin of scalp and neck	• C44.4	• 173.4
	• Skin of trunk	• C44.5	• 173.5
	• Skin of upper limb, including shoulder	• C44.6	• 173.6
	• Skin of lower limb, including hip	• C44.7	• 173.7
	• Overlapping lesion of skin	• C44.8	• 173.8
	• Malignant neoplasm of skin, unspecified	• C44.9	• 173.9
	Scrotum	**C63.2**	**187.7**
Melanoma	**Malignant melanoma of skin**	**C43**	**172**
	• Malignant melanoma of lip	• C43.0	• 172.0
	• Malignant melanoma of eyelid, including canthus	• C43.1	• 172.1
	• Malignant melanoma of ear and external auricular canal	• C43.2	• 172.2
	• Malignant melanoma of other and unspecified parts of face	• C43.3	• 172.3
	• Malignant melanoma of scalp and neck	• C43.4	• 172.4
	• Malignant melanoma of trunk	• C43.5	• 172.5
	• Malignant melanoma of upper limb, including shoulder	• C43.6	• 172.6
	• Malignant melanoma of lower limb, including hip	• C43.7	• 172.7
	• Overlapping malignant melanoma of skin	• C43.8	• 172.8
	• Malignant melanoma of skin, unspecified	• C43.9	• 172.9
Female Breast	**Malignant neoplasm of breast**	**C50**	**174**
	• Nipple and areola	• C50.0	• 174.0
	• Central portion of breast	• C50.1	• 174.1
	• Upper-inner quadrant of breast	• C50.2	• 174.2
	• Lower-inner quadrant of breast	• C50.3	• 174.3
	• Upper-outer quadrant of breast	• C50.4	• 174.4
	• Lower-outer quadrant of breast	• C50.5	• 174.5
	• Auxillary tail of breast	• C50.6	• 174.6
	• Overlapping lesion of breast	• C50.8	• 174.8
	• Breast, unspecified	• C50.9	• 174.9
Female Reproductive Organs	**Malignant neoplasm of ovary**	**C56**	**183.0**
Urinary System	**Malignant neoplasm of bladder**	**C67**	**188**
	• Trigone of bladder	• C67.0	• 188.0
	• Dome of bladder	• C67.1	• 188.1
	• Lateral wall of bladder	• C67.2	• 188.2
	• Anterior wall of bladder	• C67.3	• 188.3
	• Posterior wall of bladder	• C67.4	• 188.4
	• Bladder neck	• C67.5	• 188.5
	• Ureteric orifice	• C67.6	• 188.6
	• Urachus	• C67.7	• 188.7
	• Overlapping lesion of bladder	• C67.8	• 188.8
	• Bladder, unspecified	• C67.9	• 188.9
	Malignant neoplasms of kidney except renal pelvis	**C64**	**189.0**

	Malignant neoplasm of renal pelvis	**C65**	**189.1**
	Malignant neoplasm of ureter	**C66**	**189.2**
	Malignant neoplasm of other and unspecified urinary organs	**C68**	**189.3-189.9**
	• Urethra	• C68.0	• 189.3
	• Paraurethral gland	• C68.1	• 189.4
	• Overlapping lesion of urinary organs	• C68.8	• 189.8
	• Urinary organ, unspecified	• C68.9	• 189.9
Eye & Orbit	**Malignant neoplasm of eye and adnexa**	**C69**	**190**
	• Conjunctiva	• C69.0	• 190.3
	• Cornea	• C69.1	• 190.4
	• Retina	• C69.2	• 190.5
	• Choroid	• C69.3	• 190.6
	• Ciliary body	• C69.4	• 190.0
	• Lacrimal gland and duct	• C69.5	• 190.2, 190.7
	• Orbit	• C69.6	• 190.1
	• Overlapping lesion of eye and adnexa	• C69.8	• 190.8
	• Eye, unspecified	• C69.9	• 190.9
Thyroid	**Malignant neoplasm of thyroid gland**	**C73**	**193**
Blood & Lymphoid Tissue	**Hodgkin's disease**	**C81**	*
	• Lymphocytic predominance	• C81.0	• 201.4
	• Nodular sclerosis	• C81.1	• 201.5
	• Mixed cellularity	• C81.2	• 201.6
	• Lymphocytic depletion	• C81.3	• 201.7
	• Other Hodgkin's disease	• C81.7	• 201.0-201.2
	• Hodgkin's disease, unspecified	• C81.9	• 201.9
	Follicular [nodular] non-Hodgkin lymphoma	**C82**	*
	• Small cleaved cell, follicular	• C82.0	• 202.0
	• Mixed small cleaved and large cell, follicular	• C82.1	• 202.0
	• Large cell, follicular	• C82.2	• 202.0
	• Other types of follicular non-Hodgkin lymphoma	• C82.7	• 202.0
	• Follicular non-Hodgkin lymphoma, unspecified	• C82.9	• 202.0
	Diffuse non-Hodgkin lymphoma	**C83**	*
	• Small cell (diffuse)	• C83.0	• 200.8
	• Small cleaved cell (diffuse)	• C83.1	• 202.4
	• Mixed small and large cell (diffuse)	• C83.2	• 200.8
	• Large cell (diffuse)	• C83.3	• 200.0
	• Immunoblastic (diffuse)	• C83.4	• 200.8
	• Lymphoblastic (diffuse)	• C83.5	• 200.1
	• Undifferentiated (diffuse)	• C83.6	• 202.8
	• Burkitt's tumor	• C83.7	• 200.2
	• Other types of diffuse non-Hodgkin lymphoma	• C83.8	• 200.8
	• Diffuse non-Hodgkin lymphoma, unspecified	• C83.9	• 202.0
	Peripheral and cutaneous T-cell lymphomas	**C84**	*

	• Mycosis fungoides	• C84.0	• 202.1
	• Sezary's disease	• C84.1	• 202.2
	• T-zone lymphoma	• C84.2	• 202.8
	• Lymphoepithelioid lymphoma	• C84.3	• 202.8
	• Peripheral T-cell lymphoma	• C84.4	• 202.0
	• Other and unspecified T-cell lymphomas	• C84.5	• 202.0
	Other and unspecified types of non-Hodgkin lymphoma	**C85**	*
	• Lymphosarcoma	• C85.0	• 200.1
	• B-cell lymphoma, unspecified	• C85.1	• 202.8
	• Other specified types of non-Hodgkin lymphoma	• C85.7	• 202.8
	• Non-Hodgkin lymphoma, unspecified type	• C85.9	• 200.8
	Malignant immunoproliferative diseases	**C88**	*
	• Waldenstrom's macroglobulinemia	• C88.0	• 273.3
	• Alpha heavy chain disease	• C88.1	• 203.8
	• Gamma heavy chain disease	• C88.2	• 203.8
	• Immunoproliferative small intestinal disease	• C88.3	• 203.8
	• Other malignant immunoproliferative diseases	• C88.7	• 203.8
	• Malignant immunoproliferative disease, unspecified	• C88.9	• 203.8
	Multiple myeloma and malignant plasma cell neoplasms	**C90**	*
	• Multiple myeloma	• C90.0	• 203.0
	• Plasma cell leukemia	• C90.1	• 203.1
	• Plasmacytoma, extramedullary	• C90.2	• 203.8
	Lymphoid leukemia	**C91**	*
	• Acute lymphoblastic leukemia	• C91.0	• 204.0
	• Chronic lymphocytic leukemia	• C91.1	• 204.1
	• Subacute lymphocytic leukemia	• C91.2	• 204.2
	• Prolymphocytic leukemia	• C91.3	• 204.9
	• Hairy-cell leukemia	• C91.4	• 202.4
	• Adult T-cell leukemia	• C91.5	• 204.8
	• Other lymphoid leukemia	• C91.7	• 204.8
	• Lymphoid leukemia, unspecified	• C91.9	• 204.9
	Myeloid leukemia	**C92**	*
	• Acute myeloid leukemia	• C92.0	• 205.0
	• Chronic myeloid leukemia	• C92.1	• 205.1
	• Subacute myeloid leukemia	• C92.2	• 205.2
	• Myeloid sarcoma	• C92.3	• 205.3
	• Acute promyelocytic leukemia	• C92.4	• 205.0
	• Acute myelomonocytic leukemia	• C92.5	• 205.0
	• Other myeloid leukemia	• C92.7	• 205.8
	• Myeloid leukemia, unspecified	• C92.9	• 205.9
	Monocytic leukemia	**C93**	*
	• Acute monocytic leukemia	• C93.0	• 206.0
	• Chronic monocytic leukemia	• C93.1	• 206.1

	• Subacute monocytic leukemia	• C93.2	• 206.2
	• Other monocytic leukemia	• C93.7	• 206.8
	• Monocytic leukemia, unspecified	• C93.9	• 206.9
	Other leukemias of specified cell type	**C94**	*
	• Acute erythremia and erythroleukemia	• C94.0	• 207.0
	• Chronic erythremia	• C94.1	• 207.1
	• Acute megakaryoblastic leukemia	• C94.2	• 207.2
	• Mast cell leukemia	• C94.3	• 207.8
	• Acute pan myelosis	• C94.4	• 238.7
	• Acute myelofibrosis	• C94.5	• 238.7
	• Other specified leukemias	• C94.7	• 207.8
	Leukemia of unspecified cell type	**C95**	*
	• Acute leukemia of unspecified cell type	• C95.0	• 208.0
	• Chronic leukemia of unspecified cell type	• C95.1	• 208.1
	• Subacute leukemia of unspecified cell type	• C95.2	• 208.2
	• Other leukemia of unspecified cell type	• C95.7	• 208.8
	• Leukemia, unspecified	• C95.9	• 208.9
	Other and unspecified malignant neoplasms of lymphoid, hematopoietic and related tissue	**C96**	*
	• Letterer-Siwe disease	• C96.0	• 202.5
	• Malignant histiocytosis	• C96.1	• 202.3
	• Malignant mast cell tumor	• C96.2	• 202.6
	• True histiocytic lymphoma	• C96.3	• 202.3
	• Other specified malignant neoplasms of lymphoid, hematopoietic and related tissue	• C96.7	• 202.8
	• Malignant neoplasm of lymphoid, hematopoietic and related tissue, unspecified	• C96.9	• 202.9
Childhood cancers	Any type of cancer occurring in a person less than 20 years of age.		
Rare cancers	Any type of cancer affecting the populations smaller than 200,000 individuals in the Unites States, *i.e.*, occurring at an incidence rate less than 0.08 percent of the U.S. population. Rare cancers will be determined on a case-by-case basis.		

* For ICD-10 C81-C96 the following ICD-9 codes correlate: 200-208, 238.7, 273.3.

 For the purposes of this rule, ICD-10 C50 is limited to cancer of the breast in females.

1. WHO (World Health Organization) [1978]. International Classification of Diseases, Ninth Revision. Geneva: World Health Organization.

2. WHO (World Health Organization) [1997]. International Classification of Diseases, Tenth Revision. Geneva: World Health Organization.

Dated: October 14, 2012.

John Howard,

Administrator, World Trade Center Health Program and Director, National Institute for Occupational Safety and Health, Centers for Disease Control and Prevention, Department of Health and Human Services.

[FR Doc. 2012–25142 Filed 10–11–12; 8:45 am]

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Proposed Rules

Federal Register
Vol. 77, No. 198
Friday, October 12, 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 THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 48

[Docket ID OCC–2012–0014]

RIN 1557–AD42

Retail Foreign Exchange Transactions

AGENCY: Office of the Comptroller of the Currency, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of the Comptroller of the Currency (OCC) is proposing to amend its retail foreign exchange rule for transactions with bank common trust funds, bank collective investment funds, and insurance company separate accounts and is making technical corrections to the rule.

DATES: Comments must be received by November 13, 2012.

FOR FURTHER INFORMATION CONTACT: Roman Goldstein, Senior Attorney, or Ted Dowd, Assistant Director, Securities and Corporate Practices Division, (202) 874–5210.

ADDRESSES: Because paper mail in the Washington, DC, area and at the OCC is subject to delay, commenters are encouraged to submit comments by the Federal eRulemaking Portal or email, if possible. Please use the title ''Retail Foreign Exchange Transactions'' to facilitate the organization and review of the comments. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal*—''Regulations.gov'': Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Docket Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2012–XXXX'' to submit or view public comments and to view supporting and related materials for this proposed rule. The ''How to Use This Site'' link on the Regulations.gov home page provides information on using Regulations.gov, including instructions for submitting or viewing public comments, viewing other supporting and related materials, and viewing the docket after the close of the comment period.
- *Email: regs.comments@occ.treas.gov.*
- *Mail:* Office of the Comptroller of the Currency, 250 E Street SW., Mail Stop 2–3, Washington, DC 20219.
- *Fax:* (202) 874–5274.
- *Hand Delivery/Courier:* 250 E Street SW., Mail Stop 2–3, Washington, DC 20219.

Instructions: You must include ''OCC'' as the agency name and ''Docket Number OCC–2012–0014'' in your comment. In general, OCC will enter all comments received into the docket and publish them on the Regulations.gov Web site without change, including any business or personal information that you provide such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not enclose any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this proposed rulemaking by any of the following methods:

- *Viewing Comments Electronically:* Go to *http://www.regulations.gov,* under the ''More Search Options'' tab click next to the ''Advanced Document Search'' option where indicated, select ''Comptroller of the Currency'' from the agency drop-down menu, then click ''Submit.'' In the ''Docket ID'' column, select ''OCC–2012–XXXX'' to view public comments for this rulemaking action.
- *Viewing Comments Personally:* You may personally inspect and photocopy comments at the OCC, 250 E Street SW., Washington, DC. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874–4700. Upon arrival, visitors will be required to present valid government-issued photo identification and submit to security screening in order to inspect and photocopy comments.
- *Docket:* You may also view or request available background documents and project summaries using the methods described above.

SUPPLEMENTARY INFORMATION:

I. Background

A. OCC's Retail Foreign Exchange Rulemaking

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1] As amended by the Dodd-Frank Act, the Commodity Exchange Act (CEA) provides that a United States financial institution[2] for which there is a Federal regulatory agency[3] shall not enter into, or offer to enter into, a transaction described in section 2(c)(2)(B)(i)(I) of the CEA with a person that is not an eligible contract participant[4] except pursuant to a rule or regulation of a Federal regulatory agency allowing the transaction under such terms and conditions as the Federal regulatory agency shall prescribe[5] (a retail foreign exchange (forex) rule). Transactions described in section 2(c)(2)(B)(i)(I) include foreign currency futures, options on foreign currency futures, and options on foreign currency (other than options executed or traded on a national securities exchange).[6] A Federal regulatory agency's retail forex rule must treat similarly all such futures and options and all agreements, contracts, or transactions that are functionally or economically similar to such futures and options.[7] Retail forex rules must prescribe appropriate requirements with respect to disclosure, recordkeeping, capital and margin, reporting, business conduct, documentation, and such other

[1] Pub. L. 111–203, 124 Stat. 1376.

[2] The CEA defines *financial institution* as including a depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)). 7 U.S.C. 1a(21)(E). National banks, Federal savings associations, and Federal branches and agencies of foreign banks are depository institutions under the Federal Deposit Insurance Act.

[3] For purposes of the retail forex rules, *Federal regulatory agency* includes an appropriate Federal banking agency. 7 U.S.C. 2(c)(2)(E)(i)(III). The OCC is the appropriate Federal banking agency for national banks, Federal savings associations, and Federal branches and agencies of foreign banks. *See* 7 U.S.C. 1a(2); 12 U.S.C. 1813(q)(1), 5411–12.

[4] 7 U.S.C. 1a(18).

[5] 7 U.S.C. 2(c)(2)(E)(ii)(I).

[6] 7 U.S.C. 2(c)(2)(B)(i)(I).

[7] 7 U.S.C. 2(c)(2)(E)(iii)(II).

standards or requirements as the Federal regulatory agency determines to be necessary.[8] The OCC issued a final retail forex rule on July 14, 2011, which became effective on July 15, 2011.[9] On September 12, 2011, the OCC issued an interim final rule applying the retail forex rule to Federal savings associations on the same terms as national banks.[10]

B. Definition of Eligible Contract Participant

The CEA distinguishes retail customers from non-retail customers through the term *eligible contract participant* (ECP).[11] In many cases, the CEA provides fewer protections to ECPs than retail customers, *i.e.,* non-ECPs. For example, retail forex rules do not apply to transactions with ECPs and ECPs may enter into off-exchange swaps.[12] A person can qualify as an ECP by satisfying the requirements of one of the term's 14 prongs. Two of the prongs are relevant here: the prong for commodity pools and the prong for business entities.

Prior to enactment of the Dodd-Frank Act, a commodity pool [13] was an ECP if it (i) had total assets exceeding $5 million and (ii) was formed and operated by a person subject to regulation under the CEA or by a foreign person performing a similar role or function subject to foreign regulation.[14] The Dodd-Frank Act added a proviso to the second condition, which has become known as the *retail forex look-through:* for purposes of CEA sections [15] that provide the U.S. Commodity Futures Trading Commission (CFTC) with jurisdiction over certain accounts and pooled investment vehicles trading in retail forex, a commodity pool is not an ECP unless all of its participants are ECPs.[16]

Also prior to the Dodd-Frank Act, a corporation, partnership, proprietorship, organization, trust, or other business entity that had total assets exceeding $10 million was an ECP.[17] The Dodd-Frank Act left this provision unmodified. Many private investment vehicles, including certain commodity pools, availed themselves of this provision to be ECPs.[18]

On December 21, 2010, the CFTC and the U.S. Securities and Exchange Commission (SEC) jointly proposed a rule, as required by the Dodd-Frank Act,[19] to further define *eligible contract participant.*[20] The CFTC and SEC proposed to implement the retail forex look-through by excluding, for purposes of CEA section 2(c)(2)(B)(vi) and (C)(vii), a commodity pool with one or more direct or indirect participants that is not an ECP from the definition of *eligible contract participant.* The CFTC and SEC also proposed to prohibit a commodity pool from qualifying as an ECP as a business entity unless it had total assets exceeding $5 million and was operated by a person subject to regulation under the CEA.[21] The CFTC and SEC reasoned that allowing commodity pools to qualify as ECPs solely by having assets exceeding $10 million (as the test for business entities requires) would frustrate Congress' intent to subject commodity pools to the retail forex look-through.[22]

On April 18, 2012, the CFTC and SEC issued a final rule further defining *eligible contract participant.*[23] The definition took effect on July 23, 2012, except for certain provisions related to commodity pools, which take effect on December 31, 2012. The rule adopted a prohibition on a commodity pool qualifying as an ECP under the business entity prong [24] of the ECP definition solely by having assets exceeding $10 million.[25]

The final rule differed from the proposal in three material respects. First, the retail forex look-through generally only applies to a commodity pool that directly enters into a retail forex transaction. A commodity pool is not subject to the retail forex look-through simply because it invests in another commodity pool that enters into retail forex transactions.[26] (However, the retail forex look-through does apply to a commodity pool structured to evade subtitle A of Title VII of the Dodd–Frank Wall Street Reform and Consumer Protection Act by permitting non-ECPs to participate in retail forex transactions.[27]) For example, in a master/feeder fund structure in which the master fund enters into retail forex transactions, one would look through the master fund to the feeder fund but generally not through the feeder fund to its investors. Second, the final rule provides that, notwithstanding the look-through, a commodity pool is an ECP for retail forex purposes if it (i) is not formed for the purpose of evading regulation under the CFTC's retail forex regime, (ii) has total assets exceeding $10 million, and (iii) is formed and operated by a registered commodity pool operator (CPO) [28] or by a CPO exempt from registration under 17 CFR 4.13(a)(3).[29] Third, the rule applies the retail forex look-through only to the ECP prong for commodity pools and business entities—not to the other prongs.[30]

At the meeting adopting the final rule further defining *eligible contract participant,* the CFTC acknowledged that it was unclear if bank funds were ECPs.[31]

II. Overview of Proposed Amendments to the OCC's Retail Forex Rule

A. Treatment of Bank Funds and Insurance Company Separate Accounts

A bank fund is a bank-administered trust that holds commingled assets that meet specific criteria established by OCC regulation.[32] The bank acts as a fiduciary for the bank fund and holds

[8] 7 U.S.C. 2(c)(2)(E)(iii)(I).

[9] Retail Foreign Exchange Transactions, 76 FR 41375 (July 14, 2011).

[10] Retail Foreign Exchange Transactions, 76 FR 56094 (Sept. 12, 2011).

[11] 7 U.S.C. 1a(18).

[12] 7 U.S.C. 2(c)(2)(E)(ii)(I); 7 U.S.C. 2(e); 12 CFR 48.1 *et seq.*

[13] *Commodity pool* means any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including futures, swaps, options, retail forex transactions, retail commodity transactions, and leverage transactions. 7 U.S.C. 1a(10)(A).

[14] 7 U.S.C. 1a(18)(A)(iv).

[15] 7 U.S.C. 2(c)(2)(B)(vi) and (C)(vii).

[16] 7 U.S.C. 1a(18)(A)(iv)(II).

[17] 7 U.S.C. 1a(18)(A)(v)(I).

[18] *See* comment letter from James Kemp, Global Financial Exchange Division & Stuart J. Kaswell, Managed Funds Association, to the CFTC and SEC (Jan. 10, 2012), *http://comments.cftc.gov/PublicComments/ViewComment.aspx?id=50050.*

[19] 15 U.S.C. 8302(d), 8321(b).

[20] Swap Entities and ECPs, 75 FR 80174 (Dec. 21, 2010).

[21] *Id.* at 80185, 80212.

[22] *Id.* at 80185.

[23] Swap Entities and ECPs, 77 FR 30596 (May 23, 2012).

[24] 7 U.S.C. 1a(18)(A)(v).

[25] Swap Entities and ECPs, 77 FR 30596 (May 23, 2012).

[26] *Id.* at 30650.

[27] *Id.*

[28] A CPO is any person engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including futures, swaps, retail forex, and commodity options. 7 U.S.C. 1a(11). In general, CPOs must register with the CFTC. 7 U.S.C. 6m(1).

[29] The registration exemption under 17 CFR 4.13(a)(3) applies to private funds with de minimis commodity positions. *See* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252, 11261–63 (Feb. 24, 2012).

[30] *See* Swap Entities and ECPs, 77 FR 30596, 30651 & n.640 (May 23, 2012).

[31] *See* CFTC, Open Meeting on the 26th Series of Rulemakings Under Dodd–Frank Act (Apr. 18, 2012), *transcript available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/dfsubmission2_041812-trans.pdf* (colloquy between Commissioner Sommers and CFTC staff on p. 80 of the transcript).

[32] *See generally* OCC, Comptroller's Handbook: Collective Investment Funds 1 (Oct. 2005), *available at http://www.occ.gov/publications/publications-by-type/comptrollers-handbook/_pdf/collective-investment-funds.pdf;* 12 CFR 9.18.

legal title to the fund's assets, but the fund's participants are the beneficial owners of the fund's assets. While each participant owns an undivided interest in the aggregate assets of the bank fund, a participant does not directly own any specific asset held by the fund nor does a participant hold any certificate or other document representing an interest in the fund.[33] Insurance company separate accounts share structural features with bank funds: they are not separate legal entities; they are not subject to claims from general creditors of the insurance company; and they divorce legal title to the assets from beneficial ownership.[34]

The legal structure of these funds presents interpretive challenges under the *eligible contract participant* definition. For this reason, the OCC wishes to provide clarity regarding how its retail forex rules will apply to transactions with these funds. The OCC preliminarily believes that treating bank funds as traditional retail customers for purposes of the retail forex rule is not appropriate. It is only bank funds' status as quasi-distinct from the bank that creates this regulatory uncertainty: were bank funds clearly identical to the bank, they would be ECPs as banks; were bank funds separate legal entities, they would be ECPs as bank subsidiaries or affiliates.[35]

The definition of *eligible contract participant* contains a list of entities substantively regulated under the CEA or other regulatory schemes—banks, insurance companies, investment companies, pension plans, registered broker-dealers, and futures commission merchants—suggesting that Congress did not see a need to further regulate already-regulated entities. Bank funds should be treated the same because they too are subject to substantive regulation.[36] Congress did not subject registered investment companies and similarly-regulated foreign entities to the retail forex rules[37] despite the fact that these companies cater to retail investors and are offered publicly, unlike bank funds.[38] Imposing the retail forex rule's requirements on forex transactions between Federal depository institutions and bank funds is inconsistent with the treatment of registered investment companies and similarly regulated foreign entities and creates unwarranted regulatory burden. The disparate treatment creates competitive inequalities that Congress may not have intended.[39]

Moreover, the new definition of *eligible contract participant* creates a paradoxical result: The retail forex rule will apply to transactions with funds that are prudentially regulated—bank funds and insurance company separate accounts—but not to transactions with funds that are not prudentially regulated—hedge funds. Hedge funds will qualify as ECPs under new 17 CFR 1.3(m)(8) because they generally (i) have assets exceeding $10 million and (ii) are operated by registered CPOs or CPOs exempt from registration. CFTC regulations, however, provide that banks and insurance companies are not CPOs when they manage bank funds and separate accounts, respectively.[40] The CPO exclusion comes from the U.S. Senate Committee on Agriculture, Nutrition, and Forestry, which directed the CFTC to exclude from the definition of *commodity pool operator* banks acting in a fiduciary capacity, ERISA plans and their fiduciaries, registered investment companies, and insurance companies.[41] The rationale was that these entities do not need to be regulated under the CEA as CPOs because they are already regulated under other law.[42] It would be counterintuitive for regulatory relief—namely, the CPO exclusion for banks and insurance companies—to increase regulatory burden on these funds. The CEA requires the OCC to prescribe appropriate requirements in its retail forex rules[43] and affords the OCC with flexibility to tailor the requirements of its retail forex rule for certain classes of transactions. The OCC wrote its retail forex rule with individual consumers in mind and prescribed requirements that it deemed appropriate for retail forex transactions with individual consumers. The further definition of *eligible contract participant* raises the issue of how the retail forex rule should apply to entities that are materially different from individual consumers but that are, nonetheless, not ECPs.

The OCC preliminarily believes it appropriate to modify the requirements of the retail forex rule for retail forex transactions between Federal depository institutions[44] and bank funds. The OCC proposes to apply to these transactions only the rule's antifraud and general provisions, sections 48.1, 48.2, 48.3(a), and 48.17. The OCC preliminarily believes that the same requirements should apply to retail forex transactions between Federal depository institutions and insurance company separate accounts because the CFTC's CPO exclusions treat them equivalently. See proposed § 48.1(e).

In connection with this proposed modification, the OCC proposes to exclude retail forex transactions with bank funds and insurance company separate accounts from the profitability calculations required by § 48.7(b). That paragraph requires Federal depository institutions to calculate the percentage of retail forex accounts that are profitable and the percentage of retail forex accounts that are not profitable. The OCC is concerned that these ratios would be less informative to individual consumers of the realistic prospects of profitability if they included trades entered into by sophisticated customers

[33] 12 CFR 9.18(b)(11).

[34] The status of separate accounts as commodity pools is unclear. Commodity Pool Operators, 50 FR 15868, 15872 (Apr. 23, 1985) (''[T]he devoting of assets to commodity interest trading by an insurance company separate account could constitute the operation of a commodity pool.'')

[35] 7 U.S.C. 1a(18)(A)(i); 7 U.S.C. 1a(21)(I).

[36] *See, e.g.,* 12 U.S.C. 92a; 12 CFR 9.18. National banks' bank funds are subject to 12 CFR 9.18. State banks' bank funds may be subject to 12 CFR 9.18 because of the Internal Revenue Code, 26 U.S.C. 584(a)(2), or because of state law. State banks' bank funds may also be subject to state laws specifically regulating common trust funds and collective investment funds, such as the Michigan Collective Investment Funds Act, M.C.L. § 550.101 *et seq.*

[37] 7 U.S.C. 1a(18)(A)(iii).

[38] *See* 15 U.S.C. 80a–3(c)(3) (requiring bank common trust funds to be created and maintained for fiduciary purposes and generally forbidding advertising common trust funds or offering them for sale to the general public); 15 U.S.C. 80a–3(c)(11) (requiring bank collective investment funds to consist solely of assets of employee stock bonus, pension, or profit-sharing trusts or governmental plans).

[39] *See* 15 U.S.C. 8302 (instructing the CFTC and SEC, in adopting rules and orders defining *eligible contract participant,* to treat functionally or economically similar entities in a similar manner); S. Rep. No. 384, at 79–80 (1982) (directing the CFTC to exempt from the definition of CPO banks acting in a fiduciary capacity, ERISA plans and their fiduciaries, insurance companies, and registered investment companies).

[40] 17 CFR 4.5(a)(3). *But see* 7 U.S.C. 1A(11)(A)(ii) (defining *commodity pool operator* to include any person registered as a CPO with the CFTC).

[41] S. Rep. No. 384, at 79–80 (1982); *see also id.* (stating that registered investment companies, insurance companies, and banks and trust companies acting in a fiduciary capacity are not within the intent of the term *commodity pool operator*); Commodity Pool Operators, 50 FR 15868, 15868–69 (Apr. 23, 1985) (quoting S. Rep. No. 384).

[42] *See* S. Rep. No. 384 at 79–80 (1982). The CFTC originally proposed to exempt banks operating bank funds and insurance companies operating separate accounts from all of the requirements applicable to CPOs. The CFTC reasoned that these banks and insurance companies were sufficiently regulated under other regulatory schemes to warrant their complete exemption. Commodity Pool Operators and Commodity Trading Advisors, 49 FR 4778, 4783 (Feb. 8, 1984). The CFTC ultimately concluded that it was appropriate to provide relief even more extensive than it proposed: it created an exclusion from the definition of CPO for these banks and insurance companies. Commodity Pool Operators, 50 FR 15868 (Apr. 23, 1985).

[43] 7 U.S.C. 2(c)(2)(E)(iii).

[44] *Federal depository institution* means a national bank, a Federal savings association, or Federal branch of a foreign bank. 12 U.S.C. 1813(c)(2). In this proposal, it also includes a Federal agency of a foreign bank.

like bank funds and insurance company separate accounts.

B. Adoption of CFTC and SEC Interpretations

The OCC proposes to adopt the further definition of *eligible contract participant* in 17 CFR 1.3(m).[45] One of the OCC's objectives in promulgating its retail forex rule was ensuring regulatory comparability among retail forex counterparties. To that end, the OCC modeled its rule on the CFTC's. The OCC believes that adopting the further definition of *eligible contract participant* promotes regulatory comparability.

The CFTC and SEC rule further defining *eligible contract participant* contained two statutory interpretations regarding retail forex. First, the CFTC and SEC interpreted certain foreign funds to be ECPs for purposes of the retail forex rule.[46] Second, the CFTC and SEC explained that retail forex counterparties may rely (if reasonable) on a customer's written representation that it is an ECP.[47]

The OCC believes that the considerations that led the CFTC and SEC to consider certain foreign funds to be ECPs for purposes of the retail forex look-through [48] are equally applicable to the OCC's retail forex rule. The OCC therefore proposes to exempt from many of the retail forex rule's requirements retail forex transactions between a Federal depository institution and a foreign fund operated and managed by a foreign person and whose participants are foreign investors. These transactions will remain subject to applicable foreign law. In addition, a Federal depository institution must still obtain a supervisory non-objection to begin a retail forex business, even with foreign funds. See proposed § 48.1(d)(2).

The OCC also believes that a Federal depository institution should not be deemed in violation of the retail forex rule if it inadvertently violated one of the rule's requirements because it reasonably believed its counterparty was an ECP, bank fund, or insurance company separate account. Proposed § 48.18 provides a safe harbor for this situation. To rely on this safe harbor, a Federal depository institution must: have reasonable policies and procedures to verify the customer's status; follow these policies and procedures; and obtain a written representation from the counterparty that it is an ECP, bank fund, or insurance company separate account. Reliance on that representation must be reasonable. For this purpose, reliance would be reasonable if the representation specifies its status category—e.g., an investment company, a natural person with discretionary investments exceeding $10 million, a bank fund—unless the Federal depository institution has information that would cause a reasonable person to question the representation.

C. Additional Proposed Changes

The OCC also proposes to make additional clarifying and conforming changes to the retail forex rule.

First, the OCC proposes to clarify the capital requirements applicable to Federal branches and agencies of foreign banks that offer or enter into retail forex transactions. The current retail forex rule requires these Federal branches and agencies to be well capitalized under 12 CFR part 6. However, part 6 only applies to insured Federal branches and agencies.[49] The OCC proposes to amend the capital requirements in § 48.8 so that all Federal branches and agencies offering or entering into retail forex transactions must satisfy the requirements of 12 CFR 4.7(b)(1)(iii)(A) and (iv).[50] For purposes of determining whether a Federal branch or agency complies with these requirements, the Federal branch or agency would have to calculate capital ratios consistent with 12 CFR part 3.[51] The well capitalized requirement would continue to apply to insured Federal branches.

Second, the OCC proposes to revise the retail forex rule's prohibition on self dealing in 12 CFR 48.3(b) to be consistent with the CFTC's retail forex rule.[52] The CFTC's rule prohibits a person from entering into a retail forex transaction for an account over which it or its affiliate has investment discretion. The OCC's retail forex rule, however, prohibits a national bank or its affiliate from entering into a retail forex transaction with a customer if the national bank (but not its affiliate) has investment discretion over that customer's account. The OCC does not intend to regulate the conduct of national bank affiliates, which are subject to other agencies' retail forex rules.[53] Furthermore, the OCC believes it is inappropriate for a Federal depository institution to act as the counterparty for a retail forex transaction that its affiliate entered into using its investment discretion over a customer's account.

Third, the OCC proposes to clarify that instruments that Congress or the CFTC have excluded from regulation under the CEA [54] are not retail forex transactions. Because these instruments are excluded from regulation under the CEA, section 2(c)(2)(E) of the CEA, which prohibits retail forex transactions except under a retail forex rule, does not apply to them. Because this amendment refers to transactions that are already excluded from regulation under the CEA, it would simply clarify how the OCC's retail forex rule interacts with established law.

Finally, the OCC proposes a technical correction to a citation contained in the definition of *retail forex transaction.*

D. Interim Final Rule for Federal Savings Associations

On September 12, 2011, the OCC published an interim final rule amending part 48 to allow Federal savings associations to engage in retail forex transactions on the same terms as national banks.[55] The interim final rule requested comment, by November 14, 2011, on the application of the existing rule to Federal savings associations. The OCC received no comments on the interim final rule. The OCC plans to finalize the interim final rule, as published, at the same time as it finalizes the changes proposed in this NPR.

III. Request for Comment on the Proposed Rule

The OCC requests comments on all aspects of this proposed rule, including the following specific questions.

Question 1. Does the alternative treatment proposed for retail forex transactions with bank funds and insurance company separate accounts appropriately address those transactions? If not, please explain why

[45] The definition in 17 CFR 1.3(m) incorporates the statutory definition of *eligible contract participant.* The retail forex rule's definition of *eligible contract participant* therefore includes persons the CFTC has determined are ECPs. *See* 7 U.S.C. 1A(18)(C).

[46] Swap Entities and ECPs, 77 FR 30596 30654 (May 23, 2012).

[47] *Id.* at 30652–53.

[48] *See id.* at 30653 & n.666.

[49] 12 CFR 6.1(c), 6.20.

[50] To satisfy these requirements, the Federal branch or agency must not be subject to a formal enforcement order by the OCC, Federal Deposit Insurance Corporation, or the Board of Governors of the Federal Reserve System, and the foreign bank's most recently reported capital adequacy positions must consist of, or be equivalent to, Tier 1 and total risk-based capital ratios of at least 6 percent and 10 percent, respectively, on a consolidated basis.

[51] *See* 12 CFR 28.14.

[52] *See* 17 CFR 5.2(c).

[53] *Compare* 12 CFR 48.3(b) *with* Retail Foreign Exchange Transactions, 76 FR 41375, 41377 (July 14, 2011) (preamble description of 12 CFR 48.3(b)). The OCC does regulate a national bank affiliate if that affiliate is itself a national bank or Federal savings association.

[54] *See, e.g.,* 7 U.S.C. 2(f); 7 U.S.C. 27c; 17 CFR part 34; Statutory Interpretation Concerning Certain Hybrid Instruments, 55 FR 13582 (Apr. 11, 1990).

[55] Retail Foreign Exchange Transactions, 76 FR 56094 (Sept. 12, 2011).

not and describe the additional requirements the OCC should impose on transactions with bank funds and insurance company separate accounts. Please explain why those requirements are appropriate for transactions with bank funds and insurance company separate accounts but not for transactions with commodity pools that are ECPs under the CFTC's further definition.[56]

Question 2. Is the proposed definition of *bank fund* in § 48.2 appropriate? If not, how should it be defined? Do any bank funds not fall within the definition? Are there any bank funds that are not directly or indirectly subject to 12 CFR 9.18, such as a bank fund of a state bank? If so, how are those funds regulated?

Question 3. Is the proposed definition of *insurance company separate account* in § 48.2 appropriate? If not, how should it be defined?

Question 4. Is the exclusion of transactions with bank funds and insurance company separate accounts from the profitability calculations appropriate? If not, why not? What proportion of Federal depository institutions' forex trading is with bank funds or insurance company separate accounts?

Question 5. Should the OCC's retail forex rule adopt the CFTC's and SEC's further definition of *eligible contract participant*? Why or why not? Is the definition of *eligible contract participant* proposed in section 48.2 appropriate?

Question 6. Should the OCC's retail forex rule adopt the CFTC's and SEC's interpretation regarding how to treat foreign funds under the retail forex look-through? Why or why not? Is proposed § 48.1(d) an appropriate implementation of this interpretation? Why or why not? Does this approach properly construe the extraterritorial reach of CEA section 2(c)(2)(E)? Why or why not?

Question 7. Should the OCC adopt the CFTC's and SEC's approach to verifying ECP status? Why or why not? Is proposed § 48.18 an appropriate implementation of this approach? Why or why not?

IV. Regulatory Analysis

A. Paperwork Reduction Act

Under the Paperwork Reduction Act,[57] the OCC may not conduct or sponsor, and a person is not required to respond to, an information collection unless the information collection displays a valid Office of Management and Budget (OMB) control number. The amendments in this notice of proposed rulemaking do not introduce any new collections of information into the rules, nor do they amend the rules in a way that modifies the collection of information that OMB has previously approved for part 48.[58] Therefore, no Paperwork Reduction Act submission to OMB is required.

B. Regulatory Flexibility Act Analysis

Under section 605(b) of the Regulatory Flexibility Act, the regulatory flexibility analysis otherwise required under section 604 of the Regulatory Flexibility Act is not required if an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities and publishes its certification and a short explanatory statement in the **Federal Register** along with its rule.

The OCC supervises 772 small entities.[59] This proposal could affect approximately two of those small entities. The OCC estimates the cost to those small entities would be *de minimis.* Therefore, the OCC certifies that the rule will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995, Public Law 104–4 requires that an agency prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector of $146 million or more in any one year. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Reform Act also requires an agency to identify and consider a reasonable number of regulatory alternatives before promulgating a rule.

The OCC has determined that its proposed rule would not result in expenditures by state, local, and tribal governments, or by the private sector, of $146 million or more. Accordingly, the OCC has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

List of Subjects in 12 CFR Part 48

Banks, Consumer protection, Definitions, Federal branches and agencies, Foreign currencies, Federal savings associations, Foreign exchange, National banks, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the OCC proposes to amend 12 CFR part 48 as follows:

PART 48—RETAIL FOREX TRANSACTIONS

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

Authority: 7 U.S.C. 27 *et seq.;* 12 U.S.C. 1 *et seq.,* 24, 93a, 161, 1461 *et seq.,* 1462a, 1463, 1464, 1813(q), 1818, 1831o, 3101 *et seq.,* 3102, 3106a, 3108, and 5412.

2. Amend § 48.1 by revising paragraphs (c) and (d) and adding paragraph (e) to read as follows:

§ 48.1 Authority, purpose, and scope.

* * * * *

(c) *Scope.* Except as provided in this section, this part applies to national banks.

(d) *International applicability.* (1) *Foreign transactions.* Sections 48.3 and 48.5 through 48.16 do not apply to retail foreign exchange transactions between a foreign branch of a national bank and a non-U.S. person.

(2) *Foreign funds.* For purposes of paragraph (d)(1) of this section, a fund is a non-U.S. person if it is operated and managed by a non-U.S. person and all of its participants are non-U.S. persons. For purposes of this paragraph, if a participant is a fund, then the participant is a non-U.S. person only if all of its participants are non-U.S. persons.

(3) *Applicability of foreign law.* Transactions described in this paragraph (d) and foreign branches of national banks remain subject to applicable foreign law, including any disclosure, recordkeeping, capital, margin, reporting, business conduct, and documentation requirements.

(e) *Transactions with qualified forex customers.* Sections 48.3(b) and 48.4 through 48.16 do not apply to retail foreign exchange transactions between a national bank and a qualified forex customer.

3. Amend § 48.2 by:

a. In the introductory text, remove the phrase ''eligible contract participant;'';

b. Remove the definition of *identified banking product;*

c. Amend the definition of *retail forex transaction* by:

i. Removing, in the introductory text, ''other than an identified banking

[56] Swap Dealers and ECPs, 77 FR 30596 (May 23, 2012).

[57] 44 U.S.C. 3501–3520.

[58] OMB Control No. 1557–0250.

[59] A small entity is defined as a bank or savings association with assets up to $175 million or a trust company with assets up to $7 million. Data as of July 20, 2012.

product or a part of an identified banking product'' and adding in its place ''other than an excluded instrument or a part of an excluded instrument''; and

ii. Removing, in paragraphs (2) and (3)(iii)(B), the phrase ''15 U.S.C. 78(f)(a)'' and adding in its place the phrase ''15 U.S.C. 78f(a)''; and

d. Add the definitions for ''Bank fund,'' *''Eligible contract participant,'' ''Excluded instrument,'' ''Insurance company separate account,'' ''Insured branch,''* and *''Qualified forex customer''* in alphabetical order.

The additions read as follows:

§ 48.2 Definitions.

* * * * *

Bank fund means a fund described in 12 CFR 9.18(a)(1), (a)(2), or (c) that is subject to applicable requirements of 12 CFR 9.18.

* * * * *

Eligible contract participant has the same meaning as in 17 CFR 1.3(m).

Excluded instrument means an agreement, contract, or transaction that is exempt from regulation under the Commodity Exchange Act, including:

(1) An identified banking product, as defined in section 402(b) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27(b));

(2) A banking product described in section 405(a) of the Legal Certainty for Bank Products Act of 2000 (7 U.S.C. 27c(a));

(3) A hybrid instrument that is predominantly a security under section 2(f) of the Commodity Exchange Act (7 U.S.C. 2(f)); and

(4) A hybrid instrument that is exempt from the provisions of the Commodity Exchange Act under 17 CFR 34.3(a).

* * * * *

Insurance company separate account means a separate account established and maintained by an insurance company subject to regulation by a State insurance regulator or foreign insurance regulator.

Insured branch has the same meaning as in section 3(s)(3) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)(3)).

* * * * *

Qualified forex customer means a bank fund or an insurance company separate account.

* * * * *

4. Revise § 48.3(b) to read as follows:

§ 48.3 Prohibited Transactions.

* * * * *

(b) If a national bank or an affiliate can cause retail forex transactions to be effected for a retail forex customer without the retail forex customer's specific authorization, then the national bank may not act as the counterparty for any retail forex transaction with that retail forex customer.

5. Revise the introductory text of § 48.7(b)(1) to read as follows:

§ 48.7 Recordkeeping.

* * * * *

(b) * * *

(1) With respect to its active retail forex customer accounts over which it did not exercise investment discretion (other than retail forex proprietary accounts open for any period of time during the quarter or accounts belonging to a qualified forex customer), a national bank must prepare and maintain on a quarterly basis (calendar quarter):

* * * * *

6. Revise § 48.8 to read as follows:

§ 48.8 Capital Requirements.

(a) A national bank, other than a Federal branch or agency of a foreign bank that is not an insured branch, offering or entering into retail forex transactions must be well capitalized under 12 CFR part 6.

(b) A Federal branch or agency of a foreign bank offering or entering into retail forex transactions must satisfy the requirements of 12 CFR 4.7(b)(1)(iii)(A) and (iv).

7. Add § 48.18 to read as follows:

§ 48.18 Counterparty Verification

The OCC will not deem a national bank to have violated this part by engaging in a retail forex transaction without complying with this part's requirements if:

(a) The national bank's counterparty represented in writing that it was an eligible contract participant or a qualified forex customer;

(b) The national bank reasonably relied on that representation;

(c) The national bank had reasonable policies and procedures in place to verify the counterparty's status as an eligible contract participant or a qualified forex customer; and

(d) The national bank followed those policies and procedures.

Dated: October 5, 2012.

Thomas J. Curry,

Comptroller of the Currency.

[FR Doc. 2012–25123 Filed 10–11–12; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1070; Directorate Identifier 2012–NM–099–AD]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: We propose to adopt a new airworthiness directive (AD) for all Airbus Model A300 B4–600, B4–600R, and F4–600R series airplanes, and Model A300 C4–605R Variant F airplanes (collectively called Model A300–600 series airplanes); and Airbus Model A310 series airplanes. This proposed AD was prompted by fuel system reviews conducted by the European Aviation Safety Agency (EASA). This proposed AD would require modifying the electrical control circuits of the inner, center, and trim tank pumps, as applicable. We are proposing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

DATES: We must receive comments on this proposed AD by November 26, 2012.

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

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

For service information identified in this proposed AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.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 Operations office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this proposed AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Operations office (telephone (800) 647–5527) is in the **ADDRESSES** section. Comments will be available in the AD docket shortly after receipt.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227- 2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

We invite you to send any written relevant data, views, or arguments about this proposed AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2012–1070; Directorate Identifier 2012–NM–099–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this proposed AD. We will consider all comments received by the closing date and may amend this proposed AD based on those comments.

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

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2012–0091, dated May 25, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> [T]he FAA published Special Federal Aviation Regulation (SFAR) 88, and the Joint Aviation Authorities (JAA) published Interim Policy INT/POL/25/12.
>
> In the framework of these requirements, EASA have determined that the electrical power supply circuits of certain fuel pumps, installed on A300/A300–600, A310 and A300–600ST aeroplane, for which the canisters become uncovered during normal operation, could, under certain conditions, create an ignition source in the tank vapour space.
>
> This condition, if not corrected, could result in a fuel tank explosion and consequent loss of the aeroplane.
>
> To address this potential unsafe condition, Airbus developed a modification which includes the installation of Ground Fault Interrupters (GFI) into the inner, centre, and trim tank fuel pump control circuits, providing additional system protection by electrically isolating the pump in case of a ground fault condition downstream of the GFI. For the reasons described above, this AD requires modification of the affected fuel pumps control circuit by installing GFI.

You may obtain further information by examining the MCAI in the AD docket.

The FAA has examined the underlying safety issues involved in fuel tank explosions on several large transport airplanes, including the adequacy of existing regulations, the service history of airplanes subject to those regulations, and existing maintenance practices for fuel tank systems. As a result of those findings, we issued a regulation titled ''Transport Airplane Fuel Tank System Design Review, Flammability Reduction and Maintenance and Inspection Requirements'' (66 FR 23086, May 7, 2001). In addition to new airworthiness standards for transport airplanes and new maintenance requirements, this rule included Special Federal Aviation Regulation No. 88 (''SFAR 88,'' Amendment 21–78, and subsequent Amendments 21–82 and 21–83).

Among other actions, SFAR 88 (66 FR 23086, May 7, 2001) requires certain type design (i.e., type certificate (TC) and supplemental type certificate (STC)) holders to substantiate that their fuel tank systems can prevent ignition sources in the fuel tanks. This requirement applies to type design holders for large turbine-powered transport airplanes and for subsequent modifications to those airplanes. It requires them to perform design reviews and to develop design changes and maintenance procedures if their designs do not meet the new fuel tank safety standards. As explained in the preamble to the rule, we intended to adopt airworthiness directives to mandate any changes found necessary to address unsafe conditions identified as a result of these reviews.

In evaluating these design reviews, we have established four criteria intended to define the unsafe conditions associated with fuel tank systems that require corrective actions. The percentage of operating time during which fuel tanks are exposed to flammable conditions is one of these criteria. The other three criteria address the failure types under evaluation: single failures, single failures in combination with a latent condition(s), and in-service failure experience. For all four criteria, the evaluations included consideration of previous actions taken that may mitigate the need for further action.

The Joint Aviation Authorities (JAA) has issued a regulation that is similar to SFAR 88 (66 FR 23086, May 7, 2001). (The JAA is an associated body of the European Civil Aviation Conference (ECAC) representing the civil aviation regulatory authorities of a number of European States who have agreed to co-operate in developing and implementing common safety regulatory standards and procedures.) Under this regulation, the JAA stated that all members of the ECAC that hold type certificates for transport category airplanes are required to conduct a design review against explosion risks.

We have determined that the actions identified in this AD are necessary to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

Relevant Service Information

Airbus has issued Mandatory Service Bulletins A300–28–6104 and A310–28–2170, both dated February 28, 2012. The actions described in this service information are intended to correct the unsafe condition identified in the MCAI.

FAA's Determination and Requirements of This Proposed AD

This product has been approved by the aviation authority of another country, and is approved for operation in the United States. Pursuant to our bilateral agreement with the State of Design Authority, we have been notified of the unsafe condition described in the MCAI and service information referenced above. We are proposing this AD because we evaluated all pertinent information and determined an unsafe condition exists and is likely to exist or develop on other products of the same type design.

Costs of Compliance

Based on the service information, we estimate that this proposed AD would affect about 162 products of U.S. registry. We also estimate that it would take about 6 work-hours per product to comply with the basic requirements of

this proposed AD. The average labor rate is $85 per work-hour. Required parts would cost about $17,680 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $2,946,780, or $18,190 per product.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;
2. Is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979);
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.

We prepared a regulatory evaluation of the estimated costs to comply with this proposed AD and placed it in the AD docket.

List of Subjects in 14 CFR Part 39

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

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. The FAA amends § 39.13 by adding the following new AD:

Airbus: Docket No. FAA–2012–1070; Directorate Identifier 2012–NM–099–AD.

(a) Comments Due Date

We must receive comments by November 26, 2012.

(b) Affected ADs

None.

(c) Applicability

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

(1) All Airbus Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes; Model A300 B4–605R and B4–622R airplanes; Model A300 F4–605R and F4–622R airplanes; and Model A300 C4–605R Variant F airplanes.

(2) All Airbus Model A310–203, –204, –221, –222, –304, –322, –324, and –325 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 28; Fuel.

(e) Reason

This AD was prompted by fuel system reviews conducted by the European Aviation Safety Agency (EASA). We are issuing this AD to reduce the potential of ignition sources inside fuel tanks, which, in combination with flammable fuel vapors, could result in fuel tank explosions and consequent loss of the airplane.

(f) Compliance

You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

(g) Actions

Within 48 months after the effective date of this AD, accomplish the actions specified in paragraph (g)(1) or (g)(2) of this AD, as applicable.

(1) For Model A310 series airplanes: Modify the electrical control circuits of the inner, center, and trim tank pumps, as applicable, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A310–28–2170, dated February 28, 2012.

(2) For Model A300–600 airplanes: Modify the electrical control circuits of the inner, center, and trim tank pumps, as applicable, in accordance with the Accomplishment Instructions of Airbus Mandatory Service Bulletin A300–28–6104, dated February 28, 2012.

(h) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Branch, send it to ATTN: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–2125; fax (425) 227–1149. Information may be emailed to: *9–ANM–116–AMOC–REQUESTS@faa.gov*. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office. The AMOC approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(i) Related Information

(1) Refer to MCAI EASA Airworthiness Directive 2012–0091, dated May 25, 2012; and the service information identified in paragraphs (i)(1)(i) and (i)(1)(ii) of this AD; for related information.

(i) Airbus Mandatory Service Bulletin A310–28–2170, dated February 28, 2012.

(ii) Airbus Mandatory Service Bulletin A300–28–6104, dated February 28, 2012.

(2) For service information identified in this AD, contact Airbus SAS—EAW (Airworthiness Office), 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* Internet *http://www.airbus.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 October 3, 2012.

John P. Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25131 Filed 10–11–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA–3483; File No. S7–23–07]

RIN 3235–AJ96

Temporary Rule Regarding Principal Trades With Certain Advisory Clients

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is proposing to amend rule 206(3)–3T under the Investment Advisers Act of 1940, a temporary rule that establishes an alternative means for investment advisers that are registered with the Commission as broker-dealers to meet the requirements of section 206(3) of the Investment Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients. The amendment would extend the date on which rule 206(3)–3T will sunset from December 31, 2012 to December 31, 2014.

DATES: Comments must be received on or before November 13, 2012.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number S7–23–07 on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

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 S7–23–07. This file number should be included on the subject line if email is used. To help us 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/proposed.shtml*). Comments are also 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Melissa S. Gainor, Attorney-Adviser, Vanessa M. Meeks, Attorney-Adviser, Sarah A. Buescher, Branch Chief, or Daniel S. Kahl, Assistant Director, at (202) 551–6787 or *IArules@sec.gov,* Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–8549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission is proposing an amendment to temporary rule 206(3)–3T [17 CFR 275.206(3)–3T] under the Investment Advisers Act of 1940 [15 U.S.C. 80b] that would extend the date on which the rule will sunset from December 31, 2012 to December 31, 2014.

I. Background

On September 24, 2007, we adopted, on an interim final basis, rule 206(3)–3T, a temporary rule under the Investment Advisers Act of 1940 (the ''Advisers Act'') that provides an alternative means for investment advisers that are registered with us as broker-dealers to meet the requirements of section 206(3) of the Advisers Act when they act in a principal capacity in transactions with certain of their advisory clients.[1] The purpose of the rule was to permit broker-dealers to sell to their advisory clients, in the wake of *Financial Planning Association* v. *SEC* (the ''FPA Decision''),[2] certain securities held in the proprietary accounts of their firms that might not be available on an agency basis—or might be available on an agency basis only on less attractive terms [3]—while protecting clients from conflicts of interest as a result of such transactions.[4]

As initially adopted on an interim final basis, rule 206(3)–3T was set to sunset on December 31, 2009. In December 2009, however, we adopted rule 206(3)–3T as a final rule in the same form in which it was adopted on an interim final basis in 2007, except that we extended the rule's sunset date by one year to December 31, 2010.[5] We deferred final action on rule 206(3)–3T in December 2009 because we needed additional time to understand how, and in what situations, the rule was being used.[6]

In December 2010, we further extended the rule's sunset date by two years to December 31, 2012.[7] We deferred final action on rule 206(3)–3T at that time in order to complete a study required by section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the ''Dodd-Frank Act'') [8]

[1] Rule 206(3)–3T [17 CFR 275.206(3)–3T]. All references to rule 206(3)–3T and the various sections thereof in this release are to 17 CFR 275.206(3)–3T and its corresponding sections. *See also Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2653 (Sep. 24, 2007) [72 FR 55022 (Sep. 28, 2007)] (''2007 Principal Trade Rule Release'').

[2] 482 F.3d 481 (D.C. Cir. 2007). In the FPA Decision, handed down on March 30, 2007, the Court of Appeals for the D.C. Circuit vacated (subject to a subsequent stay until October 1, 2007) rule 202(a)(11)–1 under the Advisers Act. Rule 202(a)(11)–1 provided, among other things, that fee-based brokerage accounts were not advisory accounts and were thus not subject to the Advisers Act. For further discussion of fee-based brokerage accounts, *see* 2007 Principal Trade Rule Release, Section I.

[3] *See* 2007 Principal Trade Rule Release at nn.19–20 and Section VI.C.

[4] As a consequence of the FPA Decision, broker-dealers offering fee-based brokerage accounts with an advisory component became subject to the Advisers Act with respect to those accounts, and the client relationship became fully subject to the Advisers Act. These broker-dealers—to the extent they wanted to continue to offer fee-based accounts and met the requirements for registration—had to: register as investment advisers, if they had not done so already; act as fiduciaries with respect to those clients; disclose all material conflicts of interest; and otherwise fully comply with the Advisers Act, including the restrictions on principal trading contained in section 206(3) of the Act. *See* 2007 Principal Trade Rule Release, Section I.

[5] *See Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2965 (Dec. 23, 2009) [74 FR 69009 (Dec. 30, 2009)] (''2009 Extension Release''); *Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 2965A (Dec. 31, 2009) [75 FR 742 (Jan. 6, 2010)] (making a technical correction to the 2009 Extension Release).

[6] *See* 2009 Extension Release, Section II.c.

[7] *See Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 3118 (Dec. 1, 2010) [75 FR 75650 (Dec. 6, 2010)] (proposing a two-year extension of rule 206(3)–3T's sunset provision) (''2010 Extension Proposing Release''); *Temporary Rule Regarding Principal Trades with Certain Advisory Clients,* Investment Advisers Act Release No. 3128 (Dec. 28, 2010) [75 FR 82236 (Dec. 30, 2010)] (''2010 Extension Release'').

[8] Public Law 111–203, 124 Stat. 1376 (2010). Under section 913 of the Dodd-Frank Act, we were required to conduct a study and provide a report to Congress concerning the obligations of broker-dealers and investment advisers, including standards of care applicable to those intermediaries and their associated persons. Section 913 also

Continued

and to consider more broadly the regulatory requirements applicable to broker-dealers and investment advisers, including whether rule 206(3)–3T should be substantively modified, supplanted, or permitted to sunset.[9]

The study mandated by section 913 of the Dodd-Frank Act was prepared by the staff and delivered to Congress on January 21, 2011.[10] Since that time, we have considered the findings, conclusions, and recommendations of the 913 Study in order to determine whether to promulgate rules concerning the legal or regulatory standards of care for broker-dealers and investment advisers. In addition, since issuing the 913 Study, Commissioners and the staff have held numerous meetings with interested parties on the study and related matters.[11]

II. Discussion

We are proposing to amend rule 206(3)–3T only to extend the rule's sunset date by two additional years.[12] Absent further action by the Commission, the rule will sunset on December 31, 2012. We are proposing this extension because we continue to believe that the issues raised by principal trading, including the restrictions in section 206(3) of the Advisers Act and our experiences with, and observations regarding, the operation of rule 206(3)–3T, should be considered as part of our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers in connection with the Dodd-Frank Act.[13]

As discussed in the 2010 Extension Release, section 913 of the Dodd-Frank Act authorizes us to promulgate rules concerning, among other things, the legal or regulatory standards of care for broker-dealers, investment advisers, and persons associated with these intermediaries when providing personalized investment advice about securities to retail customers. Since the completion of the 913 Study in 2011, we have been considering the findings, conclusions, and recommendations of the study and the comments we have received from interested parties.[14] In addition, our staff has been working to obtain data and economic analysis related to standards of conduct and enhanced regulatory harmonization of broker-dealers and investment advisers to inform the Commission as it considers any future rulemaking. At this time, our consideration of the regulatory requirements applicable to broker-dealers and investment advisers and the recommendations from the 913 Study is ongoing. We will not complete our consideration of these issues before December 31, 2012, the current sunset date for rule 206(3)–3T.

If we permit rule 206(3)–3T to sunset on December 31, 2012, after that date investment advisers registered with us as broker-dealers that currently rely on rule 206(3)–3T would be required to comply with section 206(3)'s transaction-by-transaction written disclosure and consent requirements without the benefit of the alternative means of complying with these requirements currently provided by rule 206(3)–3T. This could limit the access of non-discretionary advisory clients of advisory firms that are registered with us as broker-dealers to certain securities.[15] In addition, firms may be required to make substantial changes to their disclosure documents, client agreements, procedures, and systems.

We believe that the requirements of rule 206(3)–3T, coupled with regulatory oversight, will adequately protect advisory clients for an additional limited period of time while we consider more broadly the regulatory requirements applicable to broker-dealers and investment advisers.[16] In the 2010 Extension Proposing Release, we discussed certain compliance issues identified by the Office of Compliance, Inspections and Examinations.[17] One matter identified in the staff's review resulted in a settlement of an enforcement proceeding and other matters continue to be reviewed by the staff.[18] Since 2010 and throughout the

authorizes us to promulgate rules concerning the legal or regulatory standards of care for broker-dealers, investment advisers, and persons associated with these intermediaries for providing personalized investment advice about securities to retail customers, taking into account the findings, conclusions, and recommendations of the study.

[9] *See* 2010 Extension Release, Section II.

[10] *See Study on Investment Advisers and Broker-Dealers* (''913 Study'') (Jan. 21, 2011), available at *http://www.sec.gov/news/studies/2011/913studyfinal.pdf.* For a discussion regarding principal trading, *see* section IV.C.1.(b) of the 913 Study. *See also* Commissioners Kathleen L. Casey and Troy A. Paredes, *Statement by SEC Commissioners: Statement Regarding Study on Investment Advisers and Broker-Dealers* (Jan. 21, 2011), available at *http://www.sec.gov/news/speech/2011/spch012211klctap.htm.*

[11] *See Comments on Study Regarding Obligations of Brokers, Dealers, and Investment Advisers,* File No. 4–606, available at *http://sec.gov/comments/4-606/4-606.shtml.*

[12] The rule includes a reference to an ''investment grade debt security,'' which is defined as ''a non-convertible debt security that, at the time of sale, is rated in one of the four highest rating categories of at least two nationally recognized statistical rating organizations (as defined in section 3(a)(62) of the Exchange Act).'' Rule 206(3)–3T(a)(2) and (c). Section 939A of the Dodd-Frank Act requires that we ''review any regulation issued by [us] that requires the use of an assessment of the credit-worthiness of a security or money market instrument; and any references to or requirements in such regulations regarding credit ratings.'' Once we have completed that review, the statute provides that we modify any regulations identified in our review to ''remove any reference to or requirement of reliance on credit ratings and to substitute in such regulations such standard of credit-worthiness'' as we determine to be appropriate. We believe that the credit rating requirement in the temporary rule would be better addressed after the Commission completes its review of the regulatory standards of care that apply to broker-dealers and investment advisers. Therefore, we are not proposing any substantive amendments to the rule at this time. *See generally Report on Review of Reliance on Credit Ratings* (July 21, 2011), available at *http://www.sec.gov/news/studies/2011/939astudy.pdf* (staff study reviewing the use of credit ratings in Commission regulations).

[13] The 913 Study is one of several studies relevant to the regulation of broker-dealers and investment advisers mandated by the Dodd-Frank Act. *See, e.g., Study on Enhancing Investment Adviser Examinations* (Jan. 19, 2011), available at *http://sec.gov/news/studies/2011/914studyfinal.pdf* (staff study required by section 914 of the Dodd-Frank Act, which directed the Commission to review and analyze the need for enhanced examination and enforcement resources for investment advisers); Commissioner Elisse B. Walter, *Statement on Study Enhancing Investment Adviser Examinations (Required by Section 914 of Title IV of the Dodd-Frank Wall Street Reform and Consumer Protection Act)* (Jan. 19, 2011), available at *http://sec.gov/news/speech/2011/spch011911ebw.pdf. See also Study and Recommendations on Improved Investor Access to Registration Information About Investment Advisers and Broker-Dealers* (Jan. 26, 2011), available at *http://sec.gov/news/studies/2011/919bstudy.pdf* (staff study required by section 919B of the Dodd-Frank Act, that directed the Commission to complete a study, including recommendations (some of which have been implemented) of ways to improve investor access to registration information about investment advisers and broker dealers, and their associated persons); *United States Government Accountability Office Report to Congressional Committees on Private Fund Advisers* (July 11, 2011), available at *http://www.gao.gov/new.items/d11623.pdf* (study required by section 416 of the Dodd-Frank Act, which directed the Comptroller General of the United States to study the feasibility of forming an self-regulatory organization to oversee private funds).

[14] Section 913(f) of the Dodd-Frank Act requires us to consider the 913 Study in any rulemaking authorized by that section of the Dodd-Frank Act. *See also Comments on Study Regarding Obligations of Brokers, Dealers, and Investment Advisers,* File No. 4–606, available at *http://sec.gov/comments/4-606/4-606.shtml.*

[15] For a discussion of the costs and benefits underlying rule 206(3)–3T, *see* 2007 Principal Trade Rule Release, Section VI.C.

[16] In addition, rule 206(3)–3T(b) provides that the rule does not relieve an investment adviser from acting in the best interests of its clients, or from any obligation that may be imposed by sections 206(1) or (2) of the Advisers Act or any other applicable provisions of the federal securities laws.

[17] *See* 2010 Extension Proposing Release, Section II (discussing certain compliance issues identified by the Office of Compliance Inspections and Examinations with respect to the requirements of section 206(3) or rule 206(3)–3T and noting that the staff did not identify any instances of ''dumping'' as part of its review).

[18] *See In the Matter of Feltl & Company, Inc.,* Investment Advisers Act Release No. 3325 (Nov. 28, 2011) (settled order finding, among other things, violations of section 206(3) of the Advisers Act for certain principal transactions and section 206(4) of the Advisers Act and rule 206(4)–7 thereunder for failure to adopt written policies and procedures

period of the proposed extension, the staff has and would continue to examine firms that engage in principal transactions and will take appropriate action to help ensure that firms are complying with section 206(3) or rule 206(3)–3T (as applicable), including possible enforcement action.

In light of these considerations, we believe that it would be premature to require firms currently relying on the rule to restructure their operations and client relationships before we complete our consideration of the standards of conduct and regulatory requirements applicable to broker-dealers and investment advisers. To the extent our consideration of these issues leads to new rules concerning principal trading, these firms would be required to restructure their operations and client relationships, potentially at substantial expense.

As part of our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers, we intend to carefully consider principal trading by advisers, including whether rule 206(3)–3T should be substantively modified, supplanted, or permitted to sunset. In making these determinations, we will consider, among other things, the 913 Study, relevant comments received in connection with the 913 Study and any rulemaking that may follow, the results of our staff's evaluation of the operation of rule 206(3)–3T, and comments we receive on rule 206(3)–3T in connection with this proposed extension.

III. Request for Comment

We request comment on our proposal to extend rule 206(3)–3T's sunset date for two additional years.

- Should we allow the rule to sunset?
- If so, what costs would advisers that currently rely on the rule incur? What would be the impact on their clients?
- If we allow the rule to sunset, should we consider requests from investment advisers that are registered with us as broker-dealers for exemptive orders providing an alternative means of compliance with section 206(3)?
- If we extend the rule's sunset date, is two years an appropriate period of time to extend the sunset date? Or should we extend the rule's sunset date for a different period of time? If so, for how long?
- Is it appropriate to extend rule 206(3)–3T's sunset date for a limited period of time in its current form while we complete our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers?
- Should we consider changing the requirements for adviser disclosures to have registered advisers provide more information to us and their clients about whether they are relying on the rule? For example, should we amend Part 1A of Form ADV to require advisers to disclose whether they rely on rule 206(3)–3T for certain principal transactions? Should we amend Part 2A of Form ADV to require advisers who rely on rule 206(3)–3T to provide a description to clients of the policies and procedures they have adopted to ensure compliance with the rule?
- Why do advisers eligible to rely on the temporary rule not rely on it?

IV. Paperwork Reduction Act

Rule 206(3)–3T contains ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995.[19] The Office of Management and Budget (''OMB'') last approved the collection of information with an expiration date of May 31, 2014. 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 title for the collection of information is: ''Temporary rule for principal trades with certain advisory clients, rule 206(3)–3T'' and the OMB control number for the collection of information is 3235–0630.

The amendment to the rule we are proposing today—to extend rule 206(3)–3T's sunset date for two years—does not affect the current annual aggregate estimated hour burden of 378,992 hours.[20] Therefore, we are not revising the Paperwork Reduction Act burden and cost estimates submitted to OMB as a result of this proposed amendment.

We request comment on whether the estimates continue to be reasonable. Have circumstances changed such that these estimates (or the underlying assumptions embedded in these estimates) should be modified or revised? Persons submitting comments should direct the comments to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should send a copy to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090, with reference to File No. S7–23–07.

V. Economic Analysis

A. Introduction

The Commission is sensitive to the costs and benefits of its rules. The discussion below addresses the costs and benefits of extending rule 206(3)–3T's sunset date for two years, as well as the effect of the proposed extension on the promotion of efficiency, competition, and capital formation as required by section 202(c) of the Advisers Act.[21]

Rule 206(3)–3T provides an alternative means for investment advisers that are registered with the Commission as broker-dealers to meet the requirements of section 206(3) of the Advisers Act when they act in a principal capacity in transactions with their non-discretionary advisory clients. Other than proposing to extend rule 206(3)–3T's sunset date for two years, we are not otherwise proposing to modify the rule from its current form. We previously considered and discussed the economic analysis of rule 206(3)–3T in its current form in the 2007 Principal Trade Rule Release, the 2009 Extension Release, and the 2010 Extension Release.[22]

The baseline for the following analysis of the benefits and costs of the proposed rule is the situation in existence today, in which investment advisers that are registered with us as broker-dealers can choose to use rule 206(3)–3T as an alternative means to comply with section 206(3) of the Advisers Act when engaging in principal transactions with their non-discretionary advisory clients. The proposed amendment, which will extend rule 206(3)–3T's sunset date by an additional two years, will affect investment advisers that are registered with us as broker-dealers and engage in, or may consider engaging in, principal transactions with non-discretionary advisory clients, as well as the non-discretionary advisory clients of these firms that engage in, or may consider engaging in, principal transactions. The extent to which firms currently rely on

reasonably designed to prevent violations of the Advisers Act and its rules).

[19] 44 U.S.C. 3501 *et seq.*

[20] *See Proposed Collection; Comment Request,* 75 FR 82416 (Dec. 30, 2010); *Submission for OMB Review; Comment Request,* 76 FR 13002 (Mar. 9, 2011).

[21] 15 U.S.C. 80b–2(c). Section 202(c) of the Advisers Act mandates that the Commission, when engaging in rulemaking that requires it to consider or determine whether an action is necessary or appropriate in the public interest, consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

[22] *See* 2007 Principal Trade Rule Release, Sections VI–VII; 2009 Extension Release, Sections V–VI; 2010 Extension Release, Sections V–VI.

the rule is unknown.[23] Past comment letters have indicated that since its implementation in 2007, both large and small advisers have relied upon the rule.[24]

B. Benefits and Costs of Rule 206(3)–3T

As stated in previous releases, we believe the principal benefit of rule 206(3)–3T is that it maintains investor choice and protects the interests of investors. Rule 206(3)–3T also provides non-discretionary advisory clients easier access to a wider range of securities by providing a lower cost and more efficient alternative for an adviser that is registered with us as a broker-dealer to comply with the requirements of section 206(3) of the Advisers Act. Non-discretionary advisory clients also benefit from the protections of the sales practice rules of the Exchange Act and the relevant self-regulatory organization(s), and the fiduciary duties and other obligations imposed by the Advisers Act. The rule also may promote a more efficient allocation of capital by increasing access of non-discretionary advisory clients to a wider range of securities. In the long term, the more efficient allocation of capital may lead to an increase in capital formation.

A commenter disagreed with a number of the benefits of rule 206(3)–3T described above in connection with the 2010 extension of the rule, but did not provide any specific data, analysis, or other information in support of its comment.[25] This commenter also argued that rule 206(3)–3T would impede, rather than promote, capital formation because it would lead to ''more numerous and more severe violations * * * of the trust placed by individual investors in their trusted investment adviser.'' [26] While we understand the view that numerous and severe violations of trust could impede capital formation, we have not seen any evidence that rule 206(3)–3T has caused this result. The staff has not identified instances where an adviser has used the temporary rule to ''dump'' unmarketable securities or securities that the adviser believes may decline in value into an advisory account, a harm that section 206(3) and the conditions and limitations of rule 206(3)–3T are designed to redress.[27] No commenter provided any substantive or specific evidence to contradict the Commission's previous conclusion that the rule benefits investors, and the Commission continues to believe that the rule provides those benefits.[28]

We also received comments on the 2007 Principal Trade Rule Release from commenters who opposed the limitation of the temporary rule to investment advisers that are registered with us as broker-dealers, as well as to accounts that are subject to both the Advisers Act and Exchange Act as providing a competitive advantage to investment advisers that are registered with us as broker-dealers.[29] Based on our experience with the rule to date, and as we noted in previous releases, we have no reason to believe that broker-dealers (or affiliated but separate investment advisers and broker-dealers) are put at a competitive disadvantage to advisers that are themselves also registered as broker-dealers.[30] We intend to continue to evaluate the effects of the rule on efficiency, competition, and capital formation in connection with our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers.

As we discussed in previous releases, there are also several costs associated with rule 206(3)–3T, including the operational costs associated with complying with the rule.[31] In the 2007 Principal Trade Rule Release, we presented estimates of the costs of each of the rule's disclosure elements, including: prospective disclosure and consent; transaction-by-transaction disclosure and consent; transaction-by-transaction confirmations; and the annual report of principal transactions. We also provided estimates for the following related costs of compliance with rule 206(3)–3T: (i) The initial distribution of prospective disclosure and collection of consents; (ii) systems programming costs to ensure that trade confirmations contain all of the information required by the rule; and (iii) systems programming costs to aggregate already-collected information to generate compliant principal transactions reports. We did not receive comments directly addressing with supporting data the cost analysis we presented in the 2007 Principal Trade Rule Release. We do not believe the extension we are proposing today would materially affect the cost estimates associated with the rule.[32] We request comment on whether the proposed extension would impact our previous estimates.

C. Benefits and Costs of the Proposed Extension

In addition to the benefits of rule 206(3)–3T described above and in previous releases, we believe there are benefits to extending the rule's sunset date for an additional two years. A temporary extension of rule 206(3)–3T would have the benefit of providing the Commission with additional time to consider principal trading as part of the broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers without causing disruption to the firms and clients relying on the rule.

One alternative to the proposed extension of the rule's sunset date would be to let the temporary rule sunset on its current sunset date, and so preclude investment advisers from engaging in principal transactions with their advisory clients unless in compliance with the requirements of section 206(3) of the Advisers Act. As explained in the 2010 Extension Release, if we do not extend rule 206(3)–3T's sunset date, firms currently relying on the rule would be required to restructure their operations and client relationships on or before the rule's current expiration date—potentially only to have to do so again later (first when the rule sunsets or is modified, and again if we adopt a new approach in connection with our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers).[33] On the other hand, if the rule's sunset date

[23] Based on IARD data as of August 1, 2012, we estimate that there are less than 100 registered advisers that are also registered as broker-dealers that have non-discretionary advisory accounts and that engage in principal transactions.

[24] *See* Comment Letter of Securities Industry and Financial Markets Association (Dec. 20, 2010); Comment Letter of Winslow, Evans & Crocker (Dec. 8, 2009) (''Winslow, Evans & Crocker Letter''); Comment Letter of Bank of America Corporation (Dec. 20, 2010) (''Bank of America Letter'').

[25] *See* Comment Letter of the National Association of Personal Financial Advisors (Dec. 20, 2010) (''NAPFA Letter'') (questioning the benefits of the rule in: (1) Providing protections of the sales practice rules of the Exchange Act and the relevant self-regulatory organizations; (2) allowing non-discretionary advisory clients of advisory firms that are also registered as broker-dealers to have easier access to a wider range of securities which, in turn, should continue to lead to increased liquidity in the markets for these securities; (3) maintaining investor choice; and (4) promoting capital formation).

[26] *See id.*

[27] *See supra* n.17.

[28] *See* 2007 Principal Trade Rule Release, Section VI.C; 2009 Extension Release, Section V; 2010 Extension Release, Section V.

[29] *See* Comment Letter of the Financial Planning Association (Nov. 30, 2007); Comment Letter of the American Bar Association, section of Business Law's Committee on Federal Regulation of Securities (Apr. 18, 2008). *See also* 2009 Extension Release, Section VI.

[30] *See* 2009 Extension Release, Section VI; 2010 Extension Release, Section VI.

[31] *See supra* n. 22.

[32] In the 2007 Principal Trade Rule Release, we estimated the total overall costs, including estimated costs for all eligible advisers and eligible accounts, relating to compliance with rule 206(3)–3T to be $37,205,569. *See* 2007 Principal Trade Rule Release, Section VI.D.

[33] *See* 2010 Extension Release, Section V.

is extended for two years, firms relying on the rule would continue to be able to offer clients and prospective clients access to certain securities on a principal basis and would not need to incur the cost of adjusting to a new set of rules or abandoning the systems established to comply with the current rule during this two-year period. An extension of the rule would also permit non-discretionary advisory clients who have had access to certain securities because of their advisers' reliance on the rule to trade on a principal basis to continue to have access to those securities without disruption.

We recognize that if this proposal is adopted, firms relying on the rule would continue to incur the costs associated with complying with the rule for two additional years. We also recognize that a temporary rule, by nature, creates long-term uncertainty, which in turn, may result in a reduced ability of firms to coordinate and plan future business activities.[34] However, we believe that it would be premature to allow the rule to sunset or to adopt the rule on a permanent basis while consideration of the regulatory requirements applicable to broker-dealers and investment advisers is ongoing. The Commission also considered extending the rule's sunset date for a period other than two years. Should our consideration of the fiduciary obligations and other regulatory requirements applicable to broker-dealers and investment advisers extend beyond the proposed sunset date of the temporary rule, a longer period may be appropriate. On balance, however, we believe that the proposed two-year extension of rule 206(3)–3T appropriately addresses the concerns of firms and clients relying on the rule while preserving the Commission's ability to address principal trading as part of its broader-consideration of the standards applicable to investment advisers and broker-dealers. We will continue to assess the rule's operation and impact along with intervening developments during the period of the extension.

D. Request for Comment

We request comment on all aspects of the economic analysis, including the accuracy of the potential costs and benefits identified and assessed in this Release and the prior releases, any other costs or benefits that may result from the proposal, and whether the proposal, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data to support their views.

VII. Initial Regulatory Flexibility Act Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis (''IRFA'') regarding the proposed amendment to rule 206(3)–3T in accordance with section 3(a) of the Regulatory Flexibility Act.[35]

A. Reasons for Proposed Action

We are proposing to extend rule 206(3)–3T's sunset date for two years because we believe that it would be premature to require firms relying on the rule to restructure their operations and client relationships before we complete our broader consideration of the regulatory requirements applicable to broker-dealers and investment advisers.

B. Objectives and Legal Basis

The objective of the proposed amendment to rule 206(3)–3T, as discussed above, is to permit firms currently relying on rule 206(3)–3T to limit the need to modify their operations and relationships on multiple occasions, both before and potentially after we complete any regulatory actions stemming from the 913 Study.

We are proposing to amend rule 206(3)–3T pursuant to sections 206A and 211(a) of the Advisers Act [15 U.S.C. 80b–6a and 15 U.S.C. 80b–11(a)].

C. Small Entities Subject to the Rule

Rule 206(3)–3T is an alternative method of complying with Advisers Act section 206(3) and is available to all investment advisers that: (i) Are registered as broker-dealers under the Exchange Act; and (ii) effect trades with clients directly or indirectly through a broker-dealer controlling, controlled by or under common control with the investment adviser, including small entities. Under Advisers Act rule 0–7, for purposes of the Regulatory Flexibility Act an investment adviser generally is a small entity if it: (i) Has assets under management of less than $25 million; (ii) did not have total assets of $5 million or more on the last day of its most recent fiscal year; and (iii) does not control, is not controlled by, and is not under common control with another investment adviser that has assets under management of $25 million or more, or any person (other than a natural person) that had total assets of $5 million or more on the last day of its most recent fiscal year.[36]

We estimate that as of August 1, 2012, 547 SEC-registered investment advisers were small entities.[37] As discussed in the 2007 Principal Trade Rule Release, we opted not to make the relief provided by rule 206(3)–3T available to all investment advisers, and instead have restricted it to investment advisers that are registered as broker-dealers under the Exchange Act.[38] We therefore estimate for purposes of this IRFA that 7 of these small entities (those that are both investment advisers and registered broker-dealers) could rely on rule 206(3)–3T.[39]

D. Reporting, Recordkeeping, and other Compliance Requirements

The provisions of rule 206(3)–3T impose certain reporting or recordkeeping requirements, and our proposal, if adopted, would extend the imposition of these requirements for an additional two years. We do not, however, expect that the proposed two-year extension of the rule's sunset date would alter these requirements.

Rule 206(3)–3T is designed to provide an alternative means of compliance with the requirements of section 206(3) of the Advisers Act. Investment advisers taking advantage of the rule with respect to non-discretionary advisory accounts would be required to make certain disclosures to clients on a prospective, transaction-by-transaction and annual basis.

Specifically, rule 206(3)–3T permits an adviser, with respect to a non-discretionary advisory account, to comply with section 206(3) of the Advisers Act by, among other things: (i) Making certain written disclosures; (ii) obtaining written, revocable consent from the client prospectively authorizing the adviser to enter into principal trades; (iii) making oral or written disclosure and obtaining the client's consent orally or in writing prior to the execution of each principal transaction; (iv) sending to the client a confirmation statement for each principal trade that discloses the capacity in which the adviser has acted and indicating that the client consented to the transaction; and (v) delivering to the client an annual report itemizing the principal transactions. Advisers are already required to communicate the content of many of the disclosures pursuant to their fiduciary obligations to

[34] We received several comments in connection with prior extensions of the rule urging us to make the rule permanent to avoid such uncertainty. *See e.g.,* Winslow, Evans & Crocker Letter; Bank of America Letter.

[35] 5 U.S.C. 603(a).

[36] *See* 17 CFR 275.0–7.

[37] IARD data as of August 1, 2012.

[38] *See* 2007 Principal Trade Rule Release, Section VIII.B.

[39] IARD data as of August 1, 2012.

clients. Other disclosures are already required by rules applicable to broker-dealers.

Our proposed amendment, if adopted, only would extend the rule's sunset date for two years. Advisers currently relying on the rule already should be making the disclosures described above.

E. Duplicative, Overlapping, or Conflicting Federal Rules

We believe that there are no rules that duplicate or conflict with rule 206(3)–3T, which presents an alternative means of compliance with the procedural requirements of section 206(3) of the Advisers Act that relate to principal transactions.

We note, however, that rule 10b–10 under the Exchange Act is a separate confirmation rule that requires broker-dealers to provide certain information to their customers regarding the transactions they effect, including whether the broker or dealer is acting as an agent or as a principal for its own account in a given transaction. Furthermore, FINRA rule 2232 requires broker-dealers that are members of FINRA to deliver a written notification in conformity with rule 10b–10 under the Exchange Act containing certain information. Rule G–15 of the Municipal Securities Rulemaking Board also contains a separate confirmation rule that governs transactions in municipal securities, and requires brokers, dealers and municipal securities dealers to disclose, among other things, the capacity in which the firm effected a transaction (*i.e.,* as an agent or principal). In addition, investment advisers that are qualified custodians for purposes of rule 206(4)–2 under the Advisers Act and that maintain custody of their advisory clients' assets must send quarterly account statements to their clients pursuant to rule 206(4)–2(a)(3) under the Advisers Act.

These rules overlap with certain elements of rule 206(3)–3T, but we designed the temporary rule to work efficiently together with existing rules by permitting firms to incorporate the required disclosure into one confirmation statement.

F. Significant Alternatives

The Regulatory Flexibility Act directs us to consider significant alternatives that would accomplish our stated objective, while minimizing any significant adverse impact on small entities.[40] Alternatives in this category would include: (i) Establishing different compliance or reporting standards or timetables that take into account the resources available to small entities; (ii) clarifying, consolidating, or simplifying compliance requirements under the rule for small entities; (iii) using performance rather than design standards; and (iv) exempting small entities from coverage of the rule, or any part of the rule.

We believe that special compliance or reporting requirements or timetables for small entities, or an exemption from coverage for small entities, may create the risk that the investors who are advised by and effect securities transactions through such small entities would not receive adequate disclosure. Moreover, different disclosure requirements could create investor confusion if it creates the impression that small investment advisers have different conflicts of interest with their advisory clients in connection with principal trading than larger investment advisers. We believe, therefore, that it is important for the disclosure protections required by the rule to be provided to advisory clients by all advisers, not just those that are not considered small entities. Further consolidation or simplification of the proposals for investment advisers that are small entities would be inconsistent with the Commission's goals of fostering investor protection.

We have endeavored through rule 206(3)–3T to minimize the regulatory burden on all investment advisers eligible to rely on the rule, including small entities, while meeting our regulatory objectives. It was our goal to ensure that eligible small entities may benefit from the Commission's approach to the rule to the same degree as other eligible advisers. The condition that advisers seeking to rely on the rule must also be registered with us as broker-dealers and that each account with respect to which an adviser seeks to rely on the rule must be a brokerage account subject to the Exchange Act, and the rules thereunder, and the rules of the self-regulatory organization(s) of which the broker-dealer is a member, reflect what we believe is an important element of our balancing between easing regulatory burdens (by affording advisers an alternative means of compliance with section 206(3) of the Act) and meeting our investor protection objectives.[41] Finally, we do not consider using performance rather than design standards to be consistent with our statutory mandate of investor protection in the present context.

G. Solicitation of Comments

We solicit written comments regarding our analysis. We request comment on whether the rule will have any effects that we have not discussed. We request that commenters describe the nature of any impact on small entities and provide empirical data to support the extent of the impact.

Do small investment advisers believe an alternative means of compliance with section 206(3) should be available to more of them?

VIII. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, or ''SBREFA,''[42] we must advise OMB whether a proposed regulation constitutes a ''major'' rule. Under SBREFA, a rule is considered ''major'' where, if adopted, it results in or is likely to result in: (1) An annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers or individual industries; or (3) significant adverse effects on competition, investment or innovation.

We request comment on the potential impact of the proposed amendment on the economy on an annual basis. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

IX. Statutory Authority

The Commission is proposing to amend rule 206(3)–3T pursuant to sections 206A and 211(a) of the Advisers Act [15 U.S.C. 80b–6a and 80b–11(a)].

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

Text of Proposed Rule Amendment

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows.

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The authority citation for Part 275 continues to read in part as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(G), 80b–2(a)(11)(H), 80b–2(a)(17), 80b–3, 80b–4, 80b–

[40] *See* 5 U.S.C. 603(c).

[41] *See* 2007 Principal Trade Rule Release, Section II.B.7 (noting commenters that objected to this condition as disadvantaging small broker-dealers (or affiliated but separate investment advisers and broker-dealers)).

[42] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

4a, 80b–6(4), 80b–6a, and 80b–11, unless otherwise noted.

* * * * *

§ 275.206(3)–3T [Amended]

2. In § 275.206(3)–3T, amend paragraph (d) by removing the words ''December 31, 2012'' and adding in their place ''December 31, 2014''.

By the Commission.

Dated: October 9, 2012.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2012–25116 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2009–0710; FRL–9740–4]

Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Infrastructure and Interstate Transport Requirements for the 2006 $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve the submittal from the State of New Mexico pursuant to the Clean Air Act (CAA or Act) that addresses the infrastructure elements specified in the CAA necessary to implement, maintain, and enforce the 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS or standard). We are proposing to find that the current New Mexico State Implementation Plan (SIP) meets the infrastructure elements for the 2006 $PM_{2.5}$ NAAQS. We are also proposing to find that the current New Mexico SIP meets the CAA requirement which addresses the requirement that emissions from sources in the area do not interfere with prevention of significant deterioration (PSD) measures required in the SIP of any other state, with regard to the 2006 $PM_{2.5}$ NAAQS.

DATES: Comments must be received on or before November 13, 2012.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–OAR–2009–0710, by one of the following methods:

- *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Email:* Mr. Guy Donaldson at *donaldson.guy@epa.gov.* Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.
- *Fax:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), at fax number 214–665–7263.
- *Mail:* Mr. Guy Donaldson, Chief, Air Planning Section (6PD–L), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.
- *Hand or Courier Delivery:* Mr. Guy Donaldson, Chief, 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 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2009–0710. 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 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 *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 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 or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas.

The State submittal is also available for public inspection during official business hours by appointment: New Mexico Environment Department (NMED), Air Quality Bureau, 1301 Siler Road, Building B, Santa Fe, New Mexico 87507, telephone 505–476–4300.

FOR FURTHER INFORMATION CONTACT: Mr. John Walser, Air Planning Section (6PD–L), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–7128; fax number 214–665–6762; email address *walser.john@epa.gov.*

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

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I. Background

A. What is the background for this rulemaking?

On October 17, 2006, we published revised standards for PM (71 FR 61144). For $PM_{2.5}$, the annual standard of 15 μg/m³ was retained, and the 24-hour standard was revised to 35 μg/m³. For PM_{10} the annual standard was revoked, and the 24-hour standard (150 μg/m³) was retained.

Under sections 110(a)(1) and (2) of the Act, states are required to submit SIPs [1] that provide for the implementation, maintenance, and enforcement (the infrastructure) of a new or revised NAAQS within three years following the promulgation of the NAAQS, or within such shorter period as EPA may prescribe. Section 110(a)(2) lists the specific infrastructure elements that must be incorporated into the SIPs, including for example, requirements for air pollution control measures, and monitoring that are designed to assure attainment and maintenance of the NAAQS. A table listing all 14 infrastructure elements is included in subsection B of section I of this proposed rulemaking. Thus states were required to submit such SIPs for the 2006 $PM_{2.5}$ NAAQS to EPA no later than September 21, 2009.

On September 25, 2009, we issued ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS),'' Memorandum also from William T. Harnett, Director, AQPD, OAQPS. Each of these guidance memos addresses the SIP elements found in 110(a)(2). The guidance states that, to the extent that existing SIPs already meet the requirements, states need only certify that fact to us.

On June 12, 2009, the Governor of New Mexico submitted a letter certifying that NMED has evaluated the New Mexico SIP and found that the SIP does satisfy all the requirements of section 110(a)(1) and (2) for the 2006 $PM_{2.5}$ NAAQS. The June 12, 2009 submittal included a table with an explanation of how the current New Mexico SIP meets the requirements of section 110(a)(2) for the 2006 $PM_{2.5}$ NAAQS. On July 15, 2011, we found that New Mexico's current SIP met all the requirements of section 110(a)(2) for the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS (see 76 FR 41698). For detailed information concerning the background for our previous approval, please see Docket I.D. No. EPA–R06–OAR–2009–0647 for that rulemaking.

On July 6, 2011, WildEarth Guardians and Sierra Club filed an amended complaint related to EPA's failure to take action on the SIP submittal related to the ''infrastructure'' requirements for the 2006 24-hour $PM_{2.5}$ NAAQS. On October 20, 2011, EPA entered into a consent decree with WildEarth Guardians and Sierra Club which required EPA, among other things, to complete a **Federal Register** notice of the Agency's proposed action either approving, disapproving, or approving in part and disapproving in part New Mexico's 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIP submittal addressing the applicable requirements of sections 110(a)(2)(A)–(H), (J)–(M), and section 110(a)(2)(D)(i) interstate transport requirements, by September 30, 2012.

In today's action, we are proposing to approve New Mexico's 2006 24-hour $PM_{2.5}$ NAAQS Infrastructure SIP submittal addressing the applicable requirements of sections 110(a)(2)(A)–(H), (J)–(M), and section 110(a)(2)(D)(i) interstate transport requirements. This action is not approving any specific rule, but rather proposing that New Mexico's already approved SIP, meets certain CAA requirements.

Additional information: This rulemaking will not cover four substantive issues that are not integral to acting on a state's infrastructure SIP submission: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions (''SSM''); (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (''director's discretion''); (iii) existing provisions for minor source NSR programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (''minor source NSR''); and, (iv) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's ''Final NSR Improvement Rule'' (67 FR 80186, December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (''NSR Reform''). Instead, EPA has indicated that it has other authority to address any such existing SIP defects in other rulemakings, as appropriate. A detailed rationale for why these four substantive issues are not part of the scope of infrastructure SIP rulemakings can be found in EPA's July 13, 2011, final rule entitled, ''Infrastructure SIP Requirements for the 1997 8-hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' in the section entitled, ''What is the scope of this final rulemaking?'' (see 76 FR 41076).

B. What elements are required under section 110(a)(2)?

Section 110(a) of the Clean Air Act (Act) requires that each state adopt and submit to EPA, within 3 years (or such shorter time period as the Administrator may prescribe) after the promulgation of a primary or secondary NAAQS or any revision thereof, a SIP that provides for the implementation, maintenance, and enforcement of such NAAQS. EPA refers to these specific submissions as ''infrastructure'' SIPs because they are intended to address basic structural SIP requirements for new or revised NAAQS.

Pursuant to the September 25, 2009, EPA guidance for addressing the SIP infrastructure elements required under sections 110(a)(1) and (2) for the 2006 $PM_{2.5}$ NAAQS, there are 14 essential structural elements that that must be included in the SIP. These are listed in Table 1 below.

[1] State Implementation Plans only apply on State lands and do not apply in Indian Country.

[2] Section 110(a)(2)(D)(ii) of the Act requires compliance with sections 115 and 126 of the Act, relating to international and interstate pollution abatement, respectively. Under section 126(a)(1), SIPs must require notification to nearby, affected states of ''major proposed new (or modified) sources'' in either of two instances: (1) when the source is subject to PSD (section 126(a)(1)(A)); or (2) when the source ''may significantly contribute to levels of air pollution in excess'' of the NAAQS in air quality control regions in other states (section 126(a)(1)(B)). Any new major stationary source or major modification in an attainment or unclassifiable area is subject to PSD. Therefore, in attainment or unclassifiable areas, any source that potentially falls under section 126(a)(1)(B) must also fall under (A). Thus, to the extent that section 126(a)(1)(B) provides any requirements separate from those in section 126(a)(1)(A), it does so only for major proposed new or modified sources in nonattainment areas, that is, for sources subject to nonattainment NSR. The requirements of section 126(a)(1)(B) should therefore be addressed in states with nonattainment areas through those states' nonattainment NSR programs. As explained elsewhere in this proposed rulemaking, nonattainment NSR programs are not a subject of this action, so EPA will not address the requirements of section 126(a)(1)(B) in the infrastructure SIPs.

[3] Section 110(a)(2)(I) pertains to the nonattainment planning requirements of part D, Title I of the Act. This section is not governed by the 3-year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within 3 years after promulgation of a new or revised NAAQS, but are due at the time the nonattainment area plan requirements are due pursuant to section 172. Thus this action does not cover section 110(a)(2)(I).

TABLE 1—SECTION 110(a)(2) ELEMENTS REQUIRED IN SIPS

Clean Air Act citation	Brief description
Section 110(a)(2)(A)	Emission limits and other control measures.
Section 110(a)(2)(B)	Ambient air quality monitoring/data system.
Section 110(a)(2)(C)	Program for enforcement of control measures.
Section 110(a)(2)(D)(ii) [2]	Interstate and international transport.
Section 110(a)(2)(E)	Adequate resources.
Section 110(a)(2)(F)	Stationary source monitoring system.
Section 110(a)(2)(G)	Emergency power.
Section 110(a)(2)(H)	Future SIP revisions.
Section 110(a)(2)(J) [3]	Consultation with government officials.
Section 110(a)(2)(J)	Public notification.
Section 110(a)(2)(J)	Prevention of significant deterioration (PSD) and visibility protection.
Section 110(a)(2)(K)	Air quality modeling/data.
Section 110(a)(2)(L)	Permitting fees.
Section 110(a)(2)(M)	Consultation/participation by affected local entities.

Two elements identified in section 110(a)(2) are not governed by the three-year submission deadline of section 110(a)(1) and are therefore not addressed in this action. These elements relate to part D of title I of the CAA, and submissions to satisfy them are not due within three years after promulgation of a new or revised NAAQS, but rather are due at the same time nonattainment area plan requirements are due under section 172. The two elements are: (i) Section 110(a)(2)(C) to the extent it refers to permit programs required under part D (nonattainment New Source Review (NSR)), and (ii) section 110(a)(2)(I), pertaining to the nonattainment planning requirements of part D. As a result, this action does not address infrastructure elements related to the nonattainment NSR portion of section 110(a)(2)(C) or related to 110(a)(2)(I).

II. The State's Submittal

New Mexico certified that the New Mexico SIP contains provisions that ensure the 2006 $PM_{2.5}$ NAAQS are implemented, maintained, and enforced in New Mexico. On June 12, 2009, the Governor of New Mexico submitted to EPA the Clean Air Act Section 110(a)(1) and (2) requirements in the current New Mexico SIP that address the infrastructure elements specified in the CAA section 110(a)(2), necessary to implement, maintain, and enforce the 2006 $PM_{2.5}$ NAAQS. The June 12, 2009 submittal included a cover letter from the Governor of New Mexico to the EPA Region 6 Regional Administrator, an executive summary discussion, and a SIP matrix listing New Mexico's compliance with state regulations and each section 110(a)(2) infrastructure element for $PM_{2.5}$.

We are proposing to approve the June 12, 2009 submittal since it addresses the infrastructure SIP requirements for the 2006 $PM_{2.5}$ NAAQS. A copy of the submittal can be found in the electronic docket for this action (Docket ID No. EPA–R06–OAR–2009–0710).

III. EPA's Evaluation

The New Mexico submittal addresses the elements of Section 110(a)(2) as described below. We provide additional background information and a more detailed review and analysis of the New Mexico infrastructure SIP elements in the Technical Support Document (TSD), located in the electronic docket for this proposed rulemaking.

Enforceable emission limits and other control measures, pursuant to section 110(a)(2)(A): Section 110(a)(2)(A) requires that all measures and other elements in the SIP be enforceable. This provision does not require the submittal of regulations or emission limits developed specifically for attaining the 2006 $PM_{2.5}$ standards. Those regulations are due later as part of attainment demonstrations.

The New Mexico Environmental Improvement Act, found in Chapter 74, Article 1 of the New Mexico Statutes Annotated 1978 (denoted NMSA 1978 74–1), created the New Mexico Environment Department (NMED) and the New Mexico Environmental Improvement Board (EIB). The New Mexico Air Quality Control Act codified at NMSA 1978 74–2, delegates authority to the EIB to adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to attain and maintain NAAQS and prevent or abate air pollution. See NMSA 1978 74–2–5(B)(1). The Air Quality Control Act also designates the NMED as the State's air pollution control agency and the Environmental Improvement Act provides the NMED with enforcement authority. The SIP rule at Title 20 of the New Mexico Administrative Code (denoted as 20 NMAC) describes NMED as the State's air pollution control agency and its enforcement authority, referencing the NMSA 1978 (44 FR 21019, April 9, 1979; revised 49 FR 44101, November 2, 1984; recodification approved in 62 FR 50518, September 26, 1997).

The NMED has promulgated rules to limit and control emissions of fine particulate matter ($PM_{2.5}$), sulfur dioxide (SO_2), nitrogen oxides (NO_X) and volatile organic compounds (VOCs).[4] These rules include emission limits, control measures, permits, fees, and compliance schedules and are found in Title 20, chapter 2 of the NMAC [5] (denoted 20.2 NMAC): 20.2 NMAC parts 3, 5, 7–8, 10–22, 30–34, 40–41, 72–75, and 98–99.

In this proposed action, EPA is not proposing to approve or disapprove any existing New Mexico SIP provisions with regard to excess emissions during startup, shutdown, or malfunction (SSM) of operations at a facility.[6] EPA believes that a number of states may have SSM SIP provisions that are contrary to the Act and existing EPA guidance,[7] and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having a deficient SSM provision to take steps to correct it as soon as possible. Similarly, in this proposed action, EPA is not proposing to approve or disapprove any existing

[4] NO_X and VOCs are precursors to ozone. PM can be emitted directly and secondarily formed; the latter is the result of NO_X and SO_2 precursors combining with ammonia to form ammonium nitrate and ammonium sulfate.

[5] Title 20 addresses *Environmental Protection* and chapter 2 addresses *Air Quality.*

[6] EPA approved New Mexico's current provisions regarding excess emissions occurring during startup, shutdown, and malfunction (SSM) of operations at a facility on September 14, 2009 (74 FR 46910).

[7] ''State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown,'' Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, and Robert Perciasepe, Assistant Administrator for Air and Radiation, dated August 11, 1999.

state rules with regard to director's discretion or variance provisions. EPA believes that a number of states may have such provisions that are contrary to the Act and existing EPA guidance (52 FR 45044, November 24, 1987),[8] and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision in its SIP which is contrary to the Act and EPA guidance to take steps to correct the deficiency as soon as possible.

A detailed list of the applicable 20.2 NMAC parts discussed above is provided in the TSD. New Mexico's SIP clearly contains enforceable emission limits and other control measures, which are in the federally enforceable SIP. EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(A) with respect to the 2006 $PM_{2.5}$ NAAQS.

Ambient air quality monitoring/data analysis system, pursuant to section 110(a)(2)(B): Section 110(a)(2)(B) requires SIPs to include provisions for establishment and operation of ambient air quality monitors, collecting and analyzing ambient air quality data, and making these data available to EPA upon request. The NMED operates and maintains a statewide network of air quality monitors; data are collected, results are quality assured, and the data are submitted to EPA's Air Quality System[9] on a regular basis. New Mexico's Statewide Air Quality Surveillance Network was approved by EPA on August 6, 1981 (46 FR 40005), and consists of stations that measure ambient concentrations of the six criteria pollutants, including $PM_{2.5}$. The air quality surveillance network undergoes annual review by EPA. On July 7, 2011, NMED submitted its 2011 Annual Air Monitoring Network Plan (AAMNP) that included the plans for the 2006 $PM_{2.5}$ NAAQS. EPA approved New Mexico's 2011 AAMNP on January 13, 2012.[10] The NMED Web site provides the $PM_{2.5}$ monitor locations, and current and historical data (*http://air.nmenv.state.nm.us/*).

In summary, New Mexico meets the requirement to establish, operate, and maintain an ambient air monitoring network, collect and analyze the monitoring data, and make the data available to EPA upon request. EPA is proposing to find that the current New Mexico SIP meets the requirements of section 110(a)(2)(B) with respect to the 2006 $PM_{2.5}$ NAAQS.

Program for enforcement of control measures and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that NAAQS are achieved, including a permit program, as required by Parts C and D, pursuant to section 110(a)(2)(C): Regarding a program for enforcement of control measures, as stated previously, the Air Quality Control Act designates the NMED as the State's air pollution control agency and the Environmental Improvement Act provides the NMED with authority to enforce the state's environmental quality rules. The NMED established rules governing emissions of the criteria pollutants and their precursors throughout the State and these rules are in the federally enforceable SIP. The rules in 20.2 NMAC parts 3, 5, 7–8, 10–22, 30–34, 40–41, 72–75, and 98–99 include allowable emission rates, compliance, control plan requirements, actual and allowable emissions, monitoring and testing requirements, recordkeeping and reporting requirements, and control schedules. These rules clarify the boundaries beyond which regulated entities in New Mexico can expect enforcement action.

To meet the requirement for having a program for the regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required by Parts C and D of the CAA, generally, the State is required to have SIP-approved PSD, Nonattainment, and Minor NSR permitting programs adequate to implement the 2006 $PM_{2.5}$ NAAQS. We are not evaluating nonattainment-related provisions, such as the Nonattainment NSR (NNSR) program required by part D in 110(a)(2)(C) and measures for attainment required by section 110(a)(2)(I), as part of the infrastructure SIPs for this NAAQS because these submittals are required beyond the date (3 years from NAAQS promulgation) that section 110 infrastructure SIP submittals are required.

PSD programs apply in areas that are meeting the NAAQS, referred to as areas in attainment, and in areas for which there is insufficient information to designate as either attainment or nonattainment, referred to as unclassifiable areas. New Mexico's PSD program was conditionally approved into the SIP on February 27, 1987 (52 FR 5964) and fully approved on August 15, 2011 (76 FR 41698). In addition, revisions to New Mexico's PSD program were approved into the SIP on August 21, 1990 (55 FR 34013), May 2, 1991 (56 FR 20137), October 15, 1996 (61 FR 53639), March 10, 2003 (68 FR 11316), December 24, 2003 (68 FR 74483), September 5, 2007 (72 FR 50879), November 26, 2010 (75 FR 72688) and July 20, 2011 (76 FR 43149). Additionally, on June 11, 2009 and May 23, 2011, New Mexico submitted to EPA SIP revisions that revise the state's PSD and NNSR permitting regulations to address the permitting requirements associated with the NAAQS for 8-hour ozone and $PM_{2.5}$, respectively. EPA approved the portions of the June 11, 2009 submittal associated with implementing NO_X as a precursor (75 FR 72688) as necessary to implement the 1997 ozone standard. EPA has proposed approval of the May 23, 2011 revision in a **Federal Register** notice signed on September 28, 2012, as these elements are necessary for implementation of the $PM_{2.5}$ standard. Specific details regarding our proposed approval of these submittals is available in a separate rulemaking and can be found in the Docket ID EPA–R06–OAR–2011–0033.

$PM_{2.5}$ PSD Permitting: To implement the PSD permitting component of section 110(a)(2)(C) for the 2006 $PM_{2.5}$ NAAQS, states were required to submit the necessary SIP revisions to EPA by May 16, 2011 and July 20, 2012 pursuant to EPA's NSR $PM_{2.5}$ Rule finalized May 16, 2008 (73 FR 28321) and EPA's $PM_{2.5}$ Increment—Significant Impact Levels (SILs)—Significant Monitoring Concentrations (SMC) Rule (75 FR 64864) finalized October 20, 2010, respectively. On May 23, 2011, the Governor submitted necessary revisions to the New Mexico SIP to amend the PSD program to meet the 2006 $PM_{2.5}$ NAAQS implementation requirements. To address the requirements of EPA's May 16, 2008 NSR $PM_{2.5}$ Rule, New Mexico adopted rule revisions to establish (1) The requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) significant emission rates for direct $PM_{2.5}$ and precursor pollutants (SO_2 and NO_X) and (3) the requirement that condensable PM be addressed in enforceable PM, PM_{10} and $PM_{2.5}$ emission limits included in PSD permits. To address the requirements of EPA's October 20, 2010 $PM_{2.5}$ PSD Increment—SILs—SMC Rule, New

[8] The section addressing exemptions and variances is found on p. 45109 of the 1987 rulemaking.

[9] The Air Quality System (AQS) is EPA's repository of ambient air quality data. AQS stores data from over 10,000 monitors, 5000 of which are currently active. State, Local and Tribal agencies collect the data and submit it to AQS on a periodic basis.

[10] A copy of our approval letter is available in the docket for this rulemaking.

Mexico updated its PSD rules to establish the allowable $PM_{2.5}$ increments,[11] and the optional screening tools called significant impact levels (SILs), and significant monitoring concentrations (SMCs).

In a separate rulemaking, EPA proposes to approve the May 23, 2011 SIP revisions to New Mexico's PSD permitting regulations that implement the provisions for $PM_{2.5}$ permitting because EPA found those rule revisions adequate and necessary to implement the 2006 $PM_{2.5}$ NAAQS. We have proposed the New Mexico PSD program satisfies both the May 16, 2008 (73 FR 28321) and October 20, 2010 $PM_{2.5}$ PSD rulemakings (75 FR 64864, effective December 20, 2010) and a complete analysis is provided in the TSD for the proposed action signed on September 28, 2012.

GHG PSD Permitting: New Mexico has the authority to issue permits under the SIP-approved PSD program to sources of GHG emissions (75 FR 82536, December 30, 2010).[12] The Tailoring Rule established thresholds that phase in the applicability of PSD requirements to GHG sources, starting with the largest GHG emitters, and were designed to relieve the overwhelming administrative burdens and costs associated with the dramatic increase in permitting burden that would have resulted from applying PSD requirements to GHG emission increases at or above only the mass-based statutory thresholds of 100/250 tpy generally applicable to all PSD-regulated pollutants starting on January 2, 2011. However, EPA recognized that even after it finalized the Tailoring Rule, many SIPs with approved PSD programs would, until they were revised, continue to apply PSD at the statutory thresholds, even though the states would not have sufficient resources to implement the PSD program at those levels. EPA consequently implemented its ''PSD SIP Narrowing Rule'' and narrowed its approval of those provisions of previously approved SIPs of 24 states, including New Mexico, that apply PSD to GHG emission increases from sources emitting GHGs below the Tailoring Rule thresholds (75 FR 82536, December 30, 2010). Through the PSD SIP Narrowing Rule, EPA withdrew its previous approvals of those programs to the extent the SIPs apply PSD to increases in GHG emissions from GHG-emitting sources below the Tailoring Rule thresholds. The portions of the PSD programs regulating GHGs from GHG-emitting sources with emission increases at or above the Tailoring Rule thresholds remained approved. The effect of EPA narrowing its approval in this manner is that the provisions of previously approved SIPs that apply PSD to GHG emissions increases from sources emitting GHGs below the Tailoring Rule thresholds have the status of having been submitted by the state but not yet acted upon by EPA (75 FR 82536, December 30, 2010).

On November 10, 2010, New Mexico adopted revisions to the State's PSD rules to implement the GHG thresholds established in EPA's GHG Tailoring Rule and submitted the corresponding SIP revision to EPA on December 1, 2010. On April 14, 2011, EPA proposed approval of New Mexico's GHG rules submitted on December 1, 2010 (76 FR 20907). On August 19, 2011, EPA approved New Mexico's GHG rules submitted on December 1, 2010 (see 76 FR 43149 dated July 20, 2011).

Minor Source Permitting: Section 110(a)(2)(C) creates ''a general duty on States to include a program in their SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved'' (70 FR 71612, 71677). EPA provides states with a ''broad degree of discretion'' in implementing their Minor NSR programs (71 FR 48696, 48700). The ''considerably less detailed'' regulations for minor NSR are provided in 40 CFR 51.160 through 51.164. EPA has determined that New Mexico's Minor NSR program adopted pursuant to section 110(a)(2)(C) of the Act regulates emissions of all regulated air contaminants for which there is a NAAQS (20.2.72.200 NMAC). New Mexico's Minor NSR permitting requirements are found at 20.2.72 NMAC and were approved into the SIP on May 14, 1973 (38 FR 12702).[13] In this action, EPA is proposing to approve New Mexico's infrastructure SIP for the 2006 $PM_{2.5}$ NAAQS with respect to the general requirement of section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved.

It is important to stress that EPA is not proposing to approve or disapprove the State's existing Minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have Minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state Minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing Minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

Based on the above, we are proposing to find that the current New Mexico SIP meets the requirements of section 110(a)(2)(C) with respect to the 2006 $PM_{2.5}$ NAAQS.

Interstate transport, pursuant to section 110(a)(2)(D): Section 110(a)(2)(D) has two components, 110(a)(2)(D)(i) and 110(a)(2)(D)(ii). Section 110(a)(2)(D)(i) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from contributing significantly to nonattainment, interfering with maintenance of the NAAQS in another state, or from interfering with measures required to prevent significant deterioration of air quality or to protect visibility in another state. Section 110(a)(2)(D)(ii) requires

[11] Under section 165(a)(3) of the Act, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility ''will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant * * *.'' The ''maximum allowable increase'' of an air pollutant that is allowed to occur above the applicable baseline concentration for that pollutant is known as the PSD increment. New Mexico revised their PSD program (20.2.74 NMAC) to include the allowable PSD increments. For example, for Class II areas, the allowable $PM_{2.5}$ PSD increment is 4 $\mu g/m^3$ annual arithmetic mean, and 9 $\mu g/m^3$ 24-hour maximum, as outlined in Table 4 of 20.2.74.504 NMAC.

[12] On June 24, 2010, the State submitted a letter to EPA stating that current New Mexico rules require regulating GHGs at the existing 100/250 tpy threshold, rather than at the higher thresholds set in the Tailoring Rule because the State does not have the authority to apply the meaning of the term ''subject to regulation'' established in the Tailoring Rule. New Mexico also submitted a letter on September 14, 2010, in response to the proposed GHG SIP Call again confirming that EPA correctly classified New Mexico as a State with authority to apply PSD requirements to GHGs. The September 14, 2010, letter also identifies that NMED is pursuing rulemaking activity to define the terms ''greenhouse gas'' and ''subject to regulation.'' These two letters are in the docket for this rulemaking. As explained elsewhere in this rulemaking, on November 10, 2010, New Mexico adopted revisions to the State's PSD rules to implement the GHG thresholds established in EPA's GHG Tailoring Rule and submitted the corresponding SIP revision to EPA on December 1, 2010. On April 14, 2011, EPA proposed approval of New Mexico's GHG rules submitted on December 1, 2010 (76 FR 20907). EPA approved the December 1, 2010 submittal on August 19, 2011 (76 FR 43149).

[13] Revisions to New Mexico's minor source permitting program were most recently approved by EPA into the SIP on September 26, 1997 (62 FR 50514).

SIPs to include provisions insuring compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement.

PSD and interstate transport, pursuant to section 110(a)(2)(D)(i): One of the four elements (or prongs) in section 110(a)(2)(D)(i) requires a SIP to contain adequate provisions prohibiting emissions that interfere with any other state's required measures to prevent significant deterioration of its air quality. This is the only element of 110(a)(2)(D)(i) on which EPA is proposing action in this rulemaking. EPA's 2009 Guidance made recommendations for SIP submissions to meet this requirement with respect to the 2006 $PM_{2.5}$ NAAQS.

The 2009 Guidance states that the PSD permitting program is the primary measure that each state must include to prevent interference with any other state's required measures to prevent significant deterioration of its air quality in accordance with section 110(a)(2)(D)(i)(II).

As discussed previously in this rulemaking with regards to section 110(a)(2)(C) and in the TSD, the New Mexico PSD program has been approved into the SIP. New Mexico has provided necessary revisions to its PSD program to implement the $PM_{2.5}$ standards and EPA has proposed approval of these revisions. Therefore, EPA is proposing that the New Mexico SIP meets the basic requirements for implementing the 2006 $PM_{2.5}$ NAAQS. We are proposing to find the SIP has adequately addressed section 110(a)(2)(D)(i)(II) of the CAA, for the element that requires that the SIP prohibit air pollutant emissions from sources within a state from interfering with measures required to prevent significant deterioration of air quality in any other state.

The remaining three elements of section 110(a)(2)(D)(i): (1) Do not significantly contribute to nonattainment of the relevant NAAQS in any other state for the 2006 $PM_{2.5}$ NAAQS; (2) interference with the maintenance of the NAAQS in any other state; (3) interference with measures required to protect visibility in any other state will be evaluated and addressed in future rulemakings.

Interstate and international transport, pursuant to section 110(a)(2)(D)(ii): Section 110(a)(2)(D)(ii) of the Act requires compliance with sections 115 and 126 of the Act, relating to interstate and international pollution abatement. Section 115(a) addresses endangerment of public health or welfare in foreign countries from pollution emitted in the United States. Pursuant to section 115, the Administrator has neither received nor issued a formal notification that emissions from New Mexico are endangering public health or welfare in a foreign country. Section 126(a) of the Act requires new or modified sources to notify neighboring states of potential impacts from such sources. Under section 126(a)(1)(A), SIPs must require notification to nearby, affected states of ''major proposed new (or modified) sources'' when the source is subject to PSD. New Mexico's SIP approved PSD program rules at 20.2.74.400 NMAC satisfy the requirements of section 126(a)(1)(A) by providing that the NMED must send notice of the proposed action on PSD permits to, among others, ''any state * * * whose lands may be affected by emissions from the source or modification.'' The State also has no pending obligations under section 126 of the Act.

EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(D)(ii) with respect to the 2006 $PM_{2.5}$ NAAQS.

Adequate personnel, funding, and authority, pursuant to section 110(a)(2)(E): The Department of the Environment Act provides that the secretary of the NMED ''shall * * * employ and fix the compensation of those persons necessary to discharge his duties * * *'' See NMSA 1978 9–7A–6(B). The NMED is also authorized to receive State appropriations to implement environmental programs. See generally, NMSA 1978 9–7A. There are federal sources of funding for the implementation of the 2006 $PM_{2.5}$ NAAQS, through, for example, the CAA sections 103 and 105 grant funds. The NMED receives federal funds on an annual basis, under sections 103 and 105 of the Act, to support its air quality programs. Additionally, the State provides funds equal to 40 percent of the 105 grant fees it receives.

Fees collected for the Title V and non-Title V permit programs, and other inspections, maintenance and renewals required of other air pollution sources also provide necessary funds to help implement the State's air programs. Information on permitting fees is provided in the discussion for section 110(a)(2)(L) below. The Air Quality Control Act designates the NMED as the State air pollution control agency for all purposes under federal legislation relating to air pollution and provides the NMED with the power ''to accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, or from any person * * *'' See NMSA 1978 74–2–5.1(F). For more detail on funding sources, please see the TSD.

The Air Quality Control Act delegates authority to the EIB to adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air pollution. See NMSA 1978 74–2–5(B)(1). The Environmental Improvement Act provides the NMED with the power ''to enforce the rules, regulations and orders promulgated by the board * * *'' See NMSA 1978 74–1–6(F). The Air Quality Control Act also gives the NMED the duty to ''develop and present to the environmental improvement board or the local board a plan for the regulation, control, prevention or abatement of air pollution * * *'' and gives the EIB the authority to adopt such a plan. See NMSA 1978 74–2–5.1(H) and NMSA 1978 74–2–5(B)(2). Therefore, the State has demonstrated it has adequate authority under its rules and regulations to carry out its SIP obligations with respect to the 2006 $PM_{2.5}$ NAAQS.

EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(E) with respect to the 2006 $PM_{2.5}$ NAAQS.

Stationary source monitoring system, pursuant to section 110(a)(2)(F): New Mexico's regulations at 20.2 NMAC parts 5, 7–8, 10–20, 30–34, 40–41, and 72–74 require source monitoring for compliance, recordkeeping and reporting, and provide for enforcement with respect to all the NAAQS and their precursors. These source monitoring program requirements generate data for, among other pollutants, ozone, $PM_{2.5}$, and the precursors to these pollutants (VOCs, NO_X, and SO_2).

Under the New Mexico SIP rules, the NMED is required to analyze the emissions data from point, area, mobile, and biogenic (natural) sources. The NMED uses this data to track progress towards maintaining the NAAQS, develop control and maintenance strategies, identify sources and general emission levels, and determine compliance with New Mexico and EPA requirements. The State's emissions data are available on the NMED Web site (*http://www.nmenv.state.nm.us*). These rules have been approved by EPA into the SIP. A list of the rules and **Federal Register** citations are provided in the TSD.

There are two requirements that New Mexico must meet regarding emissions inventories (EIs): The EI requirement for nonattainment areas, and the requirement to submit annual EI data to EPA's National Emissions Inventory (NEI) database. Because Nonattainment NSR is outside the scope of this

rulemaking, we are not addressing New Mexico's EI for nonattainment areas in this proposed action. The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states are given to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System (EIS). States report emissions data for the six criteria pollutants and the precursors that form them—nitrogen oxides, sulfur dioxide, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the Web site *http://www.epa.gov/ttn/chief/eiinformation.html.* The NMED is current with their submittals to the NEI database; the 2010 data for larger sources was submitted to EPA in 2011. The State's emissions data are also available on EPA's AirData Web site (*http://www.epa.gov/air/data/index.html*).[14]

EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(F) with respect to the 2006 $PM_{2.5}$ NAAQS.

Emergency power, pursuant to section 110(a)(2)(G): Section 110(a)(2)(G) requires States to provide for authority to address activities causing imminent and substantial endangerment to public health, including contingency plans to implement the emergency episode provisions in their SIPs. The Air Quality Control Act provides the NMED with authority to address environmental emergencies, and the NMED has contingency plans to implement emergency episode provisions in the SIP. New Mexico promulgated the ''Air Pollution Episode Contingency Plan for New Mexico,'' which includes contingency measures, and these provisions were approved into the SIP on August 21, 1990 (55 FR 34013).

The 2009 Infrastructure SIP Guidance for $PM_{2.5}$ recommends that a state with at least one monitored 24-hour $PM_{2.5}$ value exceeding 140.4 μg/m^3 since 2006 establish an emergency episode plan and contingency measures to be implemented should such level be exceeded again. The 2006–2011 ambient air quality monitoring data[15] for New Mexico do not exceed 140.4 μg/m^3. The $PM_{2.5}$ levels have consistently remained below this level (140.4 μg/m^3), and furthermore, the State has appropriate general emergency powers to address $PM_{2.5}$ related episodes to protect the environment and public health. Given the State's low monitored $PM_{2.5}$ levels, EPA is proposing the State is not required to submit an emergency episode plan and contingency measures at this time, for the 2006 $PM_{2.5}$ standard. Additional detail is provided in the TSD.

EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(G) with respect to the 2006 $PM_{2.5}$ NAAQS.

Future SIP revisions, pursuant to section 110(a)(2)(H): The Air Quality Control Act provides that the EIB shall ''* * * adopt, promulgate, publish, amend, and repeal regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air pollution * * *.'' See NMSA 1978 74–2–5(B)(1). The Environmental Improvement Act provides that the NMED shall, ''* * * enforce the rules, regulations and orders promulgated by the board * * *.'' See NMSA 1978 74–1–6(F). In addition, the Air Quality Control Act requires the NMED to, ''* * * advise, consult, contract with and cooperate with local authorities, other states, the federal government and other interested persons or groups in regard to matters of common interest in the field of air quality control * * *'' See NMSA 1978 74–2–5.2(B). Thus, New Mexico has the authority to revise its SIP from time to time as may be necessary to take into account revisions of primary or secondary NAAQS, or the availability of improved or more expeditious methods of attaining such standards. Furthermore, New Mexico also has the authority under the above provisions to revise its SIP in the event the EPA, pursuant to the Act, finds the SIP to be substantially inadequate to attain the NAAQS.

EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(H) with respect to the 2006 $PM_{2.5}$ NAAQS.

Consultation with government officials, pursuant to section 110(a)(2)(J):[16] The Air Quality Control Act, as codified at NMSA 1978 74–2–6, provides that, ''no regulations or emission control requirement shall be adopted until after a public hearing by the environmental improvement board or the local board'' and provides that, ''at the hearing, the environmental improvement board or the local board shall allow all interested persons reasonable opportunity to submit data, views, or arguments orally or in writing and to examine witnesses testifying at the hearing.'' See NMSA 1978 74–2–6(B) and (D). In addition, the Air Quality Control Act provides that the NMED shall have the power and duty to ''advise, consult, contract with and cooperate with local authorities, other states, the federal government and other interested persons or groups in regard to matters of common interest in the field of air quality control* * *'' See NMSA 1978 74–2–5.2(B). The State's SIP approved PSD rules at 20.2.74.400 NMAC mandate that the NMED shall provide for public participation and notification regarding permitting applications to any other state or local air pollution control agencies, local government officials of the city or county where the source will be located, and Federal Land Managers (FLM) whose lands may be affected by emissions from the source or modification. The State's SIP approved PSD rules at 20.2.74.403 NMAC require the NMED to consult with FLMs regarding permit applications for sources impacting Class I Federal areas.[17] Furthermore, the State of New Mexico has committed in the SIP to consult continually with the FLMs on the review and implementation of the visibility program and to notify the FLM of any advance notification or early consultation with a major new or modifying source prior to the submission of the permit application.[18] The State's SIP approved Transportation Conformity rules at 20.2.99.116 and 20.2.99.124 NMAC require that interagency consultation and opportunity for public involvement be provided before making transportation conformity determinations and before adopting applicable SIP revisions on

[14] The AirData Web site provides access to air pollution data for the entire United States and produces reports and maps of air pollution data based on criteria specified by the user.

[15] The ozone and PM data are available through AQS. The AQS data for PM are provided in the docket for this rulemaking.

[16] Section 110(a)(2)(J) is divided into three segments: Consultation with government officials; public notification; and PSD and visibility protection.

[17] Areas designated as mandatory Class I Federal areas consist of national parks exceeding 6,000 acres, wilderness areas and national memorial parks exceeding 5,000 acres, and all international parks that were in existence on August 7, 1977. CAA section 162(a).

[18] See 71 FR 4490, January 27, 2006.

transportation-related SIPs.[19] These rules are in the Federally-approved SIP.

EPA is proposing to find that the New Mexico SIP meets the requirements of this portion of section 110(a)(2)(J) with respect to the 2006 $PM_{2.5}$ NAAQS.

Public notification if NAAQS are exceeded, pursuant to section 110(a)(2)(J): Public notification begins with the air quality forecast, which advises the public of conditions capable of exceeding the NAAQS (see 54 FR 9783). New Mexico's provisions regarding public notification of instances or areas in which any primary NAAQS was exceeded were approved into the SIP on August 24, 1983 (48 FR 38466). In addition, the NMED air monitoring Web site provides live air quality data for each of the monitoring stations in New Mexico.[20] The Web site also provides information on the health effects of ozone, particulate matter, and other criteria pollutants.

EPA is proposing to find that the New Mexico SIP meets the requirements of this portion of section 110(a)(2)(J) with respect to the 2006 $PM_{2.5}$ NAAQS.

PSD and visibility protection, pursuant to section 110(a)(2)(J): This portion of section 110(a)(2)(J) in part requires that a state's SIP meet the applicable requirements of section 110(a)(2)(C) as relating to PSD programs. As detailed in the subsection titled ''*Program for enforcement of control measures and regulation of the modification and construction of any stationary source * * * pursuant to section 110(a)(2)(C)''* of this rulemaking and in the TSD, New Mexico's PSD program was conditionally approved into the SIP on February 27, 1987 (52 FR 5964). New Mexico has since then met the conditions of our conditional approval, so we converted our conditional approval into a full approval effective August 15, 2011 (76 FR 41698). The State's PSD program is in the SIP (52 FR 5964, 53 FR 44191, 55 FR 43013, 56 FR 20137, 61 FR 53639, 68 FR 11316, 68 FR 74483, 72 FR 50879, and 75 FR 72688). Furthermore, the State revised their rules to address $PM_{2.5}$ in their PSD program, and submitted those SIP revisions on May 23, 2011 to address the permitting requirements for direct $PM_{2.5}$ emissions and its precursors as promulgated by EPA on May 16, 2008 and adopting the $PM_{2.5}$ increment, significant impact levels (SILs), and significant monitoring concentrations (SMCs) as promulgated by EPA on October 20, 2010 (75 FR 64864). The State's minor source permitting requirements were approved at 38 FR 12702.

EPA approved New Mexico's Visibility Protection Plan and approved a Long-Term Strategy for Visibility Protection into the New Mexico SIP on January 27, 2006 (71 FR 4490). The State submitted a Regional Haze SIP to EPA on December 1, 2003. On January 15, 2009, we published a ''Finding of Failure to Submit State Implementation Plans Required by the 1999 regional haze rule'' (74 FR 2392). We found that New Mexico had failed to submit for our review and approval a complete SIP for improving visibility in the nation's national parks and wilderness areas by the required date of December 17, 2007. Specifically, we found that New Mexico had failed to submit the plan elements required by 40 CFR 51.309(g),[21] and the plan element required by 40 CFR 51.309(d)(4), which requires BART for stationary source emissions of NO_X and PM under either 40 CFR 51.308(e)(1) or 51.308(e)(2).[22] On January 13, 2009, New Mexico submitted a letter to EPA, clarifying that they intended to submit a Regional Haze (RH) SIP revision in 2009 to address the requirements of 40 CFR 51.309(d)(4) and 40 CFR 51.309(g).[23]

On September 17, 2007, New Mexico submitted a SIP revision addressing the ''good neighbor'' requirement of section 110(a)(2)(D)(i) of the CAA for the 1997 8-hour ozone and 1997 $PM_{2.5}$ NAAQS. On August 22, 2011, EPA disapproved the New Mexico Interstate Transport SIP provisions that address the requirement of 110(a)(2)(D)(II) that emissions from New Mexico sources do not interfere with measures required in the SIP of any other state under part C of the CAA to protect visibility. EPA found that New Mexico sources, except the San Juan Generating Station, are sufficiently controlled to eliminate interference with the visibility programs of other states. Therefore, EPA finalized a Federal Implementation Plan (FIP) for New Mexico to address emissions from one source: The San Juan Generating Station (SJGS) coal-fired power plant (76 FR 52388, effective September 21, 2011). The FIP addresses the RH Best Available Retrofit Technology (BART) requirements for NO_X for the SJGS. In that action, EPA found that the other New Mexico pollution sources are adequately controlled to eliminate interference with the clean air visibility programs of other states.

On July 5, 2011, New Mexico submitted a revised Regional Haze (RH) SIP to the EPA. EPA has reviewed the submittal and proposed approval of the submittal, except for the submitted nitrogen oxides NO_X Best Available Retrofit Technology (BART) determination for the San Juan Generating Station, on June 15, 2012 (77 FR 36044).

With regard to the applicable requirements for visibility protection, EPA recognizes that States are subject to visibility and regional haze program requirements under Part C of the Act (which includes sections 169A and 169B). In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, we find that there is no new visibility obligation ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective; and as such, visibility protection requirements are not relevant for purposes of this action. This would be the case even in the event a secondary $PM_{2.5}$ NAAQS for visibility is established, because this NAAQS would not affect visibility requirements under part C.

EPA is therefore proposing to find that the New Mexico SIP meets the requirements of this portion of section 110(a)(2)(J) with respect to the 2006 $PM_{2.5}$ NAAQS.

Air quality modeling and submission of data, pursuant to section 110(a)(2)(K): The Air Quality Control Act authorizes NMED to ''develop facts and make investigations and studies,'' thereby providing for the functions of environmental air quality assessment. As an example, New Mexico has the ability to perform modeling for the primary and secondary $PM_{2.5}$ standards on a case-by-case permit basis consistent with their SIP-approved PSD rules and consistent with EPA guidance and 40 CFR part 51, Appendix W, Guideline on Air Quality Models.

This section of the Act also requires that a SIP provide for the submission of data related to such air quality modeling to the EPA upon request. The Air Quality Control Act authorizes NMED to cooperate with the federal government in regard to matters of common interest in the field of air quality control, thereby allowing it to make this submission to EPA. See NMSA 1978 74–2–5.2(B).

EPA is proposing to find that the New Mexico SIP meets the requirements of

[19] See 65 FR 14877.

[20] Please see *http://air.nmenv.state.nm.us/.*

[21] 40 CFR 51.309(g) concerns the reasonable progress requirements for areas other than the 16 Class I areas covered by the Grand Canyon Visibility Transport Commission Report.

[22] New Mexico has the option to submit a Regional Haze SIP under either section 51.308 or section 51.309.

[23] January 13, 2009, letter from Bill Richardson, Governor of New Mexico, to Mayor Richard Greene, Regional Administrator, EPA Region 6. This letter is in the docket for this rulemaking.

section 110(a)(2)(K) with respect to the 2006 $PM_{2.5}$ NAAQS.

Permitting fees, pursuant to section 110(a)(2)(L): The Air Quality Control Act provides the EIB with the legal authority for establishing an emission fee schedule and a construction permit fee schedule to recover the reasonable costs of acting on permit applications, implementing, and enforcing permits. See NMSA 1978 74–2–7. New Mexico's Permit Fee System was approved by EPA on July 17, 1991 (56 FR 32511). New Mexico's Permit Fee System implements a fee system for all preconstruction air permits issued by NMED. New Mexico's regulations for construction permit fees are found at 20.2.75 NMAC. The State's Title V program and associated fees legally are not part of the SIP, but were approved by EPA on November 26, 1996 (61 FR 60032) as part of the New Mexico Title V Program.

EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(L) with respect to the 2006 $PM_{2.5}$ NAAQS.

Consultation/participation by affected local entities, pursuant to section 110(a)(2)(M): As indicated above, the Air Quality Control Act provides that, ''no regulations or emission control requirement shall be adopted until after a public hearing by the environmental improvement board or the local board'' and provides that, ''at the hearing, the environmental improvement board or the local board shall allow all interested persons reasonable opportunity to submit data, views, or arguments orally or in writing and to examine witnesses testifying at the hearing.'' See NMSA 1978 74–2–6(B) and (D). In addition, the Air Quality Control Act provides that the NMED shall have the power and duty to ''advise, consult, contract with and cooperate with local authorities, other states, the federal government and other interested persons or groups in regard to matters of common interest in the field of air quality control* * *'' See NMSA 1978 74–2–5.2(B). New Mexico's SIP approved PSD regulations at 20.2.74.400 NMAC mandate that the NMED shall provide for public participation and notification regarding permitting applications to any other state or local air pollution control agencies, local government officials of the city or county where the source will be located, and FLMs whose lands may be affected by emissions from the source or modification. New Mexico's SIP approved Transportation Conformity regulations at 20.2.99.116 and 20.2.99.124 NMAC require that interagency consultation and opportunity for public involvement be provided before making transportation conformity determinations and before adopting applicable SIP revisions on transportation-related SIPs.[24]

EPA is proposing to find that the New Mexico SIP meets the requirements of section 110(a)(2)(M) with respect to the 2006 $PM_{2.5}$ NAAQS.

IV. Proposed Action

We are proposing to approve the submittal provided by the State of New Mexico to demonstrate that the New Mexico SIP meets the requirements of Section 110(a)(1) and (2) of the Act for the 2006 $PM_{2.5}$ NAAQS. We are proposing to find that the current New Mexico SIP meets the infrastructure elements listed below:

Emission limits and other control measures (110(a)(2)(A) of the Act);
Ambient air quality monitoring/data system (110(a)(2)(B) of the Act);
Program for enforcement of control measures (110(a)(2)(C) of the Act);
Interstate and international transport (110(a)(2)(D)(ii) of the Act);
Adequate resources (110(a)(2)(E) of the Act);
Stationary source monitoring system (110(a)(2)(F) of the Act);
Emergency power (110(a)(2)(G) of the Act);
Future SIP revisions (110(a)(2)(H) of the Act);
Consultation with government officials (110(a)(2)(J) of the Act);
Public notification (110(a)(2)(J) of the Act);
Prevention of significant deterioration and visibility protection (110(a)(2)(J) of the Act);
Air quality modeling data (110(a)(2)(K) of the Act);
Permitting fees (110(a)(2)(L) of the Act); and
Consultation/participation by affected local entities (110(a)(2)(M) of the Act).

We are also proposing to approve the portion of the New Mexico submittal that addresses the requirement of section (110)(a)(2)(D)(i)(II) of the Act that emissions from sources in New Mexico do not interfere with measures required in the SIP of any other state under part C of the Act regarding PSD for the 2006 $PM_{2.5}$ NAAQS.

EPA is proposing these actions in accordance with section 110 and part C of the Act and EPA's regulations and consistent with EPA guidance. EPA's proposed approval does not extend to areas within Indian country as defined in 18 U.S.C. 1151. EPA, or eligible Indian tribes, as appropriate, will retain jurisdiction and responsibilities under the Clean Air Act, Section 110 within Indian country.

[24] See 65 FR 14877.

V. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely 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, Incorporation by reference, Intergovernmental relations, Nitrogen dioxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

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

Dated: September 28, 2012.

Ron Curry,

Regional Administrator, Region 6.

[FR Doc. 2012–25158 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2010–0019(b); FRL–9741–1]

Approval and Promulgation of Implementation Plans; North Carolina Portion of the Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina 1997 8-Hour Ozone Nonattainment Area; Reasonable Further Progress Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve state implementation plan revisions, submitted by the North Carolina Department of Environment and Natural Resources, on June 15, 2007, and November 30, 2009, to address the reasonable further progress (RFP) plan requirements for the 1997 8-hour ozone national ambient air quality standards (NAAQS) for the North Carolina portion of the bi-state Charlotte-Gastonia-Rock Hill 1997 8-hour ozone nonattainment area. The Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina 1997 8-hour ozone nonattainment area (hereafter referred to as the ''bi-state Charlotte Area'') is comprised of Cabarrus, Gaston, Lincoln, Mecklenburg, Rowan, Union and a portion of Iredell (Davidson and Coddle Creek Townships) Counties in North Carolina; and a portion of York County in South Carolina. EPA is also providing the status of its adequacy determination for the motor vehicle emissions budgets (MVEB) for volatile organic compounds and nitrogen oxides that were included in North Carolina's RFP plan. Further, EPA is proposing to approve these MVEB. This proposed action is being taken pursuant to section 110 of the Clean Air Act. EPA will take action on South Carolina's RFP plan for its portion of the bi-state Charlotte Area, in a separate action. In the Final Rules Section of this **Federal Register**, EPA is approving the State's implementation plan revisions as a direct final rule without prior proposal because the Agency views these submittals as noncontroversial and anticipates no adverse comments.

DATES: Written comments must be received on or before November 13, 2012.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2010–0019 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: R4–RDS@epa.gov.*
3. *Fax:* (404) 562–9019.
4. *Mail:* ''EPA–R04–OAR–2010–0019,'' 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.
5. *Hand Delivery or Courier:* Lynorae Benjamin, Chief, 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. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Sara Waterson, 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) 562–9061. Ms. Waterson can be reached via electronic mail at *waterson.sara@epa.gov.*

SUPPLEMENTARY INFORMATION: On March 12, 2008, EPA issued a revised ozone NAAQS. *See* 73 FR 16436. The current action, however, is being taken to address requirements under the 1997 8-hour ozone NAAQS. Requirements for the North Carolina portion of the bi-state Charlotte Area under the 2008 ozone NAAQS will be addressed in the future. For additional information see the direct final rule which is published in the Rules Section of this **Federal Register**. A detailed rationale for the approval of the RFP plan requirements for the 1997 8-hour ozone NAAQS is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on the matters being proposed for approval into the North Carolina SIP today should do so at this time.

Dated: October 2, 2012.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

[FR Doc. 2012–25188 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2011–0033; FRL–9740–5]

Approval and Promulgation of Implementation Plans; New Mexico; Revisions to the New Source Review (NSR) State Implementation Plan (SIP); Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) Permitting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve revisions to the New Mexico SIP to update the New Mexico NNSR and PSD SIP permitting programs consistent with federal requirements. EPA proposes to find that these revisions to the New Mexico SIP meet the Federal Clean Air Act (the Act or CAA) and EPA regulations, and are consistent with EPA policies. New Mexico submitted the PSD and NNSR SIP permitting revisions in two SIP submittals on June 11, 2009, and May 23, 2011. EPA is proposing this action under section 110 and parts C and D of the Act.

DATES: Comments must be received on or before November 13, 2012.

ADDRESSES: Submit your comments, identified by Docket No. EPA–R06–

OAR–2011–0033, by one of the following methods:

• *Federal Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.

• *U.S. EPA Region 6 ''Contact Us'' Web site: http://epa.gov/region6/r6comment.htm.* Please click on ''6PD (Multimedia)'' and select ''Air'' before submitting comments.

• *Email:* Ms. Adina Wiley at *wiley.adina@epa.gov.* Please also send a copy by email to the person listed in the **FOR FURTHER INFORMATION CONTACT** section below.

• *Fax:* Ms. Adina Wiley, Air Permits Section (6PD–R), at fax number 214–665–6762.

• *Mail:* Ms. Adina Wiley, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733.

• *Hand or Courier Delivery:* Ms. Adina Wiley, Air Permits Section (6PD–R), Environmental Protection Agency, 1445 Ross Avenue, Suite 1200, Dallas, Texas 75202–2733. Such deliveries are accepted only between the hours of 8 a.m. and 4 p.m. weekdays, and not on legal holidays. Special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–R06–OAR–2011–0033. 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 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 *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at *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 or Mr. Bill Deese at 214–665–7253 to make an appointment. If possible, please make the appointment at least two working days in advance of your visit. There will be a fee of 15 cents per page for making photocopies of documents. On the day of the visit, please check in at the EPA Region 6 reception area at 1445 Ross Avenue, Suite 700, Dallas, Texas 75202.

The State submittal is also available for public inspection during official business hours by appointment: New Mexico Environment Department, Air Quality Bureau, 1301 Siler Road, Building B, Santa Fe, New Mexico 87502.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley, Air Permits Section (6PD–R), Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733, telephone 214–665–2115; fax number 214–665–6762; email address *wiley.adina@epa.gov.*

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

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I. Background for Our Proposed Action

The Act at section 110(a)(2)(C) requires states to develop and submit to EPA for approval into the state SIP, preconstruction review and permitting programs applicable to certain new and modified stationary sources of air pollutants for attainment and nonattainment areas that cover both major and minor new sources and modifications, collectively referred to as the New Source Review (NSR) SIP. The CAA NSR SIP program is composed of three separate programs: PSD, NNSR, and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS—

''attainment areas''—as well as areas where there is insufficient information to determine if the area meets the NAAQS—''unclassifiable areas.'' The NNSR SIP program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS—''nonattainment areas.'' The Minor NSR SIP program addresses construction or modification activities that do not emit, or have the potential to emit, beyond certain thresholds and thus do not qualify as ''major'' and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR program. EPA regulations governing the criteria that states must satisfy for EPA approval of the NSR programs as part of the SIP are contained in 40 CFR 51.160–51.166; 52.21, 52.24; and part 51, Appendix S.

New Mexico submitted on June 11, 2009, and May 23, 2011, a collection of regulations for approval by EPA into the New Mexico SIP for PSD and NNSR permitting regulations. New Mexico adopted these regulations and submitted them for SIP approval to ensure consistency with the federal PSD and NNSR permitting requirements associated with two recently promulgated NAAQS for 8-hour ozone and $PM_{2.5}$. Specifically, the June 11, 2009, and May 23, 2011, New Mexico SIP submittals address PSD and NNSR permitting requirements promulgated in EPA's Phase 2 8-hour Ozone Implementation Rule (70 FR 71612, November 29, 2005), NSR $PM_{2.5}$ Rule (73 FR 28321, May 16, 2008), $PM_{2.5}$ PSD Increment—Significant Impact Levels (SILs)—Significant Monitoring Concentration (SMC) Rule (75 FR 64864, October 20, 2010) and Reasonable Possibility in Recordkeeping Rule (72 FR 72607, December 21, 2007). Today's proposed action and the accompanying TSD present our rationale for proposing approval of these regulations as meeting the minimum federal requirements for the adoption and implementation of the PSD and NNSR SIP permitting programs. Because the PSD and NNSR SIP permitting programs are two separate, distinct programs under Title I of the Act, this proposed action and the accompanying TSD will present a review of the submitted New Mexico rules first for consistency with PSD SIP requirements, followed by the NNSR SIP requirements as applicable.

II. Analysis of State Submittals

June 11, 2009 Submittal

In a letter dated June 11, 2009, Governor Richardson submitted revisions to the New Mexico SIP that were adopted by the New Mexico Environmental Improvement Board (NM EIB) on July 31, 2009, and became effective on August 31, 2009. This SIP submittal included revisions to the following Parts of the New Mexico Air Code (NMAC):

- Revisions to the General Definitions at 20.2.2 NMAC,
- Revisions to the New Mexico PSD Permitting Program at 20.2.74 NMAC, and
- Revisions to the New Mexico NNSR Permitting Program at 20.2.79 NMAC.

Note that EPA SIP-approved the June 11, 2009 revisions to the PSD program at 20.2.74 NMAC on November 26, 2010 (75 FR 72688), effective December 27, 2010. The rulemaking docket for this action is EPA–R06–OAR–2009–0656. EPA has taken no action to date on the June 11, 2009 submitted revisions to 20.2.2 NMAC or 20.2.79 NMAC.

This review will not cover the revisions to the General Definitions for the New Mexico SIP at 20.2.2 NMAC, submitted on June 11, 2009. These provisions are severable from our review of the PSD and NNSR program submittals because each permitting program contains program-specific definitions used in place of the General Definitions. The program-specific definitions for the PSD and NNSR programs are SIP-approved at 20.2.74.7 and 20.2.79.7 NMAC, respectively. The revisions to 20.2.2 NMAC submitted on June 11, 2009, remain before EPA for review and will be addressed in a separate action.

May 23, 2011 Submittal

In a letter dated May 23, 2011, Governor Martinez submitted revisions to the New Mexico SIP that were adopted by the NM EIB on May 3, 2011, and became effective on June 3, 2011. This SIP submittal included revisions to the following Parts of the New Mexico Air Code:

- Revisions to the New Mexico PSD Permitting Program at 20.2.74 NMAC, and
- Revisions to the New Mexico NNSR Permitting Program at 20.2.79 NMAC.

A. Analysis of Submitted Revisions to the New Mexico Prevention of Significant Deterioration Permitting SIP Program

EPA's most recent approval to the New Mexico PSD SIP program was on July 20, 2011, at 20.2.74 NMAC, where we updated our approval of the NM PSD SIP to include the revisions adopted by the State on January 1, 2011, for the permitting of greenhouse gas emissions consistent with EPA's Greenhouse Gas Tailoring Rule. *See* 76 FR 43149. Since that time, the State of New Mexico has adopted and submitted for EPA approval one revision to the PSD program on May 23, 2011, affecting the following sections:

- 20.2.74.7 NMAC—Definitions,
- 20.2.74.300 NMAC—Obligations of Owners or Operators of Sources,
- 20.2.74.303 NMAC—Ambient Impact Requirements,
- 20.2.74.306 NMAC—Monitoring Requirements,
- 20.2.74.403 NMAC—Additional Requirements for Sources Impacting Class I Federal Areas,
- 20.2.74.502 NMAC—Significant Emission Rates,
- 20.2.74.503 NMAC—Significant Monitoring Concentrations,
- 20.2.74.504 NMAC—Allowable PSD Increment, and
- 20.2.74.505 NMAC—Maximum Allowable Increases for Class I Waivers.

This revision has been submitted to adopt and implement the requirements for $PM_{2.5}$ PSD SIPs in accordance with EPA's May 16, 2008 and October 20, 2010 final NSR $PM_{2.5}$ Rule and $PM_{2.5}$ PSD Increments—SILs—SMC Rule and the December 21, 2007 Reasonable Possibility in Recordkeeping Rule. The TSD for this rulemaking includes a detailed analysis of the submitted revision and demonstration of how the submittal addresses the federal requirements. The following is a summary of how EPA proposes to find that the May 23, 2011 submitted revisions to the New Mexico PSD SIP meet the requirements of the specified final rules.

1. NSR $PM_{2.5}$ Rule

a. What are the requirements of the NSR $PM_{2.5}$ Rule for PSD SIP Programs?

On May 16, 2008, EPA finalized the NSR $PM_{2.5}$ Rule to implement the $PM_{2.5}$ NAAQS. *See* 73 FR 28321. As a result of EPA's final NSR $PM_{2.5}$ Rule, states were required to submit applicable SIP revisions to EPA no later than May 16, 2011, to address this Rule's PSD and NNSR SIP requirements. With respect to PSD permitting, the SIP revision submittals are required to meet the following PSD SIP requirements to implement the $PM_{2.5}$ NAAQS: (1) Require PSD 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 NO_X); and (3) account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in PSD permits.

b. How does the May 23, 2011 New Mexico PSD submittal satisfy the NSR $PM_{2.5}$ Rule?

New Mexico's May 23, 2011, SIP revision submittal establishes that the State's existing NSR permitting program requirements for PSD apply to the $PM_{2.5}$ NAAQS and its precursors. Specifically, the SIP revision submittal adopts and submits for EPA approval the following NSR $PM_{2.5}$ Rule PSD provisions: (1) the requirement for NSR permits to address directly emitted $PM_{2.5}$ and precursor pollutants; (2) significant emission rates for direct $PM_{2.5}$ and precursor pollutants (SO_2 and NO_X) and (3) the requirement that condensable PM be addressed in enforceable PM, PM_{10} and $PM_{2.5}$ emission limits included in PSD permits. EPA proposes to find that New Mexico's May 23, 2011 SIP revision submittal meets the NSR $PM_{2.5}$ Rule for PSD and section 110 and part C of the CAA.

i. ''Condensables'' Provision

In the NSR $PM_{2.5}$ Rule, EPA revised the definition of ''regulated NSR pollutant'' for PSD SIP purposes to add a paragraph providing that ''particulate matter (PM) emissions, $PM_{2.5}$ emissions and PM_{10} emissions'' shall include gaseous emissions from a source or activity which condense to form particulate matter at ambient temperatures and that on or after January 1, 2011, such condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for PM, $PM_{2.5}$ and PM_{10} in permits. *See* 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(vi) and ''Emissions Offset Interpretative Ruling'' (40 CFR part 51, Appendix S). A similar paragraph was added to the NNSR SIP provisions of the NSR $PM_{2.5}$ Rule but does not include ''particulate matter (PM) emissions.'' *See* 40 CFR 51.165(a)(1)(xxxvii)(D).

On March 16, 2012, EPA proposed a rulemaking to amend the definition of ''regulated NSR pollutant'' promulgated in the NSR $PM_{2.5}$ Rule regarding the PM condensable provision at 40 CFR 51.166(b)(49)(vi), 52.21(b)(50)(i), and EPA's Emissions Offset Interpretative Ruling.[1] *See* 77 FR 15656. The rulemaking proposes to remove the inadvertent requirement in the NSR $PM_{2.5}$ Rule that the measurement of condensable ''particulate matter emissions'' be included as part of the measurement and regulation of ''particulate matter emissions.'' The term ''particulate matter emissions'' includes particles that are larger than $PM_{2.5}$ and PM_{10} and is an indicator measured under various New Source Performance Standards (NSPS) (40 CFR part 60).[2]

New Mexico's May 23, 2011 SIP submittal revision includes EPA's definition for regulated NSR pollutant for condensables (at 40 CFR 51.166(b)(49)(vi)), including the term ''particulate matter emissions,'' as inadvertently promulgated in the NSR $PM_{2.5}$ Rule. EPA is, however, proposing to approve into the New Mexico SIP 20.2.74.7(AS)(6) NMAC, the requirement that condensable PM be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10}. Upon final approval of this proposal, New Mexico's condensable provision will be consistent with the federal rule until EPA finalizes its March 16, 2012, rulemaking. Once EPA finalizes the March 16, 2012 rulemaking, the NMED can choose to initiate further rulemaking to ensure consistency with federal requirements.

2. $PM_{2.5}$ PSD Increment—SILs—SMC Rule

a. What are the requirements of the $PM_{2.5}$ PSD Increment—SILs—SMC Rule for PSD SIP Programs?

EPA finalized the $PM_{2.5}$ PSD Increment—SILs—SMC Rule to provide additional regulatory requirements under the PSD SIP program regarding the implementation of the $PM_{2.5}$ NAAQS for NSR. *See* 75 FR 64864. As a result, the $PM_{2.5}$ PSD Increment—SILs—SMC Rule required states to submit SIP revisions to adopt the required PSD increments by July 20, 2012. Specifically, the SIP rule requires a state's submitted PSD SIP revision to adopt and submit for EPA approval the $PM_{2.5}$ increments pursuant to section 166(a) of the CAA to prevent significant deterioration of air quality in areas meeting the NAAQS. States could also discretionarily choose to adopt and submit for EPA approval SILs used as a screening tool (by a major source subject to PSD) to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment and a SMC, (also a screening tool) used by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of $PM_{2.5}$. More detail on the $PM_{2.5}$ PSD Increment—SILs—SMC Rule can be found in EPA's October 20, 2010 final rule. *See* 75 FR 64864.

i. What are PSD Increments?

Under section 165(a)(3) of the CAA, a PSD permit applicant must demonstrate that emissions from the proposed construction and operation of a facility ''will not cause, or contribute to, air pollution in excess of any maximum allowable increase or allowable concentration for any pollutant.'' In other words, when a source applies for a PSD SIP permit to emit a regulated pollutant in an attainment or unclassifiable area, the permitting authority implementing the PSD SIP must determine if emissions of the regulated pollutant from the source will cause significant deterioration in air quality. Significant deterioration occurs when the amount of the new pollution exceeds the applicable PSD increment, which is the ''maximum allowable increase'' of an air pollutant allowed to occur above the applicable baseline concentration[3] for that pollutant. PSD increments prevent air quality in attainment and unclassifiable areas from deteriorating to the level set by the NAAQS. Therefore an increment is the mechanism used to estimate ''significant deterioration'' of air quality for a pollutant in an area.

For PSD baseline purposes, a baseline area for a particular pollutant emitted from a source includes the attainment or unclassifiable/attainment area in which the source is located as well as any other attainment or unclassifiable/attainment area in which the source's emissions of that pollutant are projected (by air quality modeling) to result in an ambient pollutant increase of at least 1 $\mu g/m^3$ (annual average). *See* 40 CFR 51.166(b)(15)(i) and (ii). Under EPA's existing regulations, the establishment of a baseline area for any PSD increment results from the submission of the first complete PSD permit application and is based on the location of the proposed source and its emissions impact on the area. Once the baseline area is established, subsequent PSD sources locating in that area need to consider that a portion of the available increment may have already been consumed by previous emissions increases. In general, the submittal date of the first complete PSD permit application in a particular area is the operative ''baseline

[1] The comment period for this proposed rulemaking ended May 15, 2012.

[2] In addition to the NSPS for PM, it is noted that states regulated ''particulate matter emissions'' for many years in their SIPs for PM, and the same indicator has been used as a surrogate for determining compliance with certain standards contained in 40 CFR part 63, regarding National Emission Standards for Hazardous Air Pollutants.

[3] Section 169(4) of the CAA provides that the baseline concentration of a pollutant for a particular baseline area is generally the same air quality at the time of the first application for a PSD permit in the area.

date.'' [4] On or before the date of the first complete PSD application, emissions generally are considered to be part of the baseline concentration, except for certain emissions from major stationary sources. Most emissions increases that occur after the baseline date will be counted toward the amount of increment consumed. Similarly, emissions decreases after the baseline date restore or expand the amount of increment that is available. *See* 75 FR 64864. As described in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule, pursuant to the authority under section 166(a) of the CAA EPA promulgated numerical increments for $PM_{2.5}$ as a new pollutant [5] for which the NAAQS were established after August 7, 1977,[6] and derived 24-hour and annual $PM_{2.5}$ increments for the three area classifications (Class I, II and III) using the ''contingent safe harbor'' approach. *See* 75 FR 64864 at 64869 and table at 40 CFR 51.166(c)(1).

In addition to PSD increments for the $PM_{2.5}$ NAAQS, the $PM_{2.5}$ PSD Increment—SILs—SMC Rule amended the definition at 40 CFR 51.166 and 52.21 for ''major source baseline date'' and ''minor source baseline date'' to establish the $PM_{2.5}$ NAAQS specific dates (including trigger dates) associated with the implementation of $PM_{2.5}$ PSD increments. *See* 75 FR 64864. In accordance with section 166(b) of the CAA, EPA required the states to submit revised implementation plans adopting the $PM_{2.5}$ PSD increments to EPA for approval within 21 months from promulgation of the final rule (by July 20, 2012). Each state was responsible for determining how increment consumption and the setting of the minor source baseline date for $PM_{2.5}$ would occur under its own PSD program. Regardless of when a state begins to require $PM_{2.5}$ increment analysis and how it chooses to set the $PM_{2.5}$ minor source baseline date, the emissions from sources subject to PSD for $PM_{2.5}$ for which construction commenced after October 20, 2010, (major source baseline date) consume the $PM_{2.5}$ increment and therefore should be included in the increment analyses occurring after the minor source baseline date is established for an area under the state's revised PSD SIP program. New Mexico's May 23, 2011, submitted SIP revision adopts the $PM_{2.5}$ increment permitting requirements promulgated in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule.

ii. What are PSD SILs and SMC?

EPA's $PM_{2.5}$ PSD Increment—SILs—SMC Rule also established SILs and SMC for the $PM_{2.5}$ NAAQS to address air quality modeling and monitoring provisions for fine particle pollution in areas protected by the PSD program. The SILs and SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis,* modeled source impacts or monitored (ambient) concentrations, respectively. The *de minimis* principle is grounded in a decision described by the court case *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 360 (D.C. Cir. 1980). In this case reviewing EPA's 1978 PSD regulations, the court recognized that ''there is likely a basis for an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value.'' 636 F.2d at 360. EPA established such values for $PM_{2.5}$ in the $PM_{2.5}$ PSD Increment—SILs—SMC rule to be used as screening tools by a major source subject to PSD to determine the subsequent level of analysis and data gathering required for a PSD permit application for emissions of $PM_{2.5}$. See 75 FR 64864. As part of the response to comments in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule final rulemaking, EPA explained that the agency considers that the SILs and SMC used as *de minimis* thresholds for the various pollutants are useful tools that enable permitting authorities and PSD applicants to screen out ''insignificant'' activities; however, the fact remains that these values are not required by the Act as part of an approvable SIP program. EPA believes that most states are likely to discretionarily adopt the SILs and SMC because of the useful purpose they serve regardless of our position that the values are not mandatory as a part of the PSD SIP. Alternatively, states may develop and submit more stringent values for EPA approval into the SIP if they desire to do so or not develop SILs/SMC altogether. In any case, states are not under any statutory SIP-related deadline for revising their PSD programs to add these screening tools. *See* 75 FR 64864, 64900.

(a) Significant Impact Levels (SILs)

SILs are numeric values derived by EPA that may be used to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment. The primary purpose of the SILs is to identify a level of ambient impact that is sufficiently low relative to the NAAQS or increments that such impact can be considered insignificant or *de minimis.* Although EPA has not previously incorporated every application of the SILs into the PSD regulations, EPA historically since 1980 has supported the use of the SILs as *de minimis* thresholds to determine whether the predicted ambient impact resulting from the emissions increase at a proposed major new stationary source or modification is considered to cause or contribute to a violation of the NAAQS. Numerous EPA statements and practices have also recognized the use of SILs under the PSD program to determine: (1) When a proposed source's ambient impacts warrants a comprehensive (cumulative) source impact analysis [7] and; (2) the size of the impact area within which the air quality analysis is completed. *See* 75 FR 64864.

In the $PM_{2.5}$ PSD Increment—SILs—SMC Rule, EPA established the SILs threshold which reflects the degree of ambient impact on $PM_{2.5}$ concentrations that can be considered *de minimis* and would justify no further analysis or modeling of the air quality impact of a source in combination with other sources in the area because the source would not cause or contribute to an exceedance of the $PM_{2.5}$ NAAQS or the $PM_{2.5}$ increments. *See* 75 FR 64864. The $PM_{2.5}$ PSD Increment—SILs—SMC Rule established SILs to evaluate the impact that a proposed new source or modification may have on the $PM_{2.5}$ NAAQS or increment. When a proposed major new source or major modification of $PM_{2.5}$ projects, through air quality modeling, an impact less than the $PM_{2.5}$ SILs, the proposed construction or modification is considered to not have a significant air quality impact and would not need to complete a cumulative impact analysis involving an analysis of other sources in the area. Additionally, a source with a *de minimis* ambient impact would not be considered to cause or contribute to a violation of the $PM_{2.5}$ NAAQS or increments.

The $PM_{2.5}$ PSD Increment—SILs—SMC Rule established the $PM_{2.5}$ SILs at

[4] Baseline dates are pollutant specific. That is, a complete PSD application establishes the baseline date only for those regulated NSR pollutants that are projected to be emitted in significant amounts (as defined in the regulations) by the applicant's new source or modification. Thus, an area may have different baseline dates for different pollutants.

[5] EPA generally characterized the $PM_{2.5}$ NAAQS as a NAAQS for a new indicator of PM. EPA did not replace the PM_{10} NAAQs with the NAAQS for $PM_{2.5}$ when the $PM_{2.5}$ NAAQS were promulgated in 1997. EPA rather retained the annual and 24-hour NAAQS for PM_{10} as if $PM_{2.5}$ was a new pollutant even though EPA had already developed air quality criteria for PM generally. *See* 75 FR 64864 (October 20, 2010).

[6] EPA interprets 166(a) to authorize EPA to promulgate pollutant-specific PSD regulations meeting the requirements of section 166(c) and 166(d) for any pollutant for which EPA promulgates a NAAQS after 1977.

[7] A cumulative analysis is a modeling analysis used to show that the allowable emissions increase from the proposed source along with other emission increases from existing sources, will not result in a violation of either the NAAQS or increment.

EPA's existing NNSR SIP regulations at 40 CFR 51.165(b) *and* the PSD SIP regulations at 40 CFR 51.166(k)(2), 52.21(k)(2) and part 51, Appendix S as optional screening tools. Prior to the $PM_{2.5}$ PSD Increment—SILs—SMC Rule, the concept of a SIL was not previously incorporated into the PSD SIP regulations but was present in the NNSR SIP regulations. The regulations in 40 CFR 51.165(b)[8] establish the minimum requirements for NNSR programs in SIPs but apply specifically to major stationary sources and major modifications located in attainment or unclassifiable/attainment areas. Where a PSD source located in such areas may have an impact on an adjacent nonattainment area, the PSD source must still demonstrate that it will not cause or contribute to a violation of the NAAQS in the adjacent nonattainment area. Where emissions from a proposed PSD source or modification would have an ambient impact in a nonattainment area that would exceed the SILs, the source is considered to cause or contribute to a violation of the NAAQS and may not be issued a PSD permit without obtaining emissions reductions to compensate for its impact. *See* 40 CFR 51.165(b)(2)–(3). New Mexico's May 23, 2011 SIP submittal addresses the $PM_{2.5}$ SILS thresholds and provisions promulgated in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule at 40 CFR 51.165(b)(2) and 51.166(k)(2).

(b) Significant Monitoring Concentration (SMC)

Under the CAA and EPA SIP regulations, an applicant for a PSD permit is required to gather preconstruction monitoring data in certain circumstances. Section 165(a)(7) of the Act calls for ''such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any areas which may be affected by emissions from such source.'' In addition, section 165(e) requires an analysis of the air quality in areas affected by a proposed major facility or major modification and calls for gathering one year of monitoring data unless the reviewing authority determines that a complete and adequate analysis may be accomplished in a shorter period. These requirements are codified in EPA's PSD SIP regulations at 40 CFR 51.166(m) and PSD Federal Implementation Plan regulations at 40 CFR 52.21(m). In accordance with EPA's Guideline for Air Quality Modeling (40 CFR part 51, Appendix W), the preconstruction monitoring data is primarily used to determine background concentrations in modeling conducted to demonstrate that the proposed source or modification will not cause or contribute to a violation of the NAAQS. SMC are numerical values that represent thresholds of insignificant, i.e., *de minimis,* monitored (ambient) impacts on pollutant concentrations. In EPA's $PM_{2.5}$ PSD Increment—SILs—SMC Rule, EPA established a SMC of 4 $\mu g/m^3$ for $PM_{2.5}$ to be used as a screening tool by a major source subject to PSD to determine the subsequent level of data gathering required for a PSD permit application for emissions of $PM_{2.5}$.

Using the SMC as a screening tool, sources may be able to demonstrate that the modeled air quality impact of emissions from the new source or modification, or the existing air quality level in the area where the source would construct, is less than the SMC, *i.e., de minimis,* and may be allowed to forego the preconstruction monitoring requirement for a particular pollutant at the discretion of the reviewing authority. *See* 75 FR 64864, 40 CFR 51.166(i)(5) and 52.21(i)(5). As mentioned above, SMCs are not minimum required elements of an approvable SIP under the CAA. This *de minimis* value is widely considered to be a useful component for implementing the PSD program, but is not statutorily required for EPA approval of a state's PSD SIP revision submittal. States can satisfy the statutory requirements for an approvable PSD SIP program by requiring each PSD applicant to submit air quality monitoring data for $PM_{2.5}$ without using *de minimis* thresholds to exempt certain sources from such requirements. States with EPA-approved PSD SIP programs that adopt and submit for EPA approval the SMC for $PM_{2.5}$ may use the SMC, once it is part of an approved SIP, to determine when it may be appropriate to exempt a particular major stationary source or major modification from the monitoring requirements under its PSD SIP program. New Mexico's May 23, 2011 submitted SIP revision adopts the SMC threshold.

(c) SILs-SMC Litigation

EPA's authority to promulgate the SILs and SMC for PSD purposes has been challenged by the Sierra Club. *See Sierra Club* v. *EPA,* Case No. 10–1413 (D.C. Circuit Court).[9] Specifically, Sierra Club claims that the SILs and SMC screening tools adopted in the October 20, 2010, rule are inconsistent with the CAA and EPA's *de minimis* authority.[10] EPA responded to Sierra Club's claims in a Brief dated April 6, 2012, which described the Agency's authority to develop and promulgate SILs and SMC.[11] A copy of EPA's April 6, 2012 Brief can be found in the docket for today's proposed action.

b. How does the May 23, 2011 New Mexico PSD submittal satisfy the $PM_{2.5}$ Increment—SILs—SMC Rule?

New Mexico's May 23, 2011 SIP revision submittal adopts the following PSD provisions in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule: (1) PSD increments for $PM_{2.5}$ annual and 24-hour NAAQS pursuant to section 166(a) of the CAA; (2) SILs to be used as a screening tool to evaluate the impact a proposed major source or modification may have on the NAAQS or PSD increment; and (3) SMC, also used as a screening tool, to determine the level of data gathering required of a major source in support of its PSD permit application for $PM_{2.5}$ emissions.

Specifically, regarding the PSD increments, the submitted SIP revision changes include: 1) the $PM_{2.5}$ increments as promulgated in at 40 CFR 51.166(c)(1) and (p)(4) (for Class I Variances) and 2) amendments to the terms ''major source baseline date'' (at 40 CFR 51.166(b)(14)(i)(c)) and 52.21(b)(14)(i)(c)), ''minor source baseline date''(including establishment of the ''trigger date'') and ''baseline area'' (as amended at 40 CFR 51.166(b)(15)(i) and (ii) and 52.21(b)(15)(i)). These changes provide for the implementation of the $PM_{2.5}$ PSD increments for the $PM_{2.5}$ NAAQS in the state's PSD program. In today's action, EPA is proposing to approve New Mexico's May 23, 2011 submitted SIP

[8] 40 CFR 51.165(b) require states to adopt and submit for approval by EPA as a SIP revision, a preconstruction review permit program for major stationary sources and major modifications that wish to locate in an attainment or unclassifiable area but would cause or contribute to a violation of the NAAQS.

[9] On April 6, 2012, EPA filed a brief with the D.C. Circuit court defending the Agency's authority to promulgate SILs and SMC for PSD purposes.

[10] EPA interprets section 165(a)(3) of the CAA to allow the use of significance levels as a means to demonstrate that a source will not cause or contribute to any violation of the NAAQS or increments. The terms ''cause or contribute to'' and ''demonstrate'' are ambiguous and EPA reasonably interprets the statue to allow sources that do not contribute significantly to ambient air concentrations of $PM_{2.5}$ to demonstrate compliance through modeling of the source's impact measured against the SILs.

[11] Additional information on this issue can also be found in an April 25, 2010, comment letter from EPA Region 6 to the Louisiana Department of Environmental Quality regarding the SILs-SMC litigation. A copy of this letter can be found in the docket for today's rulemaking at *www.regulations.gov* using docket ID: EPA–R06–OAR–2011–0033.

revision provisions to address the $PM_{2.5}$ PSD increment provisions promulgated in the $PM_{2.5}$ PSD Increments SILs-SMC Rule.

Regarding the SILs and SMC established in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule, the Sierra Club has challenged EPA's authority to promulgate SILs and SMC. In a brief filed in the D.C. Circuit on April 6, 2012, EPA described the Agency's authority under the CAA to promulgate and implement the SMC and SILs *de minimis* thresholds. With respect to the SMC, New Mexico's SIP revision submittal includes the SMC of 4 $\mu g/m^3$ for $PM_{2.5}$ NAAQS at rule 20.2.74.503 NMAC that was added to the existing monitoring SIP exemption at 40 CFR 51.166(i)(5)(i)(c). EPA is proposing to approve the $PM_{2.5}$ SMC into the New Mexico PSD SIP as EPA believes the use of the SMC is a valid exercise of the Agency's *de minimis* authority. Furthermore, New Mexico's May 23, 2011 submitted SIP revision is consistent with EPA's current promulgated provisions in the $PM_{2.5}$ PSD Increment—SILs—SMC Rule. However, EPA notes that future court action may require the adoption and submittal of subsequent rule revisions and SIP revisions from New Mexico.

New Mexico's SIP revision submittal, adopting the new PSD SIP requirements for $PM_{2.5}$ pursuant to the $PM_{2.5}$ PSD Increment—SILs—SMC Rule also includes new regulatory text matching that at 40 CFR 51.166(k)(2), concerning the implementation of SILs for $PM_{2.5}$. EPA stated in the preamble to the $PM_{2.5}$ PSD Increment—SILs—SMC Rule that we do not consider the SILs to be a mandatory SIP element, but regard them as discretionary on the part of regulating authority for use in the PSD SIP permitting process. Nevertheless, as mentioned previously, the $PM_{2.5}$ SILs are currently the subject of litigation before the U.S. Court of Appeals. (*Sierra Club* v. *EPA,* Case No 10–1413, D.C. Circuit). In response to that litigation, EPA has requested that the court remand and vacate the regulatory text in the EPA's PSD regulations at paragraph (k)(2) so that EPA can make necessary rulemaking revisions to that text. In light of EPA's request for remand and vacatur and the agency's acknowledgement of the need to revise the regulatory text presently contained at paragraph (k)(2) of sections 40 CFR 51.166 and 52.21, EPA does not believe that it is appropriate at this time to act upon that portion of the State's SIP revision submittal that contains the affected regulatory text in the New Mexico PSD regulations, at 20.2.74.303(A) NMAC. Instead, EPA is severing and taking no action at this time with regard to these specific provisions contained in the submitted SIP revision. By severing, we mean that the submitted portions of the SIP revision that address New Mexico's NSR permitting program we are proposing action on in this notice can be implemented independently of the portions of the submittal relating to SILs. EPA anticipates taking action on the $PM_{2.5}$ SILs portion of New Mexico's May 23, 2011 PSD SIP revision in a separate rulemaking once the court case regarding the SILs issue has been resolved.

The aforementioned proposed amendments to New Mexico's SIP provide the framework for implementation of $PM_{2.5}$ NAAQS in the state's PSD permitting. Based on review and consideration of New Mexico's May 23, 2011 SIP revision submittal, EPA is finding that the New Mexico SIP revision submittals meet the aforementioned PSD permitting provisions promulgated in the NSR $PM_{2.5}$ Rule and $PM_{2.5}$ PSD Increment—SILs—SMC Rule. Consequently, EPA has made the preliminary determination to approve the SIP revisions submittals into the New Mexico SIP to implement the PSD NSR program for the $PM_{2.5}$ NAAQS.

3. Reasonable Possibility in Recordkeeping Rule

a. What are the requirements of the Reasonable Possibility in Recordkeeping Rule for PSD SIP Programs?

EPA finalized the Reasonable Possibility in Recordkeeping Rule for PSD and NNSR SIPs on December 21, 2007. *See* 72 FR 72607. As a result, SIP revisions meeting the rule were due to EPA on December 21, 2010. The final rule clarifies the ''reasonable possibility'' standard promulgated as part of EPA's 2002 NSR Reform rule. The ''reasonable possibility'' standard identifies for sources and reviewing authorities the criteria under which an owner or operator of a major stationary source undergoing a physical change or change in the method of operation that does not trigger major NSR permitting requirements must keep records. The standard also specifies the recordkeeping and reporting requirements on such sources. This final rule is in response to the decision by the U.S. Court of Appeals for the D.C. Circuit in *New York* v. *EPA,* 413 F.3d 3 (D.C. Cir. 2005) in which the ''reasonable possibility'' standard was remanded for further clarification.

b. How does the May 23, 2011 New Mexico PSD submittal satisfy the reasonable possibility in recordkeeping rule?

New Mexico's May 23, 2011 SIP revision submittal adopts new provisions at 20.2.74.300(E) and (E)(6) NMAC to implement the clarifications to the ''reasonable possibility'' standard promulgated by EPA on December 21, 2007. The revisions submitted by New Mexico are consistent with federal PSD SIP requirements at 40 CFR 51.166(r)(6), (r)(6)(vi)(a) and (b). *See* 72 FR 72607, 72616. EPA therefore proposes full approval of these submitted new provisions.

B. Analysis of Submitted Revisions to the New Mexico Nonattainment New Source Review Permitting SIP Program

EPA's most recent approval of the New Mexico NNSR SIP program was on September 5, 2007, where we updated our approval of the NM NNSR SIP program to include the revisions to address NSR Reform as adopted by the State on December 6, 2005. *See* 72 FR 50879. Since that time, the State of New Mexico has adopted and submitted revisions on June 11, 2009, and May 23, 2011, to the NNSR SIP program, affecting the following sections:

- 20.2.79.7 NMAC—Definitions (both June 11, 2009 and May 23, 2011)
- 20.2.79.109 NMAC—Applicability (both June 11, 2009 and May 23, 2011)
- 20.2.79.115 NMAC—Emission Offsets (June 11, 2009)
- 20.2.79.119 NMAC—Tables, Significant Ambient Concentrations (May 23, 2011)

These revisions have been submitted for approval by EPA to the NNSR SIP to adopt and implement the requirements in the November 29, 2005 Phase 2 8-hour Ozone Implementation Rule, the May 16, 2008 NSR $PM_{2.5}$ Rule, the October 20, 2010 $PM_{2.5}$ PSD Increments—SILs—SMC Rule, and the December 21, 2007 Reasonable Possibility in Recordkeeping Rule. The TSD for this rulemaking includes a detailed analysis of the submitted revisions and demonstration of how each revision addresses the federal requirements. The following is a summary of how EPA proposes to find the June 11, 2009 and May 23, 2011 revisions to the New Mexico NNSR program implement the requirements of the specified final rules.

1. Phase 2 8-Hour Ozone Implementation Rule

a. What are the requirements of the Phase 2 8-Hour Ozone Implementation Rule for NNSR SIP Programs?

As a result of the Phase 2 8-Hour Ozone Implementation Rule, states were required to submit applicable SIP revisions to EPA no later than June 15, 2007, to address this Rule's SIP requirements for both the PSD and NNSR programs. *See* 70 FR 71612, 71683. The SIP revision submittals were required by this Rule to revise the major source thresholds, significant emission rates, and offset ratios for ozone such that nitrogen oxides (NO_X) are recognized as an ozone precursor. New Mexico's June 11, 2009 SIP submittal included revisions to the PSD and NNSR programs to address these 8-hour ozone permitting requirements. EPA previously approved the June 11, 2009 submitted revisions to the PSD program addressing Phase 2 8-hour ozone implementation as part of the New Mexico PSD SIP.[12] Consequently, our action today only addresses the NNSR submitted program revisions that address the SIP requirements of this Phase 2 8-Hour Ozone Implementation Rule.

b. How does the June 11, 2009 New Mexico NNSR submittal satisfy the Phase 2 8-Hour Ozone Implementation Rule?

New Mexico's June 11, 2009 SIP submission includes new provisions to implement the NNSR SIP requirements of the Phase 2 8-hour Ozone Implementation Rule as promulgated by EPA on November 29, 2005. Specifically, New Mexico adopted revisions to the definitions of ''major stationary source'' and ''significant'', added new provisions to the source applicability requirements, and added new provisions to the emission offset requirements. These revisions serve to incorporate the major stationary source thresholds, significant emission rates and offset ratios pursuant to part D of title I of the CAA for the 8-hour ozone NAAQS, the CO NAAQS, and the PM_{10} NAAQS. New Mexico also adopted revisions to the requirements for emission reductions achieved through curtailments or shutdowns consistent with federal requirements. Based on our review and analysis available in the TSD for this action, we are proposing approval of the June 11, 2009 revisions to the New Mexico SIP that implement the NNSR SIP requirements of the Phase 2 8-hour ozone rule consistent with requirements at 40 CFR 51.165.

2. NSR $PM_{2.5}$ Rule

a. What are the requirements of the NSR $PM_{2.5}$ Rule for NNSR SIP Programs?

On May 16, 2008, EPA finalized the NSR $PM_{2.5}$ Rule to implement the $PM_{2.5}$ NAAQS. *See* 73 FR 28321. As a result of EPA's final NSR $PM_{2.5}$ Rule, states were required to submit applicable SIP revisions to EPA no later than May 16, 2011, to address this Rule's PSD and NNSR SIP requirements. Specifically, the SIP revision submittals are required to meet the following NNSR SIP requirements to implement the $PM_{2.5}$ NAAQS: (1) Require NNSR 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 NO_X); (3) establish $PM_{2.5}$ emission offsets; and (4) account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in NNSR permits. Additionally, the NSR $PM_{2.5}$ Rule authorized states to adopt and submit provisions in their NNSR rules that would allow interpollutant offset trading.

b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the NSR $PM_{2.5}$ Rule?

New Mexico's May 23, 2011 submission includes new provisions to implement the NNSR SIP requirements of the NSR $PM_{2.5}$ Rule, as promulgated by EPA on May 16, 2008. Specifically, New Mexico adopted revisions to the definitions of ''regulated NSR pollutant'' and ''significant'', added new provisions to the source applicability requirements, and added new provisions for emission offset requirements. These submitted revisions (1) Require NNSR 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 nitrogen oxides (NO_X)); (3) establish $PM_{2.5}$ emission offsets; (4) account for gases that condense to form particles (condensables) in $PM_{2.5}$ and PM_{10} emission limits in NNSR permits; and (5) provide for interprecursor offsetting of direct $PM_{2.5}$ emissions with emissions of identified $PM_{2.5}$ precursors based on an approved interprecursor trading hierarchy and ratio in the approved plan for a particular nonattainment area. Note that the language adopted and submitted by the State of New Mexico providing for interprecursor offsetting establishes the generic framework only. EPA is proposing to approve the generic framework as part of the New Mexico SIP. Sources proposing to construct/modify in nonattainment areas, however, will be unable to use interprecursor offsetting unless and until New Mexico adopts and submits said hierarchies and ratios for EPA review and they are subsequently approved by EPA into the New Mexico SIP.

3. $PM_{2.5}$ PSD Increment—SILs—SMC Rule

a. What are the requirements of the $PM_{2.5}$ PSD Increment—SILs—SMC Rule for NNSR SIP Programs?

The $PM_{2.5}$ PSD Increment—SILs—SMC Rule established the $PM_{2.5}$ SILs at EPA's existing NNSR SIP regulations at 40 CFR 51.165(b). The regulations in 40 CFR 51.165(b)[13] establish the minimum requirements for NNSR programs in SIPs but apply specifically to major stationary sources and major modifications located in attainment or unclassifiable/attainment areas. Where a PSD source located in such areas may have an impact on an adjacent nonattainment area, the PSD source must still demonstrate that it will not cause or contribute to a violation of the NAAQS in the adjacent nonattainment area. Where emissions from a proposed PSD source or modification would have an ambient impact in a nonattainment area that would exceed the SILs, the source is considered to cause or contribute to a violation of the NAAQS and may not be issued a PSD permit without obtaining emissions reductions to compensate for its impact. *See* 40 CFR 51.165(b)(2)–(3).

[12] *See* 75 FR 72688, November 26, 2010. EPA previously approved revisions addressing NO_X as a precursor of the 1997 8-hour ozone NAAQS in its action finding New Mexico's SIP does not interfere with measures required to prevent significant deterioration of air quality in other states for this NAAQS as per the third element of section 110(a)(2)(D). Approval of those revisions ensured New Mexico's PSD SIP included changes necessary to implement the 1997 8-hour ozone NAAQS within the state as contemplated in the August 15, 2006 ''Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' to meet the third element of section 110(a)(2)(D).

[13] 40 CFR 51.165(b) require states to adopt and submit for approval by EPA as a SIP revision, a preconstruction review permit program for major stationary sources and major modifications that wish to locate in an attainment or unclassifiable area but would cause or contribute to a violation of the NAAQS.

b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the $PM_{2.5}$ PSD Increment—SILs—SMC Rule?

The $PM_{2.5}$ PSD Increment—SILs—SMC rule promulgated $PM_{2.5}$ SILs thresholds in the NNSR regulations at 40 CFR 51.165(b)(2). New Mexico's May 23, 2011 submission includes the $PM_{2.5}$ SILs thresholds at 20.2.79.119 NMAC, consistent with the federal requirement to have the $PM_{2.5}$ SILs in EPA's NNSR SIP regulations at 40 CFR 51.165(b)(2). In light of the fact that EPA did not request the court to remand and vacate language at 40 CFR 51.165(b) and the agency has explained and affirmed its authority to develop and promulgate SILs in the brief filed with the D.C. Circuit Court concerning the litigation, EPA is proposing to approve New Mexico's adoption of the $PM_{2.5}$ SILs thresholds at 20.2.79.119 NMAC. EPA notes, however, that the SILs-SMC litigation is ongoing and therefore future court action may require the submittal of subsequent rule revisions and SIP submittals from the State of New Mexico.

The aforementioned amendments to New Mexico's NNSR SIP program along with the revisions to the New Mexico PSD SIP program discussed in Section II.A of this proposed action, provide the framework for implementation of $PM_{2.5}$ NAAQS in the state's PSD and NNSR SIP programs. Based on our review and analysis, EPA is finding that New Mexico's May 23, 2011 submitted revisions to the NNSR SIP program meet the NNSR permitting provisions promulgated in the NSR $PM_{2.5}$ Rule and $PM_{2.5}$ PSD Increment—SILs—SMC Rule. Consequently, EPA has made the preliminary determination to approve the May 23, 2011 SIP revision submittals into the New Mexico SIP to implement the NNSR program for the $PM_{2.5}$ NAAQS.

4. Reasonable Possibility in Recordkeeping Rule

a. What are the requirements of the Reasonable Possibility in Recordkeeping Rule for NNSR SIP Programs?

EPA finalized the Reasonable Possibility in Recordkeeping Rule for PSD and NNSR SIPs on December 21, 2007. *See* 72 FR 72607. As a result, SIP revisions meeting the rule were due to EPA on December 21, 2010. The final rule clarifies the ''reasonable possibility'' standard promulgated as part of EPA's 2002 NSR Reform rule. The ''reasonable possibility'' standard identifies for sources and reviewing authorities the criteria under which an owner or operator of a major stationary source undergoing a physical change or change in the method of operation that does not trigger major NSR permitting requirements must keep records. The standard also specifies the recordkeeping and reporting requirements on such sources. This final rule is in response to the decision by the U.S. Court of Appeals for the D.C. Circuit in *New York* v. *EPA,* 413 F.3d 3 (D.C. Cir. 2005) in which the ''reasonable possibility'' standard was remanded for further clarification.

b. How does the May 23, 2011 New Mexico NNSR submittal satisfy the Reasonable Possibility in Recordkeeping Rule?

New Mexico's May 23, 2011 SIP revision submittal includes new provisions at 20.2.79.109(F) and (F)(6) NMAC to implement the clarifications to the ''reasonable possibility'' standard promulgated by EPA on December 21, 2007. *See* 72 FR 72607, 72616. The revisions submitted by New Mexico are consistent with federal NNSR permitting requirements at 40 CFR 51.165(a)(6), (a)(6)(vi). EPA therefore proposes full approval of these new provisions.

III. Proposed Action

EPA is proposing the following actions in accordance with section 110 and parts C and D of the Act and EPA's regulations and consistent with EPA guidance. EPA is proposing to approve portions of two revisions to the New Mexico SIP submitted by the Governor of New Mexico on June 11, 2009 and May 23, 2011.

EPA is proposing to approve the following revised rules submitted in 2011 as meeting the $PM_{2.5}$ PSD requirements under EPA's May 16, 2008 and October 20, 2010 final $PM_{2.5}$ PSD permitting implementation rules and the December 21, 2007 Reasonable Possibility in Recordkeeping Rules.

- 20.2.74.7 NMAC—Definitions,
- 20.2.74.300 NMAC—Obligations of Owners or Operators of Sources,
- 20.2.74.303 NMAC—Ambient Impact Requirements,
- 20.2.74.306 NMAC– Monitoring Requirements,
- 20.2.74.403 NMAC—Additional Requirements for Sources Impacting Class I Federal Areas,
- 20.2.74.502 NMAC—Significant Emission Rates,
- 20.2.74.503 NMAC—Significant Monitoring Concentrations,
- 20.2.74.504 NMAC—Allowable PSD Increment, and
- 20.2.74.505 NMAC—Maximum Allowable Increases for Class I Waivers.

EPA is proposing to approve the following revised rules submitted in 2009 as meeting the EPA's November 29, 2005 Phase 2 8-hour Ozone Implementation Rule for nonattainment areas.

- 20.2.79.7 NMAC—Definitions,
- 20.2.79.109 NMAC—Applicability, and
- 20.2.79.115 NMAC—Emission Offsets.

EPA is proposing to approve the following revised rules submitted in 2011 as meeting EPA's $PM_{2.5}$ NNSR requirements under EPA's May 16, 2008 and October 20, 2010 final $PM_{2.5}$ NSR permitting implementation rules and the December 21, 2007 Reasonable Possibility in Recordkeeping Rules. New Mexico also made some nonsubstantive changes in 2011 to 20.2.79.109 NMAC as adopted and submitted in 2009, and we are proposing to approve these nonsubstantive changes.

- 20.2.79.7 NMAC—Definitions,
- 20.2.79.109 NMAC—Applicability, and
- 20.2.79.119 NMAC—Tables.

EPA is severing from this proposed action the revisions to 20.2.74.303(A) NMAC submitted on May 23, 2011 which are equivalent to the provisions EPA has requested the court to remand and vacate at 40 CFR 51.166(k)(2) that were promulgated on October 20, 2010, and conflict with our intentions for the use of SILs to demonstrate compliance with CAA section 163(a). Therefore, 20.2.74.303 NMAC as adopted by NMED on January 1, 2011, and SIP-approved by EPA on July 20, 2011, remains the SIP-approved section. The NMED continues to retain the ability to implement the $PM_{2.5}$ SILs at 20.2.79.119 NMAC consistent with EPA's interpretation of CAA section 163(a). Further, the revisions to 20.2.74.303(A) NMAC submitted on May 23, 2011, will remain before EPA for review. EPA will revisit these provisions after the court addresses EPA's request for remand with vacatur or EPA initiates rulemaking to revise 40 CFR 51.166(k)(2).

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 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 FR 43255, August 10, 1999);

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

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

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

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

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

List of Subjects in 40 CFR Part 52

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

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

Dated: September 28, 2012.

Ron Curry,

Regional Administrator, Region 6.

[FR Doc. 2012–25156 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

RIN 0648–BC37

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 38

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

ACTION: Notice of availability; request for comments.

SUMMARY: NMFS announces that the Gulf of Mexico (Gulf) Fishery Management Council (Council) has submitted Amendment 38 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) for review, approval, and implementation by NMFS. Amendment 38 proposes to modify post-season accountability measures (AMs) that affect shallow-water grouper species (SWG), change the trigger for AMs, and revise the Gulf reef fish framework procedure.

DATES: Written comments must be received on or before December 11, 2012.

ADDRESSES: You may submit comments on the amendment identified by ''NOAA–NMFS–2012–0149'' by any of the following methods:

• *Electronic Submissions:* Submit electronic comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Follow the ''Instructions'' for submitting comments.

• *Mail:* Steve Branstetter, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required field if you wish to remain anonymous).

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov,* enter ''NOAA–NMFS–2012–0149'' in the search field and click on ''search.'' After you locate the document ''Gulf of Mexico Reef Fish Amendment 38,'' click the ''Submit a Comment'' link in that row. This will display the comment web form. You can then enter your submitter information (unless you prefer to remain anonymous), and type your comment on the web form. You can also attach additional files (up to 10MB) in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Comments received through means not specified in this notice will not be considered.

For further assistance with submitting a comment, see the ''Commenting'' section at *http://www.regulations.gov/#!faqs* or the Help section at *http://www.regulations.gov.*

Electronic copies of Amendment 38 may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf.*

FOR FURTHER INFORMATION CONTACT: Steve Branstetter, telephone: 727–824–5305, or email: *Steve.Branstetter@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf is managed under the FMP. The FMP was prepared by the Council and implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

Accountability measures were established for gag and red grouper in 2009 through Amendment 30B to the FMP (74 FR 17603, April 16, 2009). These AMs included the following provision: if the recreational sector annual catch limit (ACL) for gag or red grouper is exceeded in the current year, the recreational season for all SWG is shortened the following year to ensure that the gag or red grouper recreational ACL is not exceeded again. Regulations implemented through Amendment 32 to the FMP (77 FR 6988, February 10, 2012) added more AMs, including in-season closures for gag and red grouper, and overage adjustments for gag and red grouper if they are overfished. Amendment 38 would modify the post-season AMs for gag and red grouper so that the shortening of the season following a season with an ACL overage applies only to the species with landings that exceeded the ACL the prior year. Modifying the AMs would improve the likelihood of achieving optimum yield for red grouper and avoid unnecessary closures of all SWG species (*i.e.,* gag, red grouper, black

grouper, scamp, yellowfin grouper, and yellowmouth grouper).

The current method for determining if post-season AMs have been triggered for red grouper or gag is to compute a one to 3-year moving average of recreational landings, and to compare that moving average of landings to the ACL. However, the use of a moving average has not been practicable due to the frequent changes that have occurred in the ACLs. In addition, the use of moving averages could potentially delay the implementation of AMs by unduly masking sizeable harvest overages and potentially slowing down the recovery of stocks under rebuilding. Amendment 38 would remove the 3-year moving average, allowing AMs to be based on comparison of the ACL to the current year's landings. A simple comparison of the current year's landings to the ACL could provide greater protection to the gag and red grouper stocks, be easier for fishermen to understand, and be less burdensome to administer.

Amendment 38 would revise the list of management measures that may be established or modified by the framework procedure specified in the FMP. Specifically, Amendment 38 would add a list of the AMs that may be revised through the Gulf reef fish framework process. Typically, framework actions take less than a year to implement and are effective until amended. Changes to AMs through the framework may result in faster implementation of measures beneficial to fish stocks and fishery participants. Additionally, Amendment 38 would update the language in the framework procedure related to Council advisory panels and committees. More general language in reference to Council committees and advisory panels would replace specific references that are no longer accurate.

A proposed rule that would implement measures outlined in Amendment 38 has been drafted. In accordance with the Magnuson-Stevens Act, NMFS is evaluating the proposed rule to determine whether it is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law. If that determination is affirmative, NMFS will publish the proposed rule in the **Federal Register** for public review and comment.

Consideration of Public Comments

The Council submitted Amendment 38 for Secretarial review, approval, and implementation on September 10, 2012. NMFS' decision to approve, partially approve, or disapprove Amendment 38 will be based, in part, on consideration of comments, recommendations, and information received during the comment period on this notice of availability.

Public comments received on or before December 11, 2012, will be considered by NMFS in its decision to approve, partially approve, or disapprove Amendment 38. All comments received by NMFS on Amendment 38 or the proposed rule for Amendment 38 during their respective comment periods will be addressed in a final rule.

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

Dated: October 9, 2012.

Lindsay Fullenkamp,

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

[FR Doc. 2012–25129 Filed 10–11–12; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 77, No. 198

Friday, October 12, 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.

AFRICAN DEVELOPMENT FOUNDATION

Board of Directors Executive Session Meeting

Meeting: African Development Foundation, Board of Directors Executive Session Meeting.

Time: Tuesday, October 23, 2012, 8:30 a.m. to 12:30 p.m.

Place: 1400 Eye Street NW., Suite 1000, Washington, DC 20005.

Date: Tuesday, October 23, 2012.

Status:

1. Closed session, Tuesday, October 23, 2012, *8:30 a.m. to 10:30 a.m.*

2. Open session, Tuesday, October 23, 2012, *10:45 a.m. to 12:30 p.m.*

Lloyd O. Pierson,

President & CEO, USADF.

[FR Doc. 2012–25060 Filed 10–11–12; 8:45 am]

BILLING CODE P

AGENCY FOR INTERNATIONAL DEVELOPMENT

Senior Executive Services (SES) Performance Review Board: Update

AGENCY: Office of Inspector General, U.S. Agency for International Development.

ACTION: Notice.

SUMMARY: This notice is hereby given of the appointment of members of the updated U.S. Agency for International Development, Office of Inspector General's Senior Executive Service Performance Review Board.

DATES: September 17, 2012.

FOR FURTHER INFORMATION CONTACT: Robert S. Ross, Assistant Inspector General for Management, Office of Inspector General, U.S. Agency for International Development, 1300 Pennsylvania Avenue NW., Room 8.08–029, Washington, DC 20523–8700; telephone 202–712–0010; Fax 202–216–3392; Internet email address: *rross@usaid.gov* (for email messages, the subject line should include the following reference —USAID OIG SES Performance Review Board).

SUPPLEMENTARY INFORMATION: 5 U.S.C. 4314(b)(c) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management at 5 CFR part 430, subpart C and Section 430.307 thereof in particular, one or more SES Performance Review Boards. The board shall review and evaluate the initial appraisal of each USAID OIG senior executive's performance by his or her supervisor, along with any recommendations to the appointing authority relative to the performance of the senior executive. This notice updates the membership of the USAID OIG's SES Performance Review Board as it was last published on September 30, 2011.

Approved: September 17, 2012.

The following have been selected as regular members of the SES Performance Review Board of the U.S. Agency for International Development, Office of Inspector General:

Lisa Risley, Assistant Inspector General for Investigations

Robert S. Ross, Assistant Inspector General for Management

Lisa S. Goldfluss, Legal Counsel

Alvin A. Brown, Deputy Assistant Inspector General for Audit

Melinda Dempsey, Deputy Assistant Inspector General for Audit

Lisa McClennon, Deputy Assistant Inspector General for Investigations

Winona Varnon, Principal Deputy Assistant Secretary, Department of Education

Robert Peterson, Assistant Inspector General for Inspections, Department of State

Richard Clark, Deputy Assistant Inspector General, Investigations, Department of Labor

Dated: September 17, 2012.

Michael G. Carroll,

Deputy Inspector General.

[FR Doc. 2012–25107 Filed 10–11–12; 8:45 am]

BILLING CODE 6116–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 9, 2012.

The Department of Agriculture will submit the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Utilities Service

Title: 7 CFR 1703, Subparts D, E, F, and G, Distance Learning and Telemedicine Loan and Grant Program.

OMB Control Number: 0572–0096.

Summary of Collection: The Rural Utilities Service (RUS) is a credit agency of the Department of Agriculture and is

authorized by Chapter 1 of subtitle D of the Food, Agriculture, Conservation and Trade Act of 1990. The purpose of the Distance Learning and Telemedicine Loan and Grant Program is to improve telemedicine services and distance learning services in rural areas through the use of telecommunications, computer networks, and related advanced technologies by students, teachers, medical professionals and rural residents.

Need and Use of the Information: The various forms and narrative statements required are collected from eligible applicants that are public and private, for-profit and not-for-profit rural community facilities, schools, libraries, hospitals, and medical facilities. The purpose of this information is to determine such factors as: eligibility of the applicant; the specific nature of the proposed project; the purposes for which loan and grant funds will be used; project financial and technical feasibility; and compliance with the applicable laws and regulations.

Description of Respondents: Business or other for-profit; Not-for-profit institutions; State, Local or Tribal Government.

Number of Respondents: 210.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 12,788.

Rural Utilities Service

Title: 7 CFR Part 1703–H, Deferments of RUS Loan Payments for Rural Development Projects.

OMB Control Number: 0572–0097.

Summary of Collection: Subsection (b) of section 12 of the Rural Electrification Act (RE Act) of 1936, as amended (7 U.S.C. 912), a Rural Utilities Service (RUS) electric or telephone borrower may defer the payment of principal and interest on any insured or direct loan made under the RE Act and invest under certain conditions the deferred amounts in rural development projects. The Deferment program is used to encourage borrowers to invest in and promote rural development and rural job creation projects that are based on sound economic and financial analyses.

Need and Use of the Information: RUS will collect information to determine eligibility; specific purposes for which the deferment amount will be utilized; the term of the deferment the borrower will receive; the cost of the total project and degree of participation in the financing from other sources; verification that the purposes will not violate limitations established in 7 CFR 1703–H. If the information were not collected, RUS would be unable to determine eligibility for a project.

Description of Respondents: Not-for-profit; Business or other for-profit.

Number of Respondents: 1.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 11.

Rural Utilities Service

Title: 7 CFR Part 1721, Extensions of Payments of Principal and Interest.

OMB Control Number: 0572–0123.

Summary of Collection: The Rural Utilities Service (RUS) electric program provides loans and loan guarantees to borrowers at interest rates and on terms that are more favorable than those generally available from the private sector. Procedures and conditions which borrowers may request extensions of the payment of principal and interest are authorized, as amended, in Section 12 of the Rural Electrification Act of 1936, and Section 236 of the ''Disaster Relief Act of 1970''. As a result of obtaining federal financing, RUS borrowers receive economic benefits that exceed any direct economic costs associated with complying with (RUS) regulations and requirements.

Need and Use of the Information: The collection of information occurs only when the borrower requests an extension of principal and interest. Eligible purposes include financial hardship, energy resource conservation loans, renewable energy project, and contributions-in-aid of construction. The collections are made to provide needed benefits to borrowers while also maintaining the integrity of RUS loans and their repayment of taxpayer's monies.

Description of Respondents: Not for-profit institutions.

Number of Respondents: 45.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 424.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–25164 Filed 10–11–12; 8:45 am]

BILLING CODE 3410–15–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

October 9, 2012.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on 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 should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–8681.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Rural Housing Service

Title: Form RD 410–8, Application Reference Letter (A Request for Credit Reference).

OMB Control Number: 0575–0091.

Summary of Collection: The Rural Housing Service (RHS), under Section 502 of Title V of the Housing Act of 1949, as amended, provides financial assistance to construct, improve, alter, repair, replace, or rehabilitate dwellings, which will provide modest, decent, safe, and sanitary housing to eligible individuals in rural areas. Form RD 410–8, *Applicant Reference Letter,* provides credit information and is used by RHS to obtain information about an applicant's credit history that might not appear on a credit report.

Need and Use of the Information: Using form RD–410–8, RHS will collect information to supplement or verify other debts when a credit report is limited and unavailable to determine the applicant's eligibility and creditworthiness for RHS loans and grants. It can be used to document an

ability to handle credit effectively for applicants who have not used sources of credit that appear on a credit report. The form provides RHS with relevant information about the applicant's creditworthiness and is used to make better creditworthiness decisions.

Description of Respondents: Business or other for-profit.

Number of Respondents: 8,385.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 2,516.

Charlene Parker,

Departmental Information Collection Clearance Officer.

[FR Doc. 2012–25157 Filed 10–11–12; 8:45 am]

BILLING CODE 3410–XT–P

DEPARTMENT OF AGRICULTURE

Information Collection Request; Representations Regarding Felony Conviction and Tax Delinquent Status for Corporate Applicants and Awardees

AGENCY: Office of the Chief Information Officer, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3506), the Office of the Chief Information Officer (OCIO) is requesting comments from all interested individuals and organizations on a new information collection request associated with Representations Regarding Felony Conviction and Tax Delinquent Status for Corporate Applicants and Awardees. The Department of Agriculture agencies and staff offices (except Forest Service) must comply with FY 2012 appropriations restrictions in sections 738 and 739, of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2012 (2012 Ag Appropriations Act) (Pub. L. 112–55). Forest Service must comply with the restrictions in sections 433 and 434 of the Consolidated Appropriations Act, 2012 (Pub. L. 112–74).

DATES: We will consider comments that we receive by December 11, 2012.

ADDRESSES: We invite you to submit comments on this notice. In your comments, include date, OMB control number, volume, and page number of this issue of the **Federal Register**. You may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Ruth Brown or Charlene Parker, Office of the Chief Information Officer, 1400 Independence Ave. SW., Room 405–W, Whitten Building Mail Stop, Washington, DC 20250.
- *Email: Ruth.Brown@ocio.usda.gov* or *Charlene.Parker@ocio.usda.gov.*
- *Fax:* (202) 690–2688.

Comments also should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Ruth Brown, (202) 720–8958 or Charlene Parker, (202) 720–8681. Copies of the information collection may be obtained from Ruth Brown or Charlene Parker at the above address. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Title: Representations Regarding Felony Conviction and Tax Delinquent Status for Corporate Applicants and Awardees in Non-Procurement Programs.

OMB Control Number: 0505–0025.

Type of Request: Revision and Extension of an approved information collection.

Abstract: The Department of Agriculture (USDA) agencies and staff offices (except Forest Service) must comply with the restrictions set forth in sections 738 and 739 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act (Pub. L. 112–55, as amended and/or subsequently enacted), which prevents agencies from doing business with corporations that (1) have been convicted, or had an officer or agent of such corporation acting on behalf of the corporation convicted, of a felony criminal violation under any Federal or State law within the preceding 24 months, and/or (2) have any unpaid Federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability; unless the agency has considered suspension or debarment of the corporation and made a determination that suspension or debarment are not necessary to protect the interests of the Government.

The Forest Service must comply with similar restrictions in sections 433 and 434 of the Consolidated Appropriations Act, 2012 (Pub. L. 112–74, as amended and/or subsequently enacted). The Forest Service restrictions on doing business are almost identical to the restrictions for other USDA offices and agencies; the one difference is that the Forest Service restrictions are concerned only with felony convictions under Federal law, rather than both Federal and State law.

To comply with the appropriations restrictions, the proposed information collection will require corporate applicants and awardees for USDA and Forest Service programs to represent accurately whether they do or do not have any qualifying convictions or tax delinquencies which would prevent USDA or the Forest Service from entering into a proposed business transaction with the corporate applicant. For non-procurement programs and transactions, these representations will be submitted on the proposed information collection forms AD–3030, AD 3031, AD–3030–FS and AD–3031–FS. For procurement transactions, compliance with the appropriations restrictions has been effected through the issuance of Agricultural Acquisition Regulation Advisory Number 104, issued March 29, 2012 and available here: *http://www.dm.usda.gov/procurement/policy/advisories.htm.* Accordingly, this notice does not address and the proposed information collection is not intended for use with USDA or Forest Service procurement transactions. This notice and the proposed information collection, deal only with USDA and Forest Service non-procurement transactions. The categories of non-procurement transactions covered by this notice and the proposed information collection are: non-procurement contracts, grants, loans, loan guarantees, cooperative agreements, and some memoranda of agreement. For more specific information about whether a particular non-procurement program or transaction is included in this list please contact the USDA agency or staff office or Forest Service office responsible for the program or transaction in question.

In July of 2012, OCIO received a temporary emergency clearance of forms AD–3030, AD–3031, AD–3030–FS and AD–3031–FS to begin use of the forms to effectuate compliance with the appropriations restrictions. The temporary emergency clearance expires December 31, 2012. While this expiration date is after the end of the 2012 fiscal year, the representations will continue to be required as Congress has already extended the fiscal year 2012 appropriations. Also, it is possible that the same appropriations restrictions will

be enacted in fiscal year 2013. To ensure that USDA agencies and staff offices and the Forest Service are in a position to continue compliance with the appropriations restrictions for as long as they remain in effect, OCIO is issuing this notice to effectuate a formal three year clearance of the information collection request. Should the appropriations restrictions become ineffective or not be continued during the three year clearance period, this information request will be cancelled at such time as it is no longer required.

The AD–3030 and AD–3030–FS forms will effectuate compliance with the appropriations restrictions by requiring all corporate applicants to represent at the time of application for a non-procurement program whether they have any felony convictions or tax delinquencies that would prevent USDA or the Forest Service from doing business with them. Corporations include, but are not limited to, any entity that has filed articles of incorporation in one of the 50 States, the District of Columbia, or the various territories of the United States. Corporations include both for profit and non-profit entities. The AD–3031 and AD–3031–FS require an affirmative representation that corporate awardees for non-procurement transactions do not have any felony convictions or tax delinquencies. The AD 3030/3030–FS are required at the time of application and the AD 3031/3031–FS are required at the time of award. If the application and award process are a single step, the agency or staff office may require both forms to be filed at the same time.

Collection of this information is necessary to ensure USDA agencies and staff offices and Forest Service comply with the appropriations restrictions prohibiting the Government from doing business with corporations with felony convictions and/or tax delinquencies.

Estimate of burden: Public reporting burden for this information collection is estimated to average 15 minutes per response.

Frequency of Collection: Other: Corporations—AD–3030/3030–FS—each time they apply to participate in a multitude of USDA non-procurement programs; Awardees—AD–3031/3031–FS—each time they receive an award in USDA non-procurement programs.

Respondents: Corporate applicants and awardees for USDA non-procurement programs, including grants, cooperative agreements, loans, loan guarantees, some memoranda of understanding, and non-procurement contracts.

Estimated number of Annual Respondents: 741,544.

Estimated number of Responses per Respondent: 2.75.

Estimated Total Annual Responses: 2,039,246.

Estimated Total Annual Burden Hours on Respondents: 529,463.

We are requesting comments on all aspects of this information collection to help us to:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agencies and Staff offices, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden, of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through the use of appropriate automated, electronic, mechanical, technological and other forms of information technology collection methods.

All responses to this notice, including names and addresses when provided, will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Cheryl L. Cook,

Chief Information Officer, Office of the Chief Information Office.

[FR Doc. 2012–25191 Filed 10–11–12; 8:45 am]

BILLING CODE 3410–KR–P

DEPARTMENT OF AGRICULTURE

Forest Service

Travel Management Supplemental Environmental Impact Statement (SEIS), Eldorado National Forest, El Dorado County, CA

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare a supplemental environmental impact statement.

SUMMARY: In March 2008, the U.S. Forest Service completed the Eldorado National Forest Public Wheeled Motorized Travel Management Final Environmental Impact Statement (ENF TM FEIS) and Record of Decision (ROD). The 2008 TM FEIS and ROD designated roads and trails to be open for public motor vehicle use and prohibited cross country travel. In 2009 a complaint was filed with the Eastern District Federal Court (Court Case No. 2:09–CV–02523–LKK–JFM). In its opinion dated May 26, 2011, the Court found the Forest Service failed to comply with the National Forest Management Act (''NFMA'') in connection with its analysis and designation of routes encountering meadows. In particular, the court found that the Forest Service had designated 42 routes through meadows which was inconsistent with certain standards and guidelines in both the Forest's 1989 Land and Resource Management Plan (LRMP) and standards and guidelines within the 2004 Sierra Nevada Forest Plan Amendment (SNFPA), which amended the ENF LRMP. The Court pointed out that the error in the agency's Travel Management Decision was limited to 42 routes designated for public wheeled motorized travel that have some segment(s) that go through meadows.

The purpose of the current analysis is to comply with the subsequent court order to reconsider that portion of the Travel Management Decision that pertains to the Riparian Conservation Objective (RCO) #2 for Standard and Guideline #100 pertaining to the meadows on the 42 routes, and to determine whether public wheeled motor vehicle use will be allowed on the portions of those routes that were closed by Court Order.

DATES: Comments concerning the scope of the analysis must be received by November 7, 2012. The draft Supplemental Environmental Impact Statement (DSEIS) is expected in December 2012, and the final Supplemental Environmental Impact Statement (SEIS) is expected in July, 2013.

ADDRESSES: Send written comments to Kathryn Hardy, Forest Supervisor, Eldorado National Forest, 100 Forni Road, Placerville, CA 95667, Attention: Travel Management SEIS.

FOR FURTHER INFORMATION CONTACT: Diana Erickson, TM SEIS Project Leader, 100 Forni Road, Placerville, CA 95667, or by telephone at 530–621–5214. More detailed information about the project may also be found at *http://www.fs.usda.gov/eldorado/*.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

There is a need for compliance with the United States District Court for the Eastern District of California Case No. 2:09–CV–02523–LKK–JFM, Court Order filed 07/31/12 in which the Court ''set aside and remanded for reconsideration in light of the applicable law that portion of the Forest Service's Final Environmental Impact Statement relating to the Riparian Conservation

Objective (''RCO'') Analysis for RCO #2 Standards and Guidelines #100 pertaining to the meadows on the 42 routes.''

There is a need for determining whether public wheeled motor vehicle use will be allowed on the portions of the 42 specific routes designated for such use in the Eldorado National Forest Public Wheeled Motorized Travel Management EIS Record of Decision, March 2008 that were found by the court to be inconsistent with the ENF LRMP Standards and Guidelines, as amended by SNFPA.

Proposed Action

The Forest Service proposes the following designations for the portions of the 42 routes that were closed by Court Order:

1. Designate for public motorized use 9 routes that field surveys conducted in 2011 and 2012 determined did not cross meadows, as defined in the 1988 ENF LRMP.

2. Designate for public motorized use 12 routes where field surveys determined the meadow crossings meet Standard and Guideline (S&G) No. 100.

3. Designate for public motorized use a portion of one route where the field survey determined a logical closure point before crossing a meadow.

4. Amend the Eldorado National Forest Plan as amended by SNFPA S&G No. 100 to allow continued public motorized use on 19 routes that field surveys determined to not currently meet S&G 100, and are needed to meet other purposes, and designate those routes for public motorized use.

5. Amend the Eldorado National Forest Plan as amended by SNFPA S&G 100 to allow continued public motorized use on a portion of one route up to a logical closure point after the main destination before crossing additional meadows that the field survey determined to not meet S&G 100, and designate that portion for public motorized use.

Responsible Official

Kathyrn D. Hardy, Forest Supervisor of the Eldorado National Forest will be the Responsible Official for the project.

Nature of Decision To Be Made

The decision to be made is whether to adopt and implement the proposed action, an alternative to the proposed action, or take no action to address the 42 routes.

Scoping Process

This notice of intent initiates the scoping process, which guides the development of the environmental impact statement.

It is important that the reviewers provide their comments at such times and in such manner that they are useful to the agency's preparation of the environmental impact statement. Therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.

Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed aciton. Comments submitted anonymously will be accepted and considered, however.

Three public Informational Open Houses will be held:

Monday, October 22, 2012 (4:00 p.m. to 7:00 p.m.) at Turtle Rock Community Center, 17300 State Route 89, Markleeville, CA;

Thursday, October 25, 2012 (3:00 p.m. to 8:00 p.m.) at Placerville Inn, Best Western, 6850 Greenleaf Drive, Placerville, California; and

Monday, October 29, 2012 (3:00 p.m. to 8:00 p.m.) at the Jackson Civic Center, 33 Broadway, Jackson, California.

Dated: October 4, 2012.

Kathryn D. Hardy,

Forest Supervisor.

[FR Doc. 2012–25100 Filed 10–11–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Extension of the Comment Period: The Village at Wolf Creek Access Project Draft Environmental Impact Statement

AGENCY: Forest Service, USDA.

ACTION: Extension of Comment Period

SUMMARY: The United States Department of Agriculture (USDA), Forest Service (USFS), Rio Grande National Forest announces the extension of the comment period for the Village at Wolf Creek Access Project Draft Environmental Impact Statement. The period ends October 16, 2012.

Dated: October 4, 2012.

Dan S. Dallas,

Forest Supervisor/Center Manager.

[FR Doc. 2012–25216 Filed 10–11–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Notice of Proposed New Fee Site; Federal Lands Recreation Enhancement Act, (Title VIII, Pub. L. 108–447)

AGENCY: Payette National Forest, Forest Service, USDA.

ACTION: Notice of Proposed New Fee Site.

SUMMARY: The Payette National Forest is proposing to charge a $85 fee at Burgdorf Rental Cabin from June 1 to October 15 and a $65 fee from October 16 to June 1 with no water available; a $65 fee at the Paddy Flat Rental Cabin; and a $65 fee at the Lake Fork Rental Cabin. Fees are assessed based on the level of amenities and services provided, cost of operations and maintenance, and market assessment. The fee is proposed and will be determined upon further analysis and public comment. Funds from fees would be used for the continued operation and maintenance and improvements of these rental cabins.

An analysis of the nearby private rental cabins with similar amenities shows that the proposed fees are reasonable and typical of similar sites in the area.

DATES: Comments will be accepted through March 30, 2013. New fees would begin July 2013.

ADDRESSES: Keith Lannom, Forest Supervisor, Payette National Forest, 800 West Lakeside Avenue, McCall, Idaho 83638.

FOR FURTHER INFORMATION CONTACT: Jane Cropp, Recreation Fee Coordinator, 208–634–0757. Information about proposed fee changes can also be found on the Payette National Forest Web site: *http://www.fs.usda.gov/payette*.

SUPPLEMENTARY INFORMATION: The Federal Recreation Lands Enhancement Act (Title VII, Pub. L. 108–447) directed the Secretary of Agriculture to publish a six month advance notice in the **Federal Register** whenever new recreation fee areas are established.

Once public involvement is complete, these new fees will be reviewed by a Recreation Resource Advisory Committee prior to a final decision and implementation.

Dated: October 2, 2012.

Keith B. Lannom,

Forest Supervisor, Payette National Forest.

[FR Doc. 2012–25102 Filed 10–11–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Institute of Standards and Technology.

Title: NIST Generic Clearance for Usability Data Collections.

OMB Control Number: 0693–0043.

Form Number(s): None.

Type of Request: Regular submission (extension of a currently approved information collection).

Number of Respondents: 8,500.

Average Hours per Response: Varied, dependent upon the data collection method used. The possible response time to complete a questionnaire may be 15 minutes or 2 hours to participate in an empirical study.

Burden Hours: 5,000.

Needs and Uses: NIST will conduct information collections of usability data involving usage of technological devices (such as web sites, handheld computers, cell phones, and robots.) This information will enable NIST researchers to study human-computer interactions and help establish guidelines and standards for more effective and efficient interactions.

Affected Public: Individual or households; State, Local or Tribal Government; Federal Government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, Fax number (202) 395–5167, or via the Internet at *Jasmeet_k._Seehra@omb.eop.gov.*

Dated: October 5, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–25093 Filed 10–11–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: National Institute of Standards and Technology (NIST).

Title: Generic Clearance for Program Evaluation Data Collections.

OMB Control Number: 0693–0033.

Form Number(s): None.

Type of Request: Regular submission (extension of a currently approved information collection).

Number of Respondents: 12,000.

Average Hours per Response: Varied dependent upon the individual data collection. Response time could be 2 minutes for a response card or 1 hour for a more structured survey instrument. The average response time is expected to be 30 minutes.

Burden Hours: 3,022.

Needs and Uses: In accordance with Executive Order 12862, the National Institute of Standards and Technology (NIST), a non-regulatory agency of the Department of Commerce, proposes to conduct surveys—both quantitative and qualitative—designed to evaluate our current program evaluation data collections by means of, but not limited to, focus groups, reply cards that accompany product distributions, and Web-based surveys and dialogue boxes that offer customers the opportunity to express their views on the programs they are asked to evaluate. NIST will limit its inquires to data collections that solicit strictly voluntary opinions and will not collect information that is required or regulated. Steps will be taken to assure the anonymity of respondents who participate in a collection conducted under this request.

Affected Public: Business or other for-profit organizations; Not-for-profit institutions; Individuals or households: Federal government: State, local, or tribal government.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Jasmeet Seehra, (202) 395–3123.

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov).*

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Jasmeet Seehra, OMB Desk Officer, FAX number (202) 395–5167 or via the Internet at *Jasmeet_K._Seehra@omb.eop.gov*.

Dated: October 5, 2012.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2012–25094 Filed 10–11–12; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 35–2011]

Proposed Foreign-Trade Zone—Eloy, AZ Comment Period on New Evidence

On May 23, 2011, an application was submitted to the Foreign-Trade Zones (FTZ) Board by the City of Eloy, Arizona, requesting authority to establish a general-purpose FTZ at sites in Pinal County, Arizona (76 FR 30907, 05/27/2011). Pursuant to the requirements of the FTZ Board's regulations (see 15 CFR 400.33(e)(2); formerly 15 CFR 400.27(d)(2)(v)(B)), the FTZ Board is now inviting public comment on new evidence submitted by the City of Eloy on July 31, 2012, on which there has not been an opportunity for public comment.

The comment period on the new evidence is open through November 13, 2012. Submissions shall be addressed to the Board's Executive Secretary at the following address: Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to November 26, 2012.

A copy of the City of Eloy's July 31, 2012, submission will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, 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 Christopher J. Kemp at *Christopher.Kemp@trade.gov* or (202) 482–0862.

Dated: October 5, 2012.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2012–25166 Filed 10–11–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–905]

Certain Polyester Staple Fiber From the People's Republic of China: Continuation of Antidumping Duty Order

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

DATES: Effective October 12, 2012.

SUMMARY: As a result of the determinations by the Department of Commerce (''Department'') and the International Trade Commission (''ITC'') that revocation of the antidumping duty order on certain polyester staple fiber from the People's Republic of China (''PRC'') would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing a notice of continuation of the antidumping duty order.

FOR FURTHER INFORMATION CONTACT: Jerry Huang, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4047.

SUPPLEMENTARY INFORMATION: On May 1, 2012, the Department published the notice of initiation of the sunset review of the antidumping duty order on certain polyester staple fiber from the PRC pursuant to section 751(c)(2) of the Tariff Act of 1930, as amended (''the Act'').[1]

As a result of its review, the Department determined that revocation of the antidumping duty order on certain polyester staple fiber from the PRC would likely lead to a continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margin of dumping likely to prevail should the order be revoked.[2]

On October 4, 2012, the ITC determined, pursuant to section 751(c)(1) of the Act, that revocation of the antidumping duty order on PSF from the PRC would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable future.[3]

Scope of the Order

The merchandise subject to the order is certain polyester staple fiber defined under the scope of the order as synthetic staple fibers, not carded, combed or otherwise processed for spinning, of polyesters measuring 3.3 decitex (3 denier, inclusive) or more in diameter. Certain polyester staple fiber subject to the order is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings 5503.20.0045 (3.3 to 13.2 decitex) and 5503.20.00.65 (13.2 decitex or greater). Although the subheadings are provided for convenience and customs purposes, the written product description, available in *Notice of Antidumping Duty Order: Certain Polyester Staple Fiber From the People's Republic of China,* 72 FR 30545 (June 1, 2007), remains dispositive.

Continuation of the Order

As a result of these determinations by the Department and the ITC that revocation of the antidumping duty order would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, the Department hereby orders the continuation of the antidumping order on certain polyester staple fiber from the PRC. U.S. Customs and Border Protection will continue to collect antidumping duty cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the order will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to sections 751(c)(2) and 751(c)(6) of the Act, the Department intends to initiate the next five-year review of the order not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: October 4, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–25169 Filed 10–11–12; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Initiation of Five-Year (''Sunset'') Review; Correction,* 77 FR 28355 (May 14, 2012) (''*Sunset Initiation*'').

[2] *See Certain Polyester Staple Fiber from the People's Republic of China: Final Results of Expedited Sunset Review of the Antidumping Duty Order,* 77 FR 54898 (September 6, 2012).

[3] *See Certain Polyester Staple Fiber from China Determination,* 77 FR 60720 (October 4, 2012), and USITC Publication 4351 (September 2012), Certain Polyester Staple Fiber from China, Investigation No. 731–TA–1104 (Review).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC285

Gulf of Mexico Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Gulf of Mexico Fishery Management Council (Council) will convene a public meeting.

DATES: The meeting will be held Monday, October 29–Thursday, November 1, 2012.

ADDRESSES: The meeting will be held at the Courtyard Marriott, 1600 East Beach Boulevard, Gulfport, MS 39501; telephone: (228) 864–4310.

Council address: Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607.

FOR FURTHER INFORMATION CONTACT: Dr. Stephen Bortone, Executive Director, Gulf of Mexico Fishery Management Council; telephone: (813) 348–1630.

SUPPLEMENTARY INFORMATION:

Committees

Monday, October 29, 2012

10 a.m.–10:30 a.m.—The Ad Hoc Restoration Committee will meet to discuss options for potential restoration projects under National Resource Damage Assessment process and the RESTORE Act.

10:30 a.m.–11:30 a.m.—The Data Collection Committee will review a Scoping Document for Electronic Reporting Requirements by For-Hire Vessels.

—Recess—

1 p.m.–3 p.m.—The Shrimp Management Committee will discuss the status of the Electronic Logbook reporting program; review new Shrimp Stock Assessments for Penaeid Shrimp; review the SSC recommendations; review the Status and Health of Gulf Shrimp Stocks; and discuss Exempted Fishing Permits related to Shrimp (if any).

3 p.m.–3:30 p.m.—The SSC Selection Committee will discuss the duties and responsibilities of the SSC.

3:30 p.m.–4 p.m.—The Advisory Panel Selection Committee in a CLOSED SESSION with the FULL COUNCIL will review and appoint members to the new Ad Hoc Artificial Substrate Advisory Panel and discuss appointments of former Council members to advisory panels.

4 p.m.–5 p.m.—CLOSED SESSION—FULL COUNCIL will meet to receive a report from NOAA's General Counsel.

Tuesday, October 30, 2012

8:30 a.m.–11:30 a.m. and 12:30 p.m.–5:30 p.m.—The Reef Fish Management Committee will discuss the Red Snapper Individual Fishing Quota 5-Year Review, including the Socioeconomic SSC recommendations; review the Economic Evaluation of Red Snapper Allocation; take Final Action on Amendment 37—Gray Triggerfish Rebuilding Plan; review a Scoping Document for Amendment 39—Regional Management of Red Snapper; discuss the 2013 Red Snapper Season and Non-Compliance by States; review a Draft Regulatory Amendment for Vermilion Snapper Annual Catch Limits and Bag Limits; take Final Action on a Regulatory Amendment to set the 2013 Gag Recreational Season and Bag Limits; discuss the SEDAR 27—Yellowtail Snapper Benchmark Assessment; review any additional comments from the Scientific and Statistical Committee and from the Socioeconomic Scientific and Statistical Committee; and discuss Exempted Fishing Permits related to Reef Fish (if any).

—Recess—

Immediately following the Committee Recess will be the Informal Question & Answer Session on Gulf of Mexico Fishery Management Issues.

Wednesday, October 31, 2012

8:30 a.m.–9:30 a.m.—The Reef Fish Management Committee will continue with discussions on agenda items from the previous day.

9:30 a.m.–10 a.m.—The Joint Reef Fish/Mackerel/Red Drum Committees will meet to review changes to the aquaculture proposed rule. They will also consider modifications to the Coastal Migratory Pelagics reporting requirements suggested by the South Atlantic Fishery Management Council under its Comprehensive Ecosystem-Based Amendment 3.

10 a.m.–11:30 a.m.—The Law Enforcement Committee will review and approve a new Gulf of Mexico Cooperative Law Enforcement Strategic Plan 2013–16 and a new Gulf of Mexico Cooperative Law Enforcement Operations Plan 2013–14.

—Recess—

Council

Wednesday, October 31, 2012

1 p.m.—The Council meeting will begin at with a Call to Order and Introductions.

1:10 p.m.–1:20 p.m.—The Council will review the agenda and approve the minutes.

1:20 p.m.–1:30 p.m.—The Council will approve the 2013 Committee Appointments.

1:30 p.m.–1:35 p.m.—The Council will review the Action Schedule.

1:35 p.m.–1:45 p.m.—The Council will review Exempted Fishing Permits (EFP), if any.

1:45 p.m.–5:30 p.m.—The Council will receive public testimony on Final Reef Fish Amendment 37—Gray Triggerfish Rebuilding Plan; a Regulatory Amendment to set the 2013 Gag Recreational Season and Bag Limits; and Exempted Fishing Permits (EFPs), if any. The Council will also hold an open public comment period regarding any other fishery issues or concerns. People wishing to speak before the Council should complete a public comment card prior to the comment period.

Thursday, November 1, 2012

8:30 a.m.–8:45 a.m.—The Council will vote on Exempted Fishing Permits (if any).

8:45 a.m.–3:30 p.m.—The Council will review and discuss reports from committee meetings as follows: Ad Hoc Restoration, Reef Fish, Data Collection, Shrimp, Mackerel, SSC Selection, AP Selection, Joint Reef Fish/Mackerel/Red Drum, and Law Enforcement.

3:30 p.m.–4 p.m.—Other Business items will follow.

Although other non-emergency issues not on the agendas may come before the Council and Committees for discussion, in accordance with the Magnuson Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), those issues may not be the subject of formal action during these meetings. Actions of the Council and Committees will be restricted to those issues specifically identified in the agendas and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take action to address the emergency.

The established times for addressing items on the agenda may be adjusted as necessary to accommodate the timely completion of discussion relevant to the agenda items. In order to further allow for such adjustments and completion of all items on the agenda, the meeting may be extended from, or completed prior to the date/time established in this notice.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Kathy Pereira at the Council Office (see **ADDRESSES**) at least 5 working days prior to the meeting.

Dated: October 9, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–25114 Filed 10–11–12; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC286

Pacific Fishery Management Council; Public Meetings

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

ACTION: Notice of public meetings.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) and its advisory entities will hold public meetings.

DATES: The Pacific Council and its advisory entities will meet November 2–7, 2012. The Pacific Council meeting will begin on Saturday, November 3, 2012 at 8 a.m., reconvening each day through Wednesday, November 7, 2012. All meetings are open to the public, except a closed session will be held at the end of business on Saturday, November 3, 2012 to address litigation and personnel matters. The Pacific Council will meet as late as necessary each day to complete its scheduled business.

ADDRESSES: The meetings of the Pacific Council and its advisory entities will be held at the Hilton Orange County/Costa Mesa Hotel, 3050 Bristol Street, Costa Mesa, CA 92626; telephone: (714) 540–7000.

Council Address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220.

FOR FURTHER INFORMATION CONTACT: Dr. Donald O. McIsaac, Executive Director; telephone: (503) 820–2280 or (866) 806–7204 toll free; or access the Pacific Council Web site, *http://www.pcouncil.org* for the current meeting location, proposed agenda, and meeting briefing materials.

SUPPLEMENTARY INFORMATION: The following items are on the Pacific Council agenda, but not necessarily in this order:

A. Call to Order

1. Opening Remarks
2. Roll Call
3. Executive Director's Report
4. Approve Agenda

B. Open Comment Period

1. Comments on Non-Agenda Items

C. Salmon Management

1. National Marine Fisheries Service (NMFS) Report
2. Preseason Salmon Management Schedule for 2013
3. 2012 Salmon Methodology Review

D. Habitat

1. Current Habitat Issues

E. Pacific Halibut Management

1. 2013 Pacific Halibut Regulations

F. Administrative Matters

1. Approval of Council Meeting Minutes
2. Fiscal Matters
3. Membership Appointments and Council Operating Procedures
4. Future Council Meeting Agenda and Workload Planning

G. Coastal Pelagic Species Management

1. NMFS Report
2. Exempted Fishing Permit (EFP) Process
3. Pacific Sardine Stock Assessment and Management for 2013, Including Preliminary EFP Proposals and Tribal Set-Aside

H. Enforcement Issues

1. Current Enforcement Issues

I. Groundfish Management

1. NMFS Report
2. Amendment 24 (Improvements to the Groundfish Management Process)
3. Progress Report on Using Descending Devices to Mitigate Barotrauma in Recreational Fisheries
4. Consideration of Inseason Adjustments
5. Trawl Rationalization Trailing Actions and Updates

J. Highly Migratory Species Management

1. Council Recommendations on International Highly Migratory Species Management

K. Ecosystem Based Management

1. Fishery Ecosystem Plan
2. Integrated Ecosystem Assessment Implementation Report
3. California Current Ecosystem Report

Schedule of Ancillary Meetings

Day 1—Friday, November 2, 2012

Coastal Pelagic Species Advisory Subpanel 8 a.m.
Coastal Pelagic Species Management Team 8 a.m.
Hake Carryover Workshop 8 a.m.
Scientific and Statistical Committee 8 a.m.
Habitat Committee 8:30 a.m.
Budget Committee 3 p.m.

Day 2—Saturday, November 3, 2012

California State Delegation 7 a.m.
Oregon State Delegation 7 a.m.
Washington State Delegation 7 a.m.
Coastal Pelagic Species Advisory Subpanel 8 a.m.
Coastal Pelagic Species Management Team 8 a.m.
Groundfish Advisory Subpanel 8 a.m.
Groundfish Management Team 8 a.m.
Highly Migratory Species Management Team 8 a.m.
Scientific and Statistical Committee 8 a.m.
Enforcement Consultants 4:30 p.m.

Day 3—Sunday, November 4, 2012

California State Delegation 7 a.m.
Oregon State Delegation 7 a.m.
Washington State Delegation 7 a.m.
Ecosystem Advisory Subpanel 8 a.m.
Groundfish Advisory Subpanel 8 a.m.
Groundfish Management Team 8 a.m.
Highly Migratory Species Advisory Subpanel 8 a.m.
Highly Migratory Species Management Team 8 a.m.
Enforcement Consultants As Needed
Annual Awards Banquet 6 p.m.

Day 4—Monday, November 5, 2012

California State Delegation 7 a.m.
Oregon State Delegation 7 a.m.
Washington State Delegation 7 a.m.
Ecosystem Advisory Subpanel 8 a.m.
Groundfish Advisory Subpanel 8 a.m.
Groundfish Management Team 8 a.m.
Enforcement Consultants As Needed

Day 5—Tuesday, November 6, 2012

California State Delegation 7 a.m.
Oregon State Delegation 7 a.m.
Washington State Delegation 7 a.m.
Groundfish Advisory Subpanel 8 a.m.
Groundfish Management Team 8 a.m.
Enforcement Consultants As Needed

Day 6—Wednesday, November 7, 2012

California State Delegation 7 a.m.
Oregon State Delegation 7 a.m.
Washington State Delegation 7 a.m.
Enforcement Consultants As Needed

Although non-emergency issues not contained in this agenda may come before this Council for discussion, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the Council's intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Carolyn Porter at (503) 820–2280 at least 5 days prior to the meeting date.

Dated: October 9, 2012.

Tracey L. Thompson,

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

[FR Doc. 2012–25117 Filed 10–11–12; 8:45 am]

BILLING CODE 3510–22–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Proposed Additions and Deletions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Proposed Additions to and Deletions from the Procurement List.

SUMMARY: The Committee is proposing to add services to the Procurement List that will be provided by nonprofit agencies employing persons who are blind or have other severe disabilities and deletes products previously furnished by such agencies.

Comments Must Be Received On or Before: 11/12/2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

For Further Information or to Submit Comments Contact: Barry S. Lineback,

Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION: This notice is published pursuant to 41 U.S.C. 8503(a)(2) and 41 CFR 51–2.3. Its purpose is to provide interested persons an opportunity to submit comments on the proposed actions.

Additions

If the Committee approves the proposed additions, the entities of the Federal Government identified in this notice will be required to procure the services listed below from nonprofit agencies employing persons who are blind or have other severe disabilities.

The following services are proposed for addition to the Procurement List for production by the nonprofit agencies listed:

Services

Service Type/Location: Custodial Services, Transportation Security Administration (TSA), 6100 E. M. Dirksen Parkway, Peoria International Airport, Peoria, IL.
NPA: Community Workshop and Training Center, Inc., Peoria, IL.
Contracting Activity: General Services Administration, Public Buildings Service, Property Management Service Center, Springfield, IL.
Service Type/Location: Recycling Services, Hart-Dole-Inouye Federal Center, 74 North Washington Avenue, Battle Creek, MI.
NPA: Navigations, Inc., Battle Creek, MI.
Contracting Activity: General Services Administration, Public Buildings Service, Property Management Service Center, Detroit, MI.

Deletions

The following products are proposed for deletion from the Procurement List:

Products

Mat, Floor Rubber

NSN: 2540–01–298–8449—61'' x 36'' fabricated mat, reinforced with steel wire.
NPA: Hope Haven, Inc., Rock Valley, IA.
Contracting Activity: Defense Logistics Agency Land and Maritime, Columbus, OH.

SKILCRAFT-Spartan Chemical Cleaners

NSN: 7930–00–NIB–0597—Tb-Cide Quat RTU Disinfectant.
NSN: 8125–00–NIB–0032—Spray Bottle, Tb-Cide Plus II Disinfectant.
NSN: 7930–00–NIB–0579—Tb-Cide Plus II Disinfectant.
NSN: 7930–00–NIB–0578—GreenSolutions High Dilution 256 Neutral Disinfect.
NPA: Susquehanna Association for the Blind and Vision Impaired, Lancaster, PA.
Contracting Activity: Department of Veterans Affairs, NAC, Hines, IL.

SKILCRAFT SAVVY Unreal Spot Remover

NSN: 7930–01–517–6196—55 Gallon.
NSN: 7930–01–517–6194—32 oz.
NSN: 7930–01–517–2728—5 Gallon.
NSN: 7930–01–517–6195—1 Gallon.
NPA: Susquehanna Association for the Blind and Vision Impaired, Lancaster, PA.
Contracting Activity: General Services Administration, New York, NY.

Calculator or cash register paper

NSN: 7530–01–590–7109—Roll, Thermal Paper, 3⅛ in x 270 ft, White.
NSN: 7530–01–590–7111—Roll, Thermal Paper, 3⅛ in x 230 ft, White.
NPA: Cincinnati Association for the Blind, Cincinnati, OH.
Contracting Activity: General Services Administration, New York, NY.

Barry S. Lineback,

Director, Business Operations.

[FR Doc. 2012–25112 Filed 10–11–12; 8:45 am]

BILLING CODE 6353–01–P

COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Procurement List; Additions

AGENCY: Committee for Purchase From People Who Are Blind or Severely Disabled.

ACTION: Additions to the Procurement List.

SUMMARY: This action adds products and services to the Procurement List that will be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities.

DATES: Effective Date: 11/12/2012.

ADDRESSES: Committee for Purchase From People Who Are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

FOR FURTHER INFORMATION CONTACT: Barry S. Lineback, Telephone: (703) 603–7740, Fax: (703) 603–0655, or email *CMTEFedReg@AbilityOne.gov.*

SUPPLEMENTARY INFORMATION:

Additions

On 7/20/2012 (77 FR 42701–42702), 7/27/2012 (77 FR 44220), and 8/17/2012 (77 FR 49784), the Committee for Purchase From People Who Are Blind or Severely Disabled published notices of proposed additions to the Procurement List.

After consideration of the material presented to it concerning capability of qualified nonprofit agencies to provide the products and services and impact of the additions on the current or most recent contractors, the Committee has determined that the products and services listed below are suitable for procurement by the Federal Government under 41 U.S.C. 8501–8506 and 41 CFR 51–2.4.

Regulatory Flexibility Act Certification

I certify that the following action will not have a significant impact on a substantial number of small entities. The major factors considered for this certification were:

1. The action will not result in any additional reporting, recordkeeping or other compliance requirements for small entities other than the small organizations that will furnish the products and services to the Government.

2. The action will result in authorizing small entities to furnish the products and services to the Government.

3. There are no known regulatory alternatives which would accomplish the objectives of the Javits-Wagner-O'Day Act (41 U.S.C. 8501–8506) in connection with the products and services proposed for addition to the Procurement List.

End of Certification

Accordingly, the following products and services are added to the Procurement List:

Products

NSN: 8455–00–NIB–0007—Neck Lanyard, Cord Style, Swivel Hook, Black, 36″ x .25″
NSN: 8455–00–NIB–0020—Neck Lanyard, Cord Style, Shielded Cardholder, Black, 36″ x .25″
NSN: 8455–00–NIB–0021—Neck Lanyard, Strap Style, Swivel Hook, Black, 36″ x .75″
NSN: 8455–00–NIB–0022—Neck Lanyard, Strap Style, Clip, Black, 36″ x .75″
NSN: 8455–00–NIB–0023—Neck Lanyard, Strap Style, Retractable Reel, Black, 36″ x .75″
NSN: 8455–00–NIB–0024—Neck Lanyard, Strap Style, Key Ring, Black, 36″ x .75″
Coverage: A-List for the Total Government Requirement as aggregated by the General Services Administration.
NSN: 8455–00–NIB–0005—Neck Lanyard, Cord Style, Clip, Black, 36″ x .25″
NSN: 8455–00–NIB–0031—Identification Card Holder, Opaque, 2.375″ x 3.5″
Coverage: B-List for the Broad Government Requirement as aggregated by the General Services Administration.
NPA: West Texas Lighthouse for the Blind, San Angelo, TX
Contracting Activity: General Services Administration, Fort Worth, TX

Services

Service Type/Location: Custodial Service, Fort Leonard Wood Area and Resident Office, Fort Leonard Wood, MO.
NPA: Challenge Unlimited, Inc., Alton, IL
Contracting Activity: Dept of the Army, W071 ENDIST Kansas City, Kansas City, MO
Service Type/Location: Custodial Service, Customs and Border Protection, Port Angeles Station, 110 South Penn St, Port Angeles, WA.

NPA: Morningside, Olympia, WA
Contracting Activity: Dept of Homeland Security, U.S. Customs and Border Protection, Procurement Directorate, Washington, DC
Service Type/Location: Base Operations Support Services (BOSS), Department of Public Works (DPW), 453 Novosel Street, Fort Rucker, AL.
NPA: PRIDE Industries, Roseville, CA
Contracting Activity: Dept of the Army, W6QM MICC–FT Rucker, Fort Rucker, AL

A commercial contractor submitted comments indicating its opposition to adding the services to the AbilityOne Procurement List. The contractor states that having the services provided by AbilityOne® Program nonprofit agencies will result in higher costs to the Government. The contractor argues that the services should be acquired through a competitive procurement involving small businesses.

The Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) administers the AbilityOne Program in accordance with 41 U.S.C. 8501 *et seq.* Pursuant to the statute, the Commission's responsibilities include determining which products and services produced or provided by qualified nonprofit agencies employing people who are blind or with other severe disabilities, are suitable for procurement by the Government and establishing the fair market price for products and services placed on the Procurement List. Consequently, Congress has determined that it is in the Government's best interest to have a program designed to promote employment for people who are blind or severely disabled and have charged the members of the agency appointed by the President to make the appropriate programmatic decisions, including how the Government will acquire certain items and the price they will pay for such items. The commercial contractor that submitted comments did not provide any evidence that the services will not be provided at a fair market price as established by the Committee.

Information was also submitted from a representative of the Army contracting command headquarters responsible for this project. The representative provided information from the Performance Work Statement (PWS) for this project, including identification of specific services required in the PWS, and recommended that the Committee cite these in its description of the services to be added to the Procurement List.

When the Committee considers service projects for addition to the Procurement List, the PWS is among the documents provided for their consideration. Accordingly, the Committee has specific PWS information on the services and locations of the proposed project. The Committee's practice in describing a service requirement by name is to sufficiently inform the public and the applicable Federal agency that will procure the service, without identifying specific functions or tasks in that name. However, the service provided is defined more specifically within the Committee's records and is bounded by the Government's requirement as defined in the relevant PWS.

Barry S. Lineback,
Director, Business Operations.

[FR Doc. 2012–25113 Filed 10–11–12; 8:45 am]
BILLING CODE 6353–01–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of the Board of Visitors of the U.S. Air Force Academy

AGENCY: DoD.

ACTION: Renewal of Federal Advisory Committee.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.50(d), the Department of Defense gives notice that it is renewing the charter for the Board of Visitors of the U.S. Air Force Academy (hereafter referred to as ''the Board'').

The Board is a non-discretionary federal advisory committee that shall provide independent advice and recommendations on matters relating to the U.S. Air Force Academy, to include morale, discipline, and social climate, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters relating to the Academy that the Board decides to consider.

The Board shall prepare a semiannual report containing its views and recommendations pertaining to the U.S. Air Force Academy, based on its meeting since the last such report and any other considerations it determines relevant. Each such report shall be submitted concurrently to the Secretary of Defense, through the Secretary of the Air Force, and to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

The Board is constituted annually, and it shall be composed of not more than 15 members. Under the provisions of 10 U.S.C. 9355(a) and (b)(2), the Board members shall include:

a. Six persons designated by the President, at least two of whom shall be graduates of the U.S. Air Force Academy;

b. The chairman of the Committee on Armed Services of the House of Representatives, or his designee;

c. Four persons designated by the Speaker of the House of Representatives, three of whom shall be members of the House of Representatives and the fourth of whom may not be a member of the House of Representatives;

d. The chairman of the Committee on Armed Services of the Senate, or his designee;

e. Three other members of the Senate designated by the Vice President or the President pro tempore of the Senate, two of whom are members of the Committee on Appropriations of the Senate.

The Board members referenced in paragraph (a) above, designated by the President, shall serve for three years except that any member whose term of office has expired shall continue to serve until a successor is appointed. In addition, the President shall designate persons each year to succeed the members referenced in (a) above whose terms expire that year.

The Board members shall select the Board Chairperson and Vice Chairperson from the total membership.

If a member of the Board dies or resigns or is terminated as a member of the Board, a successor shall be designated for the unexpired portion of the term by the official who designated the member.

Each member of the Board who is a member of the Armed Forces or a civilian officer or employee of the United States shall serve without compensation (other than compensation to which entitled as a member of the Armed Forces or an officer or employee of the United States, respectively). Individuals appointed by the President shall receive no compensation for their service on the Board. While performing duties as a member of the Board, each member of the Board and each adviser shall be reimbursed under Government travel regulations for travel expenses.

If a member of the Board fails to attend two successive Board meetings, except in a case in which an absence is approved in advance for good cause by the Board chairperson, such failure shall be grounds for termination from membership on the Board, pursuant to 10 U.S.C. 9355(c)(2)(A) (''absenteeism provision'').

Termination of membership on the Board pursuant to the absenteeism provision, in the case of a member of the Board who is not a member of Congress, may be made by the Board's chairperson; and in the case of a member of the Board who is a member of Congress, may be made only by the official who designated the member. When the member of the board is subject to termination from membership on the Board under the absenteeism provision, the Board's chairperson shall notify the official who designated the member. Upon receipt of such a notification with respect to a member of the Board who is a member of Congress, the official who designated the member shall take such action, as that official considers appropriate.

Upon approval by the Secretary of the Air Force, the Board, pursuant to 10 U.S.C 9355(g), may call in advisers for consultation. These advisors shall, with the exception of travel and per diem for official travel, serve without compensation.

With DoD approval, the Board is authorized to establish subcommittees, as necessary and consistent with its mission. Establishment of subcommittees will be based upon written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the Board's sponsor.

Such subcommittees or workgroups shall not work independently of the chartered Board, and shall report all their recommendations and advice to the Board for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered Board; nor can they report directly to the Department of Defense or any Federal officers or employees who are not Board members.

Subcommittee members shall be appointed by the Secretary Defense even if the member in question is already a Board member. Subcommittee members, with the approval of the Secretary of Defense, may serve a term of service on the subcommittee of one-to-four years; however, no member shall serve more than two consecutive terms of service on the subcommittee.

Subcommittee members, if not full-time or part-time government employees, shall be appointed by the Secretary of Defense according to governing DoD policy and procedures. Such individuals shall be appointed to serve as experts and consultants under the authority of 5 U.S.C. § 3109, and shall serve as special government employees, whose appointments must be renewed by the Secretary of Defense on an annual basis.

All subcommittees or working groups shall operate under the provisions of FACA, the Government in the Sunshine Act, governing Federal statutes and regulations, and governing DoD policies/procedures.

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The Board shall meet at the call of the Designated Federal Officer, in consultation with the Board's Chairperson. The estimated number of Board meetings is four per year.

In addition, the Designated Federal Officer is required to be in attendance at all Board and subcommittee meetings; however, in the absence of the Designated Federal Officer, a properly approved Alternate Designated Federal Officer shall attend the Board or subcommittee meeting.

The Designated Federal Officer, or the Alternate Designated Federal Officer, shall call all of the Board's and subcommittee's meetings; prepare and approve all meeting agendas; adjourn any meeting when the Designated Federal Officer, or the Alternate Federal Officer, determines adjournment to be in the public interest or required by governing regulations or DoD policies/procedures; and chair meetings when directed to do so by the official to whom the Board reports.

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, the public or interested organizations may submit written statements to Board of Visitors of the U.S. Air Force Academy membership about the Board's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of Board of Visitors of the U.S. Air Force Academy.

All written statements shall be submitted to the Designated Federal Officer for the Board of Visitors of the U.S. Air Force Academy, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Board of Visitors of the U.S. Air Force Academy's Designated Federal Officer can be obtained from the GSA's FACA Database—*https://www.fido.gov/facadatabase/public.asp.*

The Designated Federal Officer, pursuant to 41 CFR 102–3.150, will announce planned meetings of the Board of Visitors of the U.S. Air Force Academy. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: October 9, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–25127 Filed 10–11–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Federal Advisory Committee; Defense Intelligence Agency (DIA) Advisory Board; Closed Meeting

AGENCY: DIA, Department of Defense (DoD).

ACTION: Meeting notice.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix 2 (2001)), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), and 41 CFR 102–3.10, DoD hereby announces that the DIA Advisory Board will meet on October 29, 2012. The meeting is closed to the public. The meeting necessarily includes discussions of classified information relating to DIA's intelligence operations including its support to current operations.

DATES: The meeting will be held on October 29, 2012, from 8:30 a.m. to 3:30 p.m.

ADDRESSES: The meeting will be held at Joint-Base Bolling-Anacostia, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Ms. Ellen M. Ardrey, (202) 231–0800, Designated Federal Officer, DIA Office for Congressional and Public Affairs, Pentagon 1A874, Washington, DC 20340–5100.

Committee's Designated Federal Officer: Ms. Ellen M. Ardrey, (202) 231–0800, DIA Office for Congressional and Public Affairs, Pentagon 1A874, Washington, DC 20340–5100. *Ellen.ardrey@dodiis.mil.*

SUPPLEMENTARY INFORMATION:

Purpose of the Meeting

For the Advisory Board to discuss DIA operations and capabilities in support of current intelligence operations.

Agenda

October 29, 2012:

8:30 a.m	Call to Order	Ms. Ellen M. Ardrey, Designated Federal Officer Mrs. Mary Margaret Graham, Chairman.
9:00 a.m	Classified Briefings	DIA Personnel.
12:00 p.m	Working Lunch.	
1:30 p.m	Classified Discussion with Director, DIA	LTG Michael T. Flynn, USA, Director, DIA.
3:30 p.m	Adjourn.	

Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.155, the Director, DIA, has determined that the all meetings shall be closed to the public. The Director, DIA, in consultation with the DIA Office of the General Counsel, has determined in writing that the public interest requires that all sessions of the Board's meetings be closed to the public because they include discussions of classified information and matters covered by 5 U.S.C. 552b(c)(1).

Written Statements

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of the Federal Advisory Board Committee Act of 1972, the public or interested organizations may submit written statements at any time to the DIA Advisory Board regarding its missions and functions. All written statements shall be submitted to the Designated Federal Official for the DIA Advisory Board. The Designated Federal Official will ensure that written statements are provided to the Board for its consideration. Written statements may also be submitted in response to the stated agenda of planned board meetings. Statements submitted in response to this notice must be received by the Designated Federal Officer at least five calendar days prior to the meeting which is the subject of this notice. Written statements received after that date may not be provided or considered by the Board until its next meeting. All submissions provided before that date will be presented to the Board before the meeting that is subject of this notice. Contact information for the Designated Federal Officer is listed under **FOR FURTHER INFORMATION CONTACT**.

Dated: October 9, 2012.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2012–25111 Filed 10–11–12; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

Board of Visitors Defense Language Institute Foreign Language Center

AGENCY: Department of the Army, DoD.

ACTION: Notice of open meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended) and 41 CFR 102–3.150, the Department of Defense announces that the following Federal advisory committee meeting will take place:

Name of Committee: Board of Visitors, Defense Language Institute Foreign Language Center.

Date: October 31, 2012 and November 1, 2012.

Time of Meeting: Approximately 7:45 a.m. through 4:30 p.m. Please allow extra time for gate security for both days.

Location: Defense Language Institute Foreign Language Center and Presidio of Monterey (DLIFLC & POM), Building 614, Conference Room, Monterey, CA, 93944.

Purpose of the Meeting: The purpose of the meeting is to provide an overview of DLIFLC's Language Science & Technology directorate. In addition, the meeting will involve administrative matters.

Agenda: Summary—October 31—Board administrative details, current initiatives, and orientation to Language Science and Technology Division of DLIFLC. November 1—The Board will be briefed on items of interest to DLIFLC and have time to compile observations.

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first come basis. No member of the public attending open meetings will be allowed to present questions from the floor or speak to any issue under consideration by the Board. Although open to the public, gate access is required no later than five work days prior to the meeting. Contact the Sub-Committee's Alternate Designated Federal Officer, below, for gate access procedures.

Sub-Committee's Alternate Designated Federal Officer or Point of Contact: Dr. Robert Savukinas, ATFL–APO, Monterey, CA, 93944, *Robert.Savukinas@us.army.mil,* (831) 242–5828.

SUPPLEMENTARY INFORMATION: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act of 1972, the public may submit written statements to the Board of Visitors of the Defense Language Institute Foreign Language Center in response to the agenda. All written statements shall be submitted to the Alternate Designated Federal Officer of the Board of Visitors of the Defense Language Institute Foreign Language Center, and this individual will ensure that the written statements are provided to the membership for their consideration. Written statements should be sent to: *Attention:* ADFO at ATFL–APO–AR, Monterey, CA, 93944 or faxed to (831) 242–5963. Statements must be received by the Alternate Designated Federal officer at least five work days prior to the meeting. Written statements received after this date may not be provided to or considered by the Board of Visitors of the Defense Language Institute Foreign Language Center until its next meeting.

FOR FURTHER INFORMATION CONTACT: Dr. Robert Savukinas, ATFL–APO–AR, Monterey, CA, 93944, *Robert.Savukinas@us.army.mil,* (831) 242–5828.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2012–25204 Filed 10–11–12; 8:45 am]

BILLING CODE 3710–08–P

DEPARTMENT OF DEFENSE

Department of the Army; Corps of Engineers

Notice of Intent To Revise Scope of Draft Environmental Impact Statement for Updating the Water Control Manual for the Apalachicola-Chattahoochee-Flint River Basin To Account for the U.S. Court of Appeals for the Eleventh Circuit Ruling and a June 2012 Legal Opinion of the Corps' Chief Counsel Regarding Authority To Accommodate Municipal and Industrial Water Supply From the Buford Dam/Lake Lanier Project

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. Army Corps of Engineers (Corps), Mobile District, intends to revise the scope of the Environmental Impact Statement (EIS) for the Water Control Manual (WCM) updates for the Apalachicola-Chattahoochee-Flint (ACF) River Basin in Alabama, Florida, and Georgia, in light of a June 2011 decision of the U.S. Court of Appeals for the Eleventh Circuit and a June 2012 legal opinion of the Corps' Chief Counsel regarding authority to accommodate municipal and industrial water supply from the Buford Dam/Lake Lanier project. The Corps is updating the water control plans and manuals for the ACF Basin in order to improve operations for authorized purposes to reflect changed conditions since the manuals were last developed. The revised EIS will also consider, along with operations for all authorized purposes, an expanded range of water supply alternatives associated with the Buford Dam/Lake Lanier project, including current levels of water supply withdrawals and additional amounts that Georgia has requested from Lake Lanier and downstream at Atlanta. In all other respects, the scope of the EIS for the WCM updates will remain as described in the Updated Scoping Report, Environmental Impact Statement, Update of the Water Control Manual for the Apalachicola-Chattahoochee-Flint (ACF) River Basin, in Alabama, Florida, and Georgia (March 2010), available at *http://www.sam.usace.army.mil/pa/acf-wcm/docs.htm,* the Corps solicits comments from interested persons regarding the scope of the EIS for the WCM updates.

DATES: The public comment period will commence with publication of this notice, and will end 60 days after its publication. This notice will also be distributed to those who commented during the original scoping comment periods of October–December 2008 (see 72 FR 63561 [November 9, 2007], 73 FR 9780 [February 22, 2008], 73 FR 54391 [September 19, 2008]), and November–December 2009 (see 74 FR 59965 [November 19, 2009]). This distribution will occur by mail and/or email on or about the date of this notice. No additional public scoping meetings are planned. Comments on the scope of the EIS, including concerns, issues, or proposed alternatives that should be considered in the EIS, should be submitted in writing to (see **ADDRESSES**) and will be accepted throughout the public comment period. Comments may also be submitted by using the electronic comment form at: *http://www.sam.usace.army.mil/pa/acf-wcm/form.htm.*

ADDRESSES: To facilitate the Master Water Control Manual update, a support contract has been awarded to Tetra Tech, Inc. for preparation of the EIS and additional scoping. Please mail written comments to Tetra Tech, Inc., 61 St. Joseph Street, Suite 550, Mobile, AL 36602–3521.

FOR FURTHER INFORMATION CONTACT: Questions about the manual update or National Environmental Policy Act (NEPA) process should be directed to: Mr. Brian Zettle, Biologist, Environment and Resources Branch, Planning and Environmental Division, U.S. Army Engineer District-Mobile, Post Office Box 2288, Mobile, AL 36628–0001; Telephone (251) 690–2115; or delivered by electronic facsimile at (251) 694–3815; or email: *brian.a.zettle@usace.army.mil.* You may also request to be included on the mailing list for public distribution of notices, meeting announcements and documents.

SUPPLEMENTARY INFORMATION: The Corps is updating the water control plans and manuals for the ACF Basin in order to improve operations to reflect changed conditions since the manuals were last developed. As explained in a November 2009 **Federal Register** Notice of Intent, 74 FR 59965 (November 19, 2009), and in the March 2010 Updated Scoping Report, the Corps previously narrowed the scope of the EIS for the WCM update to exclude from consideration certain water supply operations at the Buford Dam/Lake Lanier project that would have violated a July 2009 district court order. In June 2011, the U.S. Court of Appeals for the Eleventh Circuit vacated that 2009 district court order and directed the Corps to determine its legal authority to operate the Buford Dam/Lake Lanier Project to accommodate water supply withdrawals. See *In re Tri-State Water Rights Litigation,* 644 F.3d 1160 (11th Cir. 2011). In compliance with the Eleventh Circuit's order, the Chief Counsel issued a legal opinion on June 25, 2012 (available at *http://www.sam.usace.army.mil/2012ACF_legalopinion.pdf*), concluding that the Corps has the legal authority to accommodate both current and increased levels of water supply withdrawals from Lake Lanier and downstream at Atlanta. The Chief Counsel's legal opinion does not dictate what operational decisions will be made, with regard to water supply or otherwise, but it does establish certain analytical principles that will be taken into account as the Corps makes its final operational decisions at the conclusion of the WCM update process. Such decisions will be made in light of all applicable authorities, and will be guided by the legal principles articulated in the Chief Counsel's June 25, 2012 opinion.

In light of this legal opinion and the Eleventh Circuit's ruling, it is appropriate for the Corps to consider a broader range of water supply alternatives, including both current levels of water supply withdrawals and increased withdrawals, from Lake Lanier and downstream at Atlanta, that have been determined to be within the Corps' legal authority to implement. All other scoping aspects described in the March 2010 Updated Scoping Report remain the same. Information on the ACF River Basin and the Master Water Control Manual Update process will be posted on the Mobile District Web page as it becomes available: *http://www.sam.usace.army.mil.*

Steven J. Roemhildt,

Colonel, Corps of Engineers, District Commander.

[FR Doc. 2012–25202 Filed 10–11–12; 8:45 am]

BILLING CODE 3720–58–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

[Recommendation 2012–2]

Hanford Tank Farms Flammable Gas Safety Strategy

AGENCY: Defense Nuclear Facilities Safety Board.

ACTION: Notice, recommendation.

SUMMARY: Pursuant to 42 U.S.C. 2286a(a)(5), the Defense Nuclear Facilities Safety Board has made a recommendation to the Secretary of Energy concerning the Hanford Tank Farms flammable gas safety strategy.

DATES: Comments, data, views, or arguments concerning the recommendation are due on or before November 13, 2012.

ADDRESSES: Send comments concerning this notice to: Defense Nuclear Facilities Safety Board, 625 Indiana Avenue NW., Suite 700, Washington, DC 20004–2001.

FOR FURTHER INFORMATION CONTACT: Deborah H. Richardson or Andrew L. Thibadeau at the address above or telephone number (202) 694–7000.

Dated: October 5, 2012.

Jessie H. Roberson,

Vice Chairman.

RECOMMENDATION 2012–2 TO THE SECRETARY OF ENERGY

Hanford Tank Farms Flammable Gas Safety Strategy

Pursuant to 42 U.S.C. § 2286a(a)(5) Atomic Energy Act of 1954, As Amended

Dated: September 28, 2012

Background

The Defense Nuclear Facilities Safety Board (Board) believes that current operations at the Hanford Tank Farms require safety-significant active ventilation of double-shell tanks (DSTs) to ensure the removal of flammable gas from the tanks' headspace. A significant flammable gas accident would have considerable radiological consequences, endanger personnel, contaminate portions of the Tank Farms, and seriously disrupt the waste cleanup mission. Further, the Board believes that actions are necessary to install real time monitoring to measure tank ventilation flowrates as well as upgrade other indication systems used to perform safety-related functions.

On August 5, 2010, the Board sent a letter to the Department of Energy (DOE) outlining issues related to the safety strategy for flammable gas scenarios at the Hanford Tank Farms. In its letter, the Board identified that the safety analyses for accident scenarios used non-bounding values for (1) the radiological inventory of the tanks and (2) the amount of waste that could be released in a major accident. Notwithstanding these non-conservatisms, DOE's safety analyses show that all of the DSTs generate flammable gas in sufficient quantities to reach the lower flammability limit (LFL) for hydrogen. Further, many of the tanks contain sufficient quantities of gas trapped in the waste such that the LFL could be exceeded if the gas were spontaneously released, which is possible under both normal operating and accident conditions. The current control strategy does not include any measures to periodically release the trapped gases in a controlled manner to preclude the accumulation of flammable concentrations.

DOE's safety analyses show that the potential flammable gas scenarios warrant a credited safety control due to the dose consequences to workers and the public. Accordingly, the ventilation systems for the DSTs were previously classified as safety-significant and credited in the documented safety analysis for the Tank Farms to address flammable gas scenarios. The revision of the safety analysis approved by DOE on January 21, 2010, and implemented on March 30, 2010, reduced the DST ventilation systems from safety-significant to defense-in-depth and replaced them with a specific administrative control (SAC) for flammable gas monitoring.

In its August letter, the Board noted that DOE's SAC for flammable gas monitoring exhibited a number of weaknesses that collectively rendered it inadequate as a safety control. The reliance on an administrative control in lieu of an engineered feature is also contrary to DOE's established hierarchy of controls as well as sound engineering practice. Further, the Board noted that a number of other installed systems that are (1) necessary to provide accurate and reliable indications of abnormal conditions associated with flammable gas events, and (2) serve as a direct input to determining whether an operator action is required were not appropriately classified in accordance with their safety function.

In response to these issues, DOE, in a letter dated February 25, 2011, informed the Board that it had revised its decision to downgrade the DST ventilation systems and would take action to restore the systems to their former safety-significant status. Additionally, DOE indicated that the level indication systems for the DST annuli and the double contained receiver tank would be upgraded to safety-significant.

During the last year, the Board reviewed DOE's progress in meeting these commitments and addressing the Board's safety concerns. The Board noted that while some improvements had been made to the SAC used for flammable gas monitoring, it remained inadequate as a credited safety control. The SAC is less reliable than an engineered feature, remains susceptible to undetectable false low readings, and lacks independent verification.

Although DOE maintains a commitment to upgrading the DST ventilation systems and other installed non-safety-related instrumentation used to perform safety functions, the Board has concluded that no progress has been made in these areas, and the schedule for upgrades continues to slip. The latest schedule, outlined in a letter to the Board dated April 2, 2012, reflects a commitment to completing the upgrades to three of the five DST ventilation systems by fiscal year 2014. During the Board's June 2012 review, DOE indicated that even this was no longer a realistic schedule. DOE's current path forward is to upgrade only one of the DST ventilation systems (AY/AZ Tank Farm) by fiscal year 2015 to support mixer pump testing that is currently anticipated in 2016. No near-term procurement or installation plans are in place for the four other DST ventilation systems. Similarly, no plans or activities are proposed to upgrade the installed non-safety instrumentation systems being used in safety-related applications (e.g., the level indication systems for the DST annuli and the double container receiver tank).

Conclusions

The Board believes that DOE needs to upgrade the DST ventilation systems and other instrumentation systems used for safety-related functions at the Hanford Tank Farms. Further, the continued reliance on an inadequate SAC for flammable gas control presents an unnecessary risk to safety. At this time, DOE does not have a means to provide alternate ventilation if the existing ventilation system becomes inoperable. The hazards posed by flammable gas releases in DSTs and the challenges they pose to any ventilation system are directly proportional to the volume of flammable gas retained within the DST wastes. Reducing the current inventories of flammable gases retained in the DST waste and keeping them small would reduce the future hazards posed by gas release events.

Recommendation

Accordingly, the Board recommends that DOE:

1. Take near-term action to restore the classification of the DST ventilation systems to safety-significant. In the process, determine the necessary attributes of an adequate active ventilation system that can deliver the required flow rates within the time frame necessary to prevent and mitigate the site-specific flammable gas hazards at the Hanford Tank Farms.

2. Take near-term action to install safety-significant instrumentation for real-time monitoring of the ventilation exhaust flow from each DST.

3. Take near-term action to upgrade the existing installed non-safety-related equipment that is being used to fulfill safety functions at the Hanford Tank Farms to an appropriate safety classification. This includes instrumentation and control equipment whose indications are necessary for operators to take action to accomplish necessary safety functions.

4. Identify compensatory measures in case any existing DST ventilation systems become unavailable at the Hanford Tank Farms.

5. Evaluate means to reduce the existing inventory of retained flammable gases in a controlled manner. Since these gases will continue to be generated until the tank contents are processed, evaluate methods to reduce the future retention of flammable gases in these tanks or to periodically mix them to prevent the future accumulation of flammable gas inventories that could cause the tank headspace to exceed the LFL if rapidly released.

The Board urges the Secretary to avail himself of the authority under the Atomic Energy Act (42 U.S.C. § 2286d(e)) to ''implement any such recommendation (or part of any such recommendation) before, on, or after the date on which the Secretary transmits the implementation plan to the Board under this subsection.''

Peter S. Winokur, Ph.D.,

Chairman.

[FR Doc. 2012–25064 Filed 10–11–12; 8:45 am]

BILLING CODE 3670–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records—Principal Investigator/ Application File and Associated Records

AGENCY: Institute of Education Sciences, Department of Education.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act), the Department of Education (Department) publishes this notice of a new system of records entitled ''Institute of Education Sciences Principal Investigator/Application File and Associated Records'' (18–13–26). The Office of the Deputy Director for Science at the Department's Institute of Education Sciences (Institute) will establish and maintain this system of records.

The system of records will contain information on individuals who are principal investigators and who have requested grant support or received grant support, or both, from the Institute, either individually or through an academic institution or other organization.

The system of records notice will cover a database and paper files containing personally identifying information about these principal investigators, including their names, addresses, telephone numbers, titles, institutional or organizational affiliations, employment histories, professional experiences, academic credentials, current and pending support from other grant programs, research applications submitted to Institute competitions, and the peer reviews (summary statements) and peer review scores associated with their applications.

The Institute is building this database to assist Institute staff, who manage the peer review process, by systematically assembling and maintaining files that are necessary and appropriate to the scientific peer review of grant applications submitted to the Institute. The database will also enable applicants and principal investigators who have requested grant support from the Institute to electronically access the reviews and scores for their applications following the peer review of their applications for scientific merit. (An applicant may be an academic institution or other organization that employs a principal investigator and that is identified within the grant application as the applicant).

DATES: The Department seeks comment on the new system of records described in this notice, in accordance with the requirements of the Privacy Act. We must receive your comments on the proposed routine uses for the system of records referenced in this notice on or before November 13, 2012.

The Department filed a report describing the new system of records covered by this notice with the Chair of the Senate Committee on Homeland Security and Governmental Affairs, the Chair of the House Committee on Oversight and Government Reform, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on October 09, 2012. This system of records will become effective at the later date of—(1) the expiration of the 40-day period for OMB review on November 19, 2012 unless OMB waives 10 days of the 40-day review period for compelling reasons shown by the Department, or (2) November 13, 2012, unless the system of records needs to be changed as a result of public comment or OMB review.

ADDRESSES: Address all comments about the proposed routine uses to Dr. Anne Ricciuti, Deputy Director for Science, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue NW., room 602F, Washington, DC 20208–0001. Telephone: (202) 219–2247. If you prefer to send comments through the Internet, use the following address: *comments@ed.gov.*

You must include the term ''Principal Investigator/Application File and Associated Records'' in the subject line of the electronic message.

During and after the comment period, you may inspect all comments about this notice at the U.S. Department of Education in room 602Q, 555 New Jersey Avenue NW., Washington, DC, between the hours of 8:00 a.m. and 4:30 p.m., Eastern time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request, we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Dr. Anne Ricciuti. Telephone: (202) 219–2247.

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS) at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed in this section.

SUPPLEMENTARY INFORMATION:

Introduction

The Privacy Act (5 U.S.C. 552a) requires the Department to publish in the **Federal Register** this notice of a new system of records maintained by the Department. The Department's regulations implementing the Privacy Act are contained in part 5b of title 34 of the Code of Federal Regulations (CFR).

The Privacy Act applies to any record about an individual that is maintained in a system of records from which personally identifying information is retrieved by a unique identifier associated with each individual, such as a name or Social Security Number (SSN). The information about each individual is called a ''record,'' and the system, whether manual or computer-based, is called a ''system of records.''

The Privacy Act requires each agency to publish a notice of a system of records in the **Federal Register** and to prepare and send a report to OMB whenever the agency publishes a new system of records or makes a significant change to an established system of records. Each agency is also required to send copies of the report to the Chair of the Senate Committee on Homeland Security and Governmental Affairs and the Chair of the House Committee on Oversight and Government Reform. These reports are included to permit an evaluation of the probable effect of the proposal on the privacy rights of individuals.

Electronic Access to This Document

The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at this site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: October 9, 2012.

John Q. Easton,

Director, Institute of Education Sciences.

For the reasons discussed in the preamble, the Director of the Institute of Education Sciences (Institute), U.S. Department of Education (Department), publishes a notice of a new system of records to read as follows:

SYSTEM NUMBER:

18–13–26

SYSTEM NAME:

Institute of Education Sciences Principal Investigator/Application File and Associated Records.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATIONS:

(1) Office of the Deputy Director for Science, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue NW., room 606C, Washington, DC 20208–0001.

(2) The Institute's contractor, SRA International, Inc., through its Center for Peer Review and Science Management, Health and Civil Services Sector, 8490 Progress Drive, Suite 200, Frederick, MD 21701–4995.

(3) Contractor servers at Savvis—DC3, 45845 Nokes Boulevard, Sterling, VA 20166–6574.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records about individuals who are principal investigators and who have requested grant support, or received grant support, or both, from the Institute, either individually or through an academic institution or other organization.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system of records covers a database and paper files containing personally identifying information about these principal investigators, including their names, addresses, telephone numbers, titles, institutional or organizational affiliations, employment histories, professional experiences, academic credentials, current and pending support from other grant programs, research applications submitted to Institute competitions and the peer reviews (summary statements) and peer review scores associated with their applications.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The Institute's programs for funding research are authorized under the Education Sciences Reform Act of 2002 (ESRA), 20 U.S.C. 9501 et seq.

PURPOSE(S):

The purpose of this system of records is to assist Institute staff, who manage the peer review process, by systematically assembling and maintaining files that are necessary and appropriate to the scientific peer review of grant applications submitted to the Institute. The electronic database that is a part of this system of records will also enable applicants and principal investigators who have requested grant support from the Institute to electronically access the reviews and scores for their applications following the peer review of their applications for scientific merit. (An applicant may be an academic institution or other organization that employs a principal investigator and that is identified within the grant application as the applicant.) Access to the information in the electronic database will be strictly controlled and granted on the basis of proper identity authentication credentials to include, at a minimum, a user ID and password.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. These disclosures may be made on a case-by-case basis or, if the Department has complied with the computer matching requirements of the Privacy Act, under a computer matching agreement.

1. *Program Purposes.*

(a) Disclosure to Applicants that are Academic Institutions or Other Organizations that Employ Principal Investigators. Disclosure of information from the system may be provided to academic institutions or other organizations that employ principal investigators and that have applied for, or that have received grant support from, the Institute. Disclosure will permit them to access information about the review process and award decisions for the applications that they submitted.

(b) *Disclosure to Peer Reviewers.* Disclosure of information from the system may be provided to peer reviewers for their opinions and evaluations of principal investigators' applications as part of the Institute's scientific merit peer review process.

2. *Contract Disclosure.* When the Department contracts with an entity for the purposes of performing any function that requires disclosure of records in this system to employees of the contractor, the Department may disclose the records to those employees. Before entering into such a contract, the Department shall require the Contractor to maintain Privacy Act safeguards as required under 5 U.S.C. 522a(m) with respect to the records in the system.

3. *Enforcement Disclosure.* In the event that information in this system of records indicates, either on its face or in connection with other information, a violation or potential violation of any statute, regulation, or order of competent authority, the Department may disclose the relevant records to the appropriate agency, whether foreign, Federal, State, tribal, or local, charged with the responsibility of investigating or prosecuting that violation or charged with enforcing or implementing the statute, executive order, rule, regulation, or order issued pursuant thereto.

4. *Litigation and Alternative Dispute Resolution (ADR) Disclosures.*

(a) *Introduction.* In the event that one of the parties listed below is involved in litigation or ADR, or has an interest in litigation or ADR, the Department may disclose certain records to the parties described in paragraphs (b), (c) and (d) of this routine use under the conditions specified in those paragraphs:

(i) The Department, or any component of the Department; or

(ii) Any Department employee in his or her official capacity; or

(iii) Any Department employee in his or her individual capacity if the Department of Justice (DOJ) has been requested to, or has agreed to, provide or arrange for representation for the employee;

(iv) Any Department employee in his or her individual capacity where the Department has agreed to represent the employee; or

(v) The United States, where the Department determines that the litigation is likely to affect the Department or any of its components.

(b) *Disclosure to the DOJ.* If the Department determines that disclosure of certain records to the DOJ is relevant and necessary to litigation or ADR, the Department may disclose those records as a routine use to the DOJ.

(c) *Adjudicative Disclosures.* If the Department determines that disclosure of certain records to an adjudicative

body before which the Department is authorized to appear, or to an individual or entity designated by the Department or otherwise empowered to resolve or mediate disputes, is relevant and necessary to the litigation or ADR, the Department may disclose those records as a routine use to the adjudicative body, individual, or entity.

(d) *Parties, Counsel, Representatives, or Witnesses.* If the Department determines that disclosure of certain records to a party, counsel, representative, or witness is relevant and necessary to the litigation or ADR, the Department may disclose those records as a routine use to the party, counsel, representative, or witness.

5. *Freedom of Information Act (FOIA) and Privacy Act Advice Disclosure.* The Department may disclose records to the DOJ or the Office of Management and Budget if the Department concludes that disclosure is desirable or necessary in determining whether particular records are required to be disclosed under the FOIA or the Privacy Act.

6. *Disclosure to the DOJ.* The Department may disclose records to the DOJ to the extent necessary for obtaining DOJ advice on any matter relevant to an audit, inspection, or other inquiry related to the programs covered by this system.

7. *Congressional Member Disclosure.* The Department may disclose an individual's records to a member of Congress in response to an inquiry from the member made at the written request of that individual. The member's right to the information is no greater than the right of the individual who requested it.

8. *Disclosure in the Course of Responding to Breach of Data.* The Department may disclose records from this system to appropriate agencies, entities, and persons when: (a) The Department suspects or has confirmed that the security or confidentiality of information in the system of records has been compromised; (b) the Department has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of this system or other systems or programs that rely upon the compromised information (whether maintained by the Department or another agency or entity); and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with the Department's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Various portions of the system are maintained electronically, in paper files, or both. The Department maintains records in this system both on paper and in compact disc, read-only-memory (CD–ROM), and the contractor (SRA International, Inc.) maintains data for this system on computers and in hard copy.

RETRIEVABILITY:

Paper and electronic records will be retrieved using principal investigators' names or grant application numbers.

SAFEGUARDS:

The Department's paper and CD–ROM records are stored in locked metal filing cabinets or in a secured room, with access limited to personnel whose duties require access. All physical access to the Department's sites is controlled and monitored by security personnel who check each individual entering the building for an employee or visitor badge.

The computer system employed by the contractor offers a high degree of resistance to tampering and circumvention. The system enforces assigned authorizations by controlling access based on the individual's role in the project. Each individual's access is determined by the system administrator in conjunction with the Institute and other administrative staff. These rights are re-assessed periodically by the application administrator.

The system has share-level and file-level security utilizing New Technology File System (NTFS), which is built into the Windows 2008 operating system. The system administrator grants or denies access to users or groups of users at the folder or file level. Several system groups are established within the Windows server to permit fine-grained control of user access to project folders. No other contractor users or groups of users will be given access to these folders or files.

The system's servers are located at the Savvis DC3 data center and are protected by Savvis' procedures governing physical access to the servers. Access to sensitive areas is controlled by means of key cards, ID badges, security guards, biometric hand scanners, man traps equipped with key cards, key-locked equipment cages, and continuous video surveillance.

RETENTION AND DISPOSAL:

Records are maintained and disposed of in accordance with the Department's Records Disposition Schedule for Discretionary Grant File Records and Related Records (ED 254A.1).

SYSTEM MANAGER AND ADDRESS:

Deputy Director for Science, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue NW., room 600, Washington, DC 20208–0001.

NOTIFICATION PROCEDURE:

If you wish to determine whether a record exists regarding you in the system of records, contact the system manager. Your request must meet the requirements of regulations at 34 CFR 5b.5, including proof of identity.

RECORD ACCESS PROCEDURE:

If you wish to gain access to your record in the system of records, contact the system manager. Your request must meet the requirements of regulations at 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURE:

If you wish to contest the content of a record regarding you in the system of records, contact the system manager. Your request must meet the requirements of the regulations at 34 CFR 5b.7, including proof of identity.

RECORD SOURCE CATEGORIES:

Information will be provided voluntarily by individuals who are principal investigators and who have requested and/or received grant support from the Institute either individually or through an academic institution or other organization.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2012–25174 Filed 10–11–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records—Impact Evaluation of Race to the Top and School Improvement Grants

AGENCY: Institute of Education Sciences, Department of Education.

ACTION: Notice of a new system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended, 5 U.S.C. 552a (Privacy Act), the Department of Education (Department) publishes this notice of a new system of records entitled ''Impact Evaluation of Race to the Top and School Improvement Grants'' (18–13–32). The National Center for Education Evaluation and Regional Assistance at

the Department's Institute of Education Sciences awarded a contract in September 2010 to Mathematica Policy Research to conduct an implementation and impact evaluation of two of the Department's grant programs: Race to the Top and Title I School Improvement Grants. The system of records will contain records on students in tested grades from approximately 61 school districts in 21 states and the District of Columbia, and will be used to conduct the study.

DATES: In accordance with the requirements of the Privacy Act, the Department seeks comments on the new system of records described in this notice and in particular on the proposed routine uses for the new system of records. We must receive your comments on or before November 13, 2012.

The Department filed a report describing the new system of records covered by this notice with the Chair of the Senate Committee on Homeland Security and Governmental Affairs, the Chair of the House Committee on Oversight and Government Reform, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB) on October 9, 2012. This system of records will become effective at the later date of—(1) the expiration of the 40-day period for OMB review on November 19, 2012, unless OMB waives 10 days of the 40-day review period for compelling reasons shown by the Department, or (2) November 13, 2012, unless the system of records needs to be changed as a result of public comment or OMB review. The Department will publish any changes to the system of records or routine uses that result from public comment or OMB review.

ADDRESSES: Address all comments about the proposed routine uses to Dr. Audrey Pendleton, Associate Commissioner, Evaluation Division, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue NW., Room 502D, Washington, DC 20208–0001. Telephone: (202) 208–7078. If you prefer to send your comments through the Internet, use the following address: *comments@ed.gov.* You must include the term ''Impact Evaluation of Race to the Top and School Improvement Grants'' in the subject line of the electronic message.

During and after the comment period, you may inspect all public comments about this notice at the Department in Room 502D, 555 New Jersey Avenue NW., Washington, DC, between the hours of 8:00 a.m. and 4:30 p.m., Washington, DC time, Monday through Friday of each week except Federal holidays.

Assistance to Individuals With Disabilities in Reviewing the Rulemaking Record

On request we will provide an appropriate accommodation or auxiliary aid to an individual with a disability who needs assistance to review the comments or other documents in the public rulemaking record for this notice. If you want to schedule an appointment for this type of accommodation or auxiliary aid, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: Dr. Audrey Pendleton, Associate Commissioner, Evaluation Division, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue NW., Room 502D, Washington, DC 20208–0001. Telephone: (202) 208–7078. If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed in this section.

SUPPLEMENTARY INFORMATION:

Introduction

The Privacy Act (5 U.S.C. 552a) requires the Department to publish in the **Federal Register** this notice of a new system of records (5 U.S.C. 552a(e)(4) and (e)(11)). The Department's regulations implementing the Privacy Act are contained in the Code of Federal Regulations (CFR) at 34 CFR part 5b.

The Privacy Act applies to information about individuals that contains individually identifying information and that is retrieved by a unique identifier associated with each individual, such as a name or social security number. The information about each individual is called a ''record,'' and the system, whether manual or computer based, is called a ''system of records.''

Whenever the Department publishes a new system of records or makes a significant change to an established system of records, the Privacy Act requires it to publish a system of records notice in the **Federal Register**. The Department is also required to submit reports to the Administrator of the Office of Information and Regulatory Affairs at OMB, the Chair of the Senate Committee on Homeland Security and Governmental Affairs, and the Chair of the House of Representatives Committee on Oversight and Government Reform. These reports are intended to permit an evaluation of the probable effect of the proposal on the privacy rights of individuals.

Electronic Access to This Document

The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: October 9, 2012.

John Q. Easton,

Director, Institute of Education Sciences.

For the reasons discussed in the preamble, the Director of the Institute of Education Sciences, U.S. Department of Education (Department) publishes a notice of a new system of records to read as follows:

SYSTEM NUMBER:

18–13–32

SYSTEM NAME:

Impact Evaluation of Race to the Top and School Improvement Grants.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATIONS:

(1) Evaluation Division, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences (IES), U.S. Department of Education, 555 New Jersey Avenue NW., Room 502D, Washington, DC 20208–0001.

(2) Mathematica Policy Research, 600 Alexander Park, Suite 100, Princeton, NJ 08540 (contractor).

(3) The American Institutes for Research, 1000 Thomas Jefferson St.

NW., Washington, DC 20007 (subcontractor).

(4) Social Policy Research Associates, 1330 Broadway, Suite 1426, Oakland, CA 94612 (subcontractor).

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The system will contain records on students in tested grades from approximately 61 school districts in 21 states and the District of Columbia.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system of records will include information about the students who are included in the study. This student-level information will include, but will not necessarily be limited to, student IDs; the names and IDs of the school and school district that the student attends; year of birth; demographic information such as race, ethnicity, gender, and educational background (grade level, free and reduced-price lunch status, English language learner status, and special education status); whether the student graduated from high school and enrolled in college; and assessment information and scores on reading and mathematics state assessments.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The study is authorized under the Education Sciences Reform Act of 2002, Part D, Section 171(b)(2) (20 U.S.C. 9561(b)(2)), which authorizes the IES to ''conduct evaluations of Federal education programs administered by the Secretary (and as time and resources allow, other education programs) to determine the impact of such programs (especially on student academic achievement in the core academic areas of reading, mathematics, and science).''

PURPOSE(S):

The information contained in the records maintained in this system will be used to conduct an implementation and impact evaluation of two of the Department's grant programs: Race to the Top and Title I School Improvement Grants.

The study will address the following four research questions: (1) How are Race to the Top and School Improvement Grants implemented at the State, district, and school levels? (2) Are Race to the Top reforms related to improvement in student outcomes? (3) Does receipt of School Improvement Grants funding to implement a school turnaround model affect outcomes for low-performing schools? (4) Is the implementation of school turnaround models, and strategies within those models, related to improvement in student outcomes?

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The Department may disclose information contained in a record in this system of records under the routine uses listed in this system of records without the consent of the individual if the disclosure is compatible with the purposes for which the record was collected. The Department may make these case-by-case disclosures or, if the Department has complied with the computer matching requirements of the Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. 552a), under a computer matching agreement. Any disclosure of individually identifying information from a record in this system must also comply with the requirements of section 183 of the Education Sciences Reform Act (ESRA) (20 U.S.C. 9573), which provides confidentiality standards that apply to all collection, reporting, and publication of data by IES.

(1) *Research Disclosure.* The Director of IES may disclose information from this system of records to qualified researchers solely for the purpose of carrying out specific research that is compatible with the purpose of this system of records. The researcher shall be required to maintain under the Privacy Act and the ESRA safeguards with respect to such records. When individually identifying information from a student's education record will be disclosed to the researcher under the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g (FERPA), the researcher also shall be required to comply with the requirements of a written agreement between the researcher and IES pursuant to the written agreement requirements under FERPA.

(2) *Contract Disclosure.* If the Department contracts with an entity to perform any function that requires disclosing records in this system to the contractor's employees, the Department may disclose the records to those employees who have received the appropriate level of security clearance from the Department. Before entering into such a contract, the Department will require the contractor to establish and maintain the safeguards required under the Privacy Act (5 U.S.C. 552a(m)) with respect to the records in the system.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

None.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

The Department maintains records on CD–ROM, and the contractor (Mathematica Policy Research) and subcontractors (The American Institutes for Research and Social Policy Research Associates) maintain data for this system on computers and in hard copy.

RETRIEVABILITY:

Records in this system are indexed and retrieved by a unique random number assigned to each individual that is cross-referenced by the individual's unique State- or district-assigned student ID on a separate list.

SAFEGUARDS:

All physical access to the Department's site and to the sites of the Department's contractor and subcontractors, where this system of records is maintained, is controlled and monitored by security personnel. The computer system employed by the Department offers a high degree of resistance to tampering and circumvention. This security system limits data access to Department and contract staff on a need-to-know basis and controls individual users' ability to access and alter records within the system.

The contractor and subcontractors will establish a similar set of procedures at their sites to ensure confidentiality of data. The contractor and subcontractors are required to ensure that print data identifying individuals are in files physically separated from other research data and electronic files identifying individuals are separated from other electronic research data files. The contractor and subcontractors will maintain security of the complete set of all master data files and documentation. Access to individually identifying data will be strictly controlled. At each site, all print data will be kept in locked file cabinets during nonworking hours and work on hardcopy data will take place in a single room, except for data entry.

Physical security of electronic data will also be maintained. Security features that protect project data include: Password-protected accounts that authorize users to use the contractor's system but to access only specific network directories and network software; user rights and directory and file attributes that limit those who can use particular directories and files and determine how they can use them; and additional security features that the network administrators will establish for projects as needed.

The Department's, contractor's, and subcontractors' employees who ''maintain'' (collect, maintain, use, or disseminate) data in this system must comply with the requirements of the Privacy Act and the confidentiality standards in section 183 of the ESRA.

RETENTION AND DISPOSAL:

Records are maintained and disposed of in accordance with the Department's Records Disposition Schedules ED 068.a (NARA Job Number: N1–441–08–18).

SYSTEM MANAGER AND ADDRESS:

Associate Commissioner, Evaluation Division, National Center for Education Evaluation and Regional Assistance, Institute of Education Sciences, U.S. Department of Education, 555 New Jersey Avenue NW., Room 502D, Washington, DC 20208–0001.

NOTIFICATION PROCEDURE:

If you wish to determine whether a record exists regarding you in the system of records, contact the system manager at the address listed under SYSTEM MANAGER AND ADDRESS. Your request must meet the requirements of the Department's Privacy Act regulations at 34 CFR 5b.5, including proof of identity.

RECORD ACCESS PROCEDURE:

If you wish to gain access to a record about you in this system of records, contact the system manager at the address listed under SYSTEM MANAGER AND ADDRESS. Your request must meet the requirements of the Department's Privacy Act regulations at 34 CFR 5b.5, including proof of identity.

CONTESTING RECORD PROCEDURE:

If you wish to contest the content of a record regarding you in the system of records, contact the system manager at the address listed under SYSTEM MANAGER AND ADDRESS. Your request for access to a record must meet the requirements of the Department's Privacy Act regulations at 34 CFR 5b.7, including proof of identity, specification of the particular record you are seeking to have changed, and the written justification for making such a change.

RECORD SOURCE CATEGORIES:

This system will contain records on students included in the Impact Evaluation of Race to the Top and School Improvement Grants. Data will be obtained through student records maintained by states or school districts.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 2012–25186 Filed 10–11–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

DOE/Advanced Scientific Computing Advisory Committee

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of Open Meeting.

SUMMARY: This notice announces a meeting of the Advanced Scientific Computing Advisory Committee (ASCAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, October 30, 2012, 9:00 a.m.–5:00 p.m. and Wednesday, October 31, 2012, 9:00 a.m.–12:00 p.m.

ADDRESSES: American Geophysical Union, (AGU), 2000 Florida Avenue NW, Washington, DC 20009–1277.

FOR FURTHER INFORMATION CONTACT: Melea Baker, Office of Advanced Scientific Computing Research; SC–21/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue SW., Washington, DC 20585–1290; Telephone (301) 903–7486.

SUPPLEMENTARY INFORMATION: *Purpose of the Meeting:* The purpose of this meeting is to provide advice and guidance on a continuing basis to the Department of Energy on scientific priorities within the field of advanced scientific computing research.

Tentative Agenda Topics:

- View from Washington.
- View from Germantown.
- Computational Science Graduate Fellowship (CSGF) Longitudinal Study.
- Update on Exascale.
- Update from DOE data-intensive science and exascale subcommittee.
- Facilities update.
- ESnet-5.
- Early Career technical talks.
- Co-design.
- Innovative and Novel Computational Impact on Theory and Experiment (INCITE).
- Public Comment (10-minute rule).

Public Participation: The meeting is open to the public. A webcast of this meeting will be available. Please check the Web site below for updates and information on how to view the meeting. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Melea Baker, (301) 903–7486 or by email at: *Melea.Baker@science.doe.gov.* You must make your request for an oral statement at least 5 business days prior to the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available on the U.S. Department of Energy's Office of Advanced Scientific Computing Web site (*www.sc.doe.gov/ascr*) for viewing.

Issued at Washington, DC on October 5, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–25144 Filed 10–11–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[FE DOCKET NOS. 10–111–LNG, 12–61–LNG, 12–74–NG, 12–78–NG, 12–79–NG, 12–80–NG, 12–81–NG, 12–82–NG, 12–83–NG, 12–85–NG]

Excelerate Liquefaction Solutions I, LLC, Nutreco Canada Inc., JM & RAL Energy Inc., Constellation Energy Gas Choice, Inc., St. Clair Power L.P., Hess Corporation, Tenaska Gas Storage, LLC, Bluewater Gas Storage, LLC, City of Glendale Water And Power; Orders Granting Authority To Import and Export Natural Gas, To Export Liquefied Natural Gas and Vacating Prior Authority During August 2012

AGENCY: Office of Fossil Energy, Department of Energy (DOE).

ACTION: Notice of orders.

SUMMARY: The Office of Fossil Energy (FE) of the Department of Energy gives notice that during August 2012, it issued Orders granting authority to import and export natural gas and liquefied natural gas and vacating prior authority. These Orders are summarized in the attached appendix and may be found on the FE Web site at *http://www.fossil.energy.gov/programs/gasregulation/authorizations/Orders-2012.html.* They are also available for inspection and copying in the Office of Fossil Energy, Office of Natural Gas Regulatory Activities, Docket Room 3E–

033, Forrestal Building, 1000 Independence Avenue SW., Washington, DC 20585, (202) 586–9478. The Docket Room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, DC, on October 4, 2012.

John A. Anderson,

Manager, Natural Gas Regulatory Activities, Office of Oil and Gas Global Security and Supply, Office of Fossil Energy.

APPENDIX

DOE/FE Orders Granting Import/Export Authorizations

Order no.	Date issued	FE docket no.	Authorization holder	Description of action
2961–A	08/07/12	10–111–LNG	Sabine Pass Liquefaction, LLC.	Final Opinion and Order granting long-term authority to export LNG from Sabine Pass LNG Terminal to Free Trade Agreement Nations.
3128	08/09/12	12–61–NG	Excelerate Liquefaction Solutions I, LLC.	Order granting long-term multi-contract authorization to export LNG by vessel from the Excelerate Liquefaction Solutions I, LLC Terminal to Free Trade Agreement Nations.
3129	08/14/12	12–74–NG	Nutreco Canada Inc.	Order granting blanket authority to import/export natural gas from/to Canada.
3130	08/14/12	12–78–NG	JM & RAL Energy Inc.	Order granting blanket authority to export natural gas to Mexico.
3131	08/14/12	12–79–NG	Constellation Energy Gas Choice, Inc..	Order granting blanket authority to import natural gas from Canada and vacating prior authority.
3132	08/14/12	12–80–NG	St. Clair Power L.P.	Order granting blanket authority to import/export natural gas from/to Canada.
3133	08/14/12	12–81–NG	Hess Corporation	Order granting blanket authority to import/export natural gas from/to Canada.
3134	08/14/12	12–82–NG	Tenaska Gas Storage, LLC.	Order granting blanket authority to export natural gas to Canada.
3135	08/14/12	12–83–NG	Bluewater Gas Storage, LLC.	Order granting blanket authority to import/export natural gas from/to Canada.
3136	08/14/12	12–85–NG	City of Glendale Water and Power.	Order granting blanket authority to import/export natural gas from/to Canada.

[FR Doc. 2012–25146 Filed 10–11–12; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2011–0754; FRL–9365–5]

Agency Information Collection Activities; Proposed Renewal of an Approved Collection; Comment Request

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (PRA), this document announces that EPA is planning to submit a request to renew an existing approved Information Collection Request (ICR) to the Office of Management and Budget (OMB). The ICR, entitled: ''Pesticide Data Call-In Program'' and identified by EPA ICR No. 2288.02 and OMB Control No. 2070–0174, is currently scheduled to expire on November 30, 2012. Before submitting the ICR to OMB for review and approval, EPA is soliciting comments on specific aspects of the ICR.

DATES: Comments must be received on or before December 11, 2012.

ADDRESSES: Submit your comments, identified by docket identification (ID) number EPA–HQ–OPP–2011–0754, 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), (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: Cameo Smoot, Field and External Affairs Division (7506P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (703) 305–5454; fax number: (703) 308–5884; email address: *smoot.cameo@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What information is EPA particularly interested in?

Pursuant to PRA section 3506(c)(2)(A) (44 U.S.C. 3506(c)(2)(A)), EPA specifically solicits comments and information to enable it to:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility.
2. Evaluate the accuracy of the Agency's estimates of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
3. Enhance the quality, utility, and clarity of the information to be collected.

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. In particular, EPA is requesting comments from very small businesses (those that employ less than 25) on examples of specific additional efforts that EPA could make to reduce the paperwork burden for very small businesses affected by this collection.

II. What should I consider when I prepare my comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible and provide specific examples.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Offer alternative ways to improve the collection activity.
7. Make sure to submit your comments by the deadline identified under **DATES**.
8. To ensure proper receipt by EPA, be sure to identify the docket ID number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

III. What information collection activity or ICR does this action apply to?

Affected Entities: Entities potentially affected by this ICR include pesticide registrants, which may be identified by the North American Industrial Classification System (NAICS) code 32532, pesticide and other agricultural chemical manufacturing.

Title: Pesticide Data Call-In Program.

ICR number: EPA ICR No. 2288.01.

OMB control number: OMB Control No. 2070–0174.

ICR status: This ICR is currently scheduled to expire on November 30, 2012. EPA will be seeking a short renewal of the currently approved ICR. This short renewal will provide additional time to allow EPA to finish working to restructure the ICR, improve the electronic forms and instructions, and consult with stakeholders and OMB on those ICR changes and the corresponding adjustments to the burden estimates. This extension is necessary because the ICR covers ongoing activities that are required to support the statutorily mandated pesticide reviews.

An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in title 40 of the Code of Federal Regulations (CFR), after appearing in the **Federal Register** when approved, are listed in 40 CFR part 9, are displayed either by publication in the **Federal Register** or by other appropriate means, such as on the related collection instrument or form, if applicable. The display of OMB control numbers for certain EPA regulations is consolidated in 40 CFR part 9.

Abstract: Under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), every pesticide product must be registered with EPA. An applicant for registration must supply data to demonstrate that the pesticide product will not cause ''unreasonable adverse effects'' on humans or to the environment. Under the Federal Food, Drug, and Cosmetic Act (FFDCA), EPA must determine, from data supplied by the applicant or registrant, that the level of pesticide residues in food and feed will be safe for human consumption, defined as ''a reasonable certainty that no harm'' will result from exposures to pesticide residues. Although data is provided with the initial applications, the Agency issues Data Call-Ins (DCIs) when it has determined that more information is necessary to make the necessary decision pursuant to the mandates in FIFRA and FFDCA.

The programs represented in this proposed ICR renewal and consolidation share a common statutory authority, section 3(c)(2)(B) of FIFRA, which authorizes EPA to require pesticide registrants to generate and submit data to the Agency, when such data are needed to maintain an existing registration of a pesticide. EPA's determination that additional data are needed can occur for various reasons, with the following four reasons being the most common:

1. *Reregistration program.* Section 4 of FIFRA requires EPA to re-assess the health and safety data for all pesticide active ingredients registered before November 1, 1984, to ''reregister'' them, i.e., determine whether these ''older'' pesticides meet the criteria for registration that would be expected of a pesticide being registered today for the first time. FIFRA section 4 directs EPA to use FIFRA section 3(c)(2)(B) authority to obtain the required data. Although the Reregistration Eligibility Decisions are complete, the Agency may still need to issue DCIs to close out the program.

2. *Registration review program.* Section 3(g) of FIFRA contains provisions to help achieve the goal of reviewing each pesticide every 15 years to assure that the pesticide continues to pose no risk of unreasonable adverse effects on human health or the environment. FIFRA section 3(g) instructs EPA to use the FIFRA section 3(c)(2)(B) authority to obtain the required data.

3. *Special review program.* Though rare, EPA may conduct a special review if EPA believes that a pesticide poses risks of unreasonable adverse effects on human health or the environment. Section 3(c)(2)(B) of FIFRA provides a means of obtaining any needed data.

4. *Anticipated residue/percent crop treated information.* Under section 408 of FFDCA, before a pesticide may be used on food or feed crops, the Agency must establish a tolerance for the pesticide residues on that crop or establish an exemption from the requirement to have a tolerance. Section 408(b)(2)(E) and (F) of FFDCA authorize the use of anticipated or actual residue (ARs) data and percent crop treated (PCT) data to establish, modify, maintain, or revoke a tolerance for a pesticide. The FFDCA requires that if AR data are used, data must be reviewed five years after a tolerance is initially established. If PCT data are used, the FFDCA affords EPA the discretion to obtain additional data if any or all of several conditions are met.

The Agency issues DCIs when it has determined that more information is necessary to make decision about pesticides pursuant to the mandates in FIFRA and FFDCA. Agency decisions requiring additional data are based on the data requirements set forth in 40 CFR parts 150 through 180, with the majority of the data requirements captured in 40 CFR parts 158 and 161.

Burden statement: The annual public reporting and recordkeeping burden for this collection of information is estimated to range form 59 to 13,636 hours per response, depending on the review program and type of DCI issued. Burden is defined in 5 CFR 1320.3(b). The ICR provides a detailed explanation of this estimate, which is only briefly summarized here:

Frequency of collection: On occasion.

Estimated number of potential respondents: 1,643.

Estimated number of total annual responses: 184.

Estimated total annual burden on respondents: 262,301 hours.

Estimated total annual costs: $12,506,726.

Changes in the estimates: The total estimated burden for this ICR is unchanged from that currently approved by OMB.

IV. What is the next step in the process for this ICR?

EPA intends to submit the ICR to OMB for review and a short term approval (i.e., 12 months) pursuant to 5 CFR 1320.12. EPA will issue another **Federal Register** document pursuant to 5 CFR 1320.5(a)(1)(iv) to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB. If you have any questions about this ICR or the approval process, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Reporting and recordkeeping requirements.

Dated: October 4, 2012.

James Jones,

Acting Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2012–25145 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9741–5; Docket ID No. EPA–HQ–ORD–2011–0895]

Draft Research Report: Investigation of Ground Water Contamination Near Pavillion, WY

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of Extension of Public Comment Period.

SUMMARY: EPA is announcing an extension to the public comment period for the external review of the draft research report titled, ''Investigation of Ground Water Contamination near Pavillion, Wyoming.'' The draft research report was prepared by the National Risk Management Research Laboratory, within the EPA Office of Research and Development (ORD), and EPA Region 8. This draft research report is not final as described in EPA's Information Quality Guidelines, and does not represent and should not be construed to represent Agency policy or views. Eastern Research Group, Inc., an EPA contractor for external peer review, will convene an independent panel of experts for peer review of this draft research report. Public comments submitted during the public comment period will be made available to the peer review panel for consideration in their review. An external peer review meeting will take place following the public comment period. An additional **Federal Register** notice will be published about one month prior to the meeting to provide the meeting date, location, and registration information. Additional details about the peer review process can be found at: *http://cfpub.epa.gov/si/si_public_pra_view.cfm?dirEntryID=240345.*

DATES: The public comment period began December 14, 2011, and ends January 15, 2013. Comments should be submitted to the docket or received in writing by EPA by January 15, 2013.

ADDRESSES: The draft ''Investigation of Ground Water Contamination near Pavillion, Wyoming.'' is available via the Internet on the EPA Region 8 site at: *http://www.epa.gov/region8/superfund/wy/pavillion/EPA_ReportOnPavillion_Dec-8-2011.pdf.*

Comments may be submitted electronically via *http://www.regulations.gov,* by email, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of this notice.

Additional Information: For information on the docket, *www.regulations.gov,* or the public comment period, please contact the Office of Environmental Information (OEI) Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone: 202–566–1752; facsimile: 202–566–1753; or email: *ORD.Docket@epa.gov.*

For information on the draft report, please contact Rebecca Foster, U.S. Environmental Protection Agency, P.O. Box 1198, Ada, OK 74821; telephone: 580–436–8750; facsimile: 580–436–8529; or email: *foster.rebecca@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Information About Pavillion Ground Water Investigation

Pavillion, Wyoming is located in Fremont County, about 20 miles northwest of Riverton. The concern at the site is potential ground water contamination, based on resident complaints about smells, tastes, and adverse changes in water quality of their domestic wells. In collaboration with ORD, Region 8 has been conducting a ground water investigation. The purpose of this ground water investigation is to better understand the basic ground water hydrology and how the constituents of concern may be occurring in the aquifer. More information is available at *http://www.epa.gov/region8/superfund/wy/pavillion/.*

II. How To Submit Comments To the Docket at http://www.regulations.gov

Submit your comments, identified by Docket ID No. EPA–HQ–ORD–2011–0895, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *Email: ORD.Docket@epa.gov.*
- *Facsimile:* 202–566–1753.
- *Mail:* Office of Environmental Information Docket (Mail Code: 2822T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460. The telephone number is 202–566–1752. If you provide comments by mail, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.
- *Hand Delivery:* The OEI Docket is located in the EPA Headquarters Docket Center, EPA West Building, Room 3334, 1301 Constitution 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. Deliveries are only accepted during the docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information. If you provide comments by hand delivery, please submit one unbound original with pages numbered consecutively, and three copies of the comments. For attachments, provide an index, number pages consecutively with the comments, and submit an unbound original and three copies.

Instructions: Direct your comments to Docket ID No. EPA–HQ–ORD–2011–0895. Please ensure that your comments are submitted within the specified comment period. It is EPA's policy to include all comments it receives in the public docket without change and to make the comments available online at *http://www.regulations.gov,* including any personal information provided, unless comments include information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is

an ''anonymous access'' system, which means that EPA will not know your identity or contact information unless you provide it in the body of your comments. If you send email comments directly to EPA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comments that are placed in the public docket and made available on the Internet. If you submit electronic comments, EPA recommends that you include your name and other contact information in the body of your comments and with any disk or CD–ROM you submit. If EPA cannot read your comments due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comments. Electronic files should avoid the use of special characters and any form of encryption and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.*

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

Dated: October 5, 2012.

Lek Kadeli,

Principal Deputy Assistant Administrator, Office of Research and Development.

[FR Doc. 2012–25148 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–9005–5]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7146 or *http://www.epa.gov/compliance/nepa/.*

Weekly receipt of Environmental Impact Statements

Filed 10/01/2012 Through 10/05/2012

Pursuant to 40 CFR 1506.9.

Notice

Section 309(a) of the Clean Air Act requires that EPA make public its comments on EISs issued by other Federal agencies. EPA's comment letters on EISs are available at: *http://www.epa.gov/compliance/nepa/eisdata.html.*

SUPPLEMENTARY INFORMATION: As of October 1, 2012, EPA will not accept paper copies or CDs of EISs for filing purposes; all submissions on or after October 1, 2012 must be made through e-NEPA.

While this system eliminates the need to submit paper or CD copies to EPA to meet filing requirements, electronic submission does not change requirements for distribution of EISs for public review and comment. To begin using e-NEPA, you must first register with EPA's electronic reporting site—*https://cdx.epa.gov/epa_home.asp.*

EIS No. 20120317, Final EIS, USACE, MS, Proposed Widening of the Pascagoula Lower Sound/Bayou Casotte Channel, Jackson County, MS, Review Period Ends: 11/13/2012, Contact: Philip Hegji 251–690–3222.

EIS No. 20120318, Final Supplement, USACE, TX, Clear Creek Reevaluation Study Project, Flood Risk Management and Ecosystem Restoration, Brazoria, Fort Bend, Galveston and Harris Counties, TX, Review Period Ends: 11/13/2012, Contact: Andrea Catanzaro 409–766–6346.

EIS No. 20120319, Draft EIS, NPS, MA, Herring River Restoration Project, In and Adjacent to Cape Cod National Seashore, Towns of Wellfleet and Truro, MA, Comment Period Ends: 12/12/2012, Contact: Mark Husbands 303–987–6965.

EIS No. 20120320, Draft EIS, FTA, MN, Southwest Transitway Construction and Operation Light Rail Transit, Hennepin County, MN, Comment Period Ends: 12/11/2012, Contact: Marisol Simon 312–353–2789.

EIS No. 20120321, Final EIS, BLM, NV, Mount Hope Project, Molybdenum Mining and Processing Operation, Eureka County, NV, Review Period Ends: 11/13/2012, Contact: Gloria Tibbetts 775–635–4060.

EIS No. 20120322, Final EIS, NOAA, 00, Harvest Specifications and Management Measures for the 2013–2014 Pacific Coast Groundfish Fishery and Amendment 21–2 to the Pacific Coast Fishery Management Plan, Federal Waters off the Coast of WA, OR, and CA, Review Period Ends: 11/13/2012, Contact: Becky Renko 206–526–6110.

EIS No. 20120323, Draft Supplement, BLM, NV, Silver State Solar Energy Project, and Proposed Las Vegas Field Office Resource Management Plan Amendment, To Address New Information, Clark County, NV, Comment Period Ends: 01/11/2013, Contact: Greg Helseth 702–515–5173.

EIS No. 20120324, Final EIS, USFS, MT, Lonesome Wood Vegetation Management 2 Project Areas, Lake Ranger District, Gallatin National Forest, Gallatin County, MT, Review Period Ends: 11/26/2012, Contact: Teri Seth 406–522–2520.

EIS No. 20120325, Final EIS, NPS, WA, Stehekin River Corridor Implementation Plan, General Management Plan, Lake Chelan National Recreation Area, North Cascades National Park Service Complex, WA, Review Period Ends: 11/13/2012, Contact: Jon Riedel 360–873–4590 ext. 21.

Amended Notices

EIS No. 20050140, Final EIS, FHWA, NV, Boulder City/U.S. 93 Corridor Transportation Improvements, Study Limits are between a western boundary on US 95 in the City of Henderson and an eastern boundary on US 93 west of downtown Boulder City, NPDES and U.S. Army COE Section 404 Permits Issuance and Right-of-Way Grant, Clark County, NV, Review Period Ends: 05/13/2005, Contact: Ted P. Bendure 775–687–5322.

Adoption—The U.S. Department of Energy's Western Area Power Administration (WAPA) has adopted the U.S. Department of Transportation's Federal Highway Administration's (FHWA) Final EIS filed with EPA. The WAPA was a cooperating agency with the FHWA's EIS therefore, recirculation of the document was not necessary and there is no comment period.

EIS No. 20110106, Draft EIS, BIA, NM, Withdrawn—Pueblo of Jemez 70.277 Acre Fee-To-Trust Transfer and Casino Project, Implementation, Dona Ana County, NM, Comment Period Ends: 07/01/2011, Contact: Priscilla Wade 505–563–3417 Revision to FR Notice Published 06/03/2011; Officially Withdrawn by the Preparing Agency.

Dated: October 9, 2012.

Aimee S. Hessert,

Deputy Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 2012–25154 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9741–3]

National and Governmental Advisory Committees to the U.S. Representative to the Commission for Environmental Cooperation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act, Public Law 92–463, EPA gives notice of a meeting of the National Advisory Committee (NAC) and Governmental Advisory Committee (GAC) to the U.S. Representative to the North American Commission for Environmental Cooperation (CEC). The National and Governmental Advisory Committees advise the EPA Administrator in her capacity as the U.S. Representative to the CEC Council. The Committees are authorized under Articles 17 and 18 of the North American Agreement on Environmental Cooperation (NAAEC), North American Free Trade Agreement Implementation Act, P.L. 103–182, and as directed by Executive Order 12915, entitled ''Federal Implementation of the North American Agreement on Environmental Cooperation.'' The NAC is composed of 13 members representing academia, environmental non-governmental organizations, and private industry. The GAC consists of 13 members representing state, local, and Tribal governments. The Committees are responsible for providing advice to the U.S. Representative on a wide range of strategic, scientific, technological, regulatory, and economic issues related to implementation and further elaboration of the NAAEC.

The purpose of the meeting is to provide advice on issues related to the new CEC Communication Strategy and the role of the committee's in furthering the goals of the strategy. The committees will also review the CEC's 2013 Draft Operational Plan and learn about Tribal issues in North America. The meeting will also include a public comment session. A copy of the agenda will be posted at *http://www.epa.gov/ofacmo/nacgac-page.htm.*

DATES: The National and Governmental Advisory Committees will hold an open meeting on Thursday, October 25, 2012, from 8:30 a.m. to 5:00 p.m., and Friday, October 26, from 8:30 a.m. until 2:00 p.m.

ADDRESSES: The meeting will be held at the U.S. EPA, Conference Room B–305, located in the Ariel Rios North Building, 1201 Constitution Ave. NW., Washington, DC 20004. Telephone: 202–564–2294. The meeting is open to the public, with limited seating on a first-come, first-served basis. If you plan to attend, please register with Ms. Stephanie McCoy, by no later than October 16th by calling 202–564–2294 or via email at *mccoy.stephanie@epa.gov*. Please provide your name, organization, address and telephone number.

FOR FURTHER INFORMATION CONTACT: Oscar Carrillo, Designated Federal Officer, *carrillo.oscar@epa.gov,* 202–564–0347, U.S. EPA, Office of Federal Advisory Committee Management and Outreach (1601–M), 1200 Pennsylvania Avenue NW., Washington, DC 20460.

SUPPLEMENTARY INFORMATION: Requests to make oral comments, or provide written comments to the Committees, should be sent to Oscar Carrillo, Designated Federal Officer, at the contact information above.

Meeting Access: For information on access or services for individuals with disabilities, please contact Oscar Carrillo at 202–564–0347 or *carrillo.oscar@epa.gov*. To request accommodation of a disability, please contact Oscar Carrillo, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

Dated: October 3, 2012.

Oscar Carrillo,

Designated Federal Officer.

[FR Doc. 2012–25143 Filed 10–11–12; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK OF THE UNITED STATES

[Public Notice: 2012–0529]

Application for Final Commitment for a Long-term Loan or Financial Guarantee in Excess of $100 million; 25 Day Comment Period

AGENCY: Export-Import Bank of the United States.

ACTION: Notice of 25 day comment period regarding an application for final commitment for a long-term loan or financial guarantee in excess of $100 million.

Reason for Notice

This Notice is to inform the public, in accordance with Section 3(c)(10) of the Charter of the Export-Import Bank of the United States (''Ex-Im Bank''), that Ex-Im Bank has received an application for final commitment for a long-term loan or financial guarantee in excess of $100 million (as calculated in accordance with Section 3(c)(10) of the Charter).

Comments received within the comment period specified below will be presented to the Ex-Im Bank Board of Directors prior to final action on this Transaction.

Reference: AP087414XX.

Purpose and Use

Brief description of the purpose of the transaction:

To support the export of U.S. manufactured aircraft to Russia.

Brief non-proprietary description of the anticipated use of the items being exported:

To provide passenger air service between Russia and other countries.

To the extent that Ex-Im Bank is reasonably aware, the item(s) being exported may be used to produce exports or provide services in competition with the exportation of goods or provision of services by a United States industry.

Parties

Principal Supplier: The Boeing Company.

Obligor: OJSC VEB-Leasing.

Guarantor(s): Bank for Development and Foreign Economic Affairs (Vnesheconombank).

Description of Items Being Exported

Boeing 777 aircraft.

Information On Decision: Information on the final decision for this transaction will be available in the ''Summary Minutes of Meetings of Board of Directors'' on *http://www.exim.gov/articles.cfm/board%20minute.*

Confidential Information: Please note that this notice does not include confidential or proprietary business information; information which, if disclosed, would violate the Trade Secrets Act; or information which would jeopardize jobs in the United States by supplying information that competitors could use to compete with companies in the United States.

DATES: Comments must be received on or before November 6, 2012 to be assured of consideration before final consideration of the transaction by the Board of Directors of Ex-Im Bank.

ADDRESSES: Comments may be submitted through *www.regulations.gov.*

Kathryn Hoff-Patrinos,

Deputy General Counsel.

[FR Doc. 2012–25215 Filed 10–11–12; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice of Sunshine Act Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that at 10:45 a.m. on Tuesday, October 9, 2012, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters related to the Corporation's supervision, corporate, and resolution activities.

In calling the meeting, the Board determined, on motion of Director Thomas M. Hoenig (Appointive), seconded by Director Thomas J. Curry (Comptroller of the Currency), concurred in by Director Jeremiah O. Norton (Appointive), Director Richard Cordray (Director, Consumer Financial Protection Bureau), and Acting Chairman Martin J. Gruenberg, that Corporation business required its consideration of the matters which were to be the subject of this meeting on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the ''Government in the Sunshine Act'' (5 U.S.C. §§ 552b(c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550 17th Street NW., Washington, DC.

Dated: October 9, 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–25150 Filed 10–10–12; 11:15 am]

BILLING CODE P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Notice of Sunshine Act Meeting

October 5, 2012.

TIME AND DATE: 11:00 a.m., Wednesday, October 17, 2012.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (entry from F Street entrance).

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Black Castle Mining Co.,* Docket Nos. WEVA 2006–891–R et al.; and *Secretary of Labor* v. *Michael Vira, employed by Black Castle Mining Co.,* Docket No. WEVA 2007–421. (Issues include whether the Administrative Law Judge erred in concluding that pre-shift and on-shift examinations conducted by the operator were adequate.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Emogene Johnson,

Administrative Assistant.

[FR Doc. 2012–25233 Filed 10–10–12; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Notice

October 5, 2012.

TIME AND DATE: 10:00 a.m., Wednesday, October 17, 2012.

PLACE: The Richard V. Backley Hearing Room, Room 511N, 1331 Pennsylvania Avenue NW., Washington, DC 20004 (entry from F Street entrance)

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Manalapan Mining Co., Inc.,* Docket No. KENT 2008–737 (Issues include whether the Administrative Law Judge erred in concluding that certain violations were not the result of the operator's unwarrantable failure to comply.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFO: Jean Ellen (202) 434–9950/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Emogene Johnson,

Administrative Assistant.

[FR Doc. 2012–25234 Filed 10–10–12; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than October 29, 2012.

A. Federal Reserve Bank of Cleveland (Nadine Wallman, Vice President) 1455 East Sixth Street, Cleveland, Ohio 44101–2566:

1. *Tonti Financial Corp Trust, Tonti Financial Corp Trust II, The Alfred E. Tonti Trust, and their trustee, Thomas Tonti,* all of Columbus, Ohio; to acquire voting shares of Tonti Financial Corp, Columbus, Ohio, and thereby indirectly acquire voting shares of First Bank of Ohio, Tiffin, Ohio.

B. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Douglas Osborne and Donald Osborne, both of Ham Lake, Minnesota, as a group acting in concert, and Kenneth M. Welle and Lori M. Welle,* both of Dayton, Minnesota; to acquire voting shares of Community Pride Bank Corporation, Ham Lake, Minnesota, and thereby indirectly acquire voting shares of Community Pride Bank, Isanti, Minnesota.

Board of Governors of the Federal Reserve System, October 9, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–25120 Filed 10–11–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company

Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than November 8, 2012.

A. Federal Reserve Bank of St. Louis (Glenda Wilson, Community Affairs Officer) P.O. Box 442, St. Louis, Missouri 63166–2034:

1. *C & J Bennett Family Limited Partnership,* Hardinsburg, Kentucky; to become a bank holding company by acquiring at least 52 percent of the voting shares of Farmers Bancshares, Inc., and thereby indirectly acquire voting shares of Farmers Bank, both in Hardinsburg, Kentucky, and Leitchfield Deposit Bank & Trust Company, Leitchfield, Kentucky.

Board of Governors of the Federal Reserve System, October 9, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–25119 Filed 10–11–12; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 121 0157]

Alan B. Miller and Universal Health Services; Analysis of Agreement Containing Consent Orders To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of Federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before November 7, 2012.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/uhsascendconsent/* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''Universal Health Services, File No. 121 0157''on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/uhsascendconsent/,* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Janelle Filson (202–326–2882), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for October 5, 2012), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before November 7, 2012. Write ''Universal Health Services, File No. 121 0157'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm.* As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which * * * is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/uhsascendconsent/* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

may file a comment through that Web site.

If you file your comment on paper, write ''Universal Health Services, File No. 121 0157'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 7, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction and Background

The Federal Trade Commission (''Commission'') has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (''Consent Agreement'') from Alan B. Miller and Universal Health Services, Inc. (collectively, ''UHS''). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that otherwise would result from the merger of UHS with Ascend Health Corporation (''Ascend''). Under the terms of the proposed Consent Agreement, UHS is required to divest, within six months after the Decision and Order is issued, its Peak Behavioral Health Services facility (''Peak''), and all relevant assets and real property in the local market encompassing El Paso, Texas and its suburb, Santa Teresa, New Mexico (''El Paso/Santa Teresa''), to an acquirer that receives the approval of the Commission. UHS will acquire University Behavioral Health of El Paso, the Ascend facility, when the merger closes. To ensure that the divested assets attract a buyer that can adequately compete with UHS post-divestiture, the Consent Agreement requires a second UHS hospital, Mesilla Valley Hospital (''Mesilla Valley''), located in Las Cruces, New Mexico, to be divested if the original divestiture assets are not sold to an approved buyer within the six-month timeframe. UHS and Ascend have also agreed to hold the to-be-divested assets separate, and to maintain the economic viability, marketability, and competitiveness of both the Peak and Mesilla Valley assets until the potential acquirer is approved by the Commission and the divestiture is complete.

The proposed Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw the Consent Agreement, modify the Consent Agreement, or make it final.

On June 3, 2012, UHS agreed to acquire Ascend in a transaction valued at approximately $517 million. The Commission's complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by removing an actual, direct, and substantial competitor from one local market for acute inpatient psychiatric services. The proposed Consent Agreement would remedy the alleged violations by requiring a complete divestiture in the affected market. The divestiture will replace the competition that otherwise would be lost in the El Paso/Santa Teresa market as a result of the proposed acquisition.

II. The Parties

UHS, headquartered in King of Prussia, Pennsylvania, owns or operates 25 general acute care hospitals and 198 behavioral health facilities located in 36 states, Washington, DC, Puerto Rico, and the U.S. Virgin Islands. It is one of the largest hospital management companies in the United States, with 2011 revenues totaling approximately $7.5 billion. In 2011, UHS's 198 behavioral health facilities generated approximately $3.4 billion in revenue (25% of total revenues) from nearly 19,000 licensed beds and over 5 million patient days. The top revenue sources for its behavioral health centers are commercial payors (38% of 2011 net revenue), Medicaid (24%), and Medicare (17%). In November 2010, UHS completed its acquisition of Psychiatric Solutions, Inc., which had operated the nation's largest network of freestanding inpatient behavioral health facilities, subject to an FTC consent order that required UHS to divest facilities in Nevada, Delaware, and Puerto Rico.

Ascend, headquartered in New York, New York, owns or operates nine behavioral health facilities located in Arizona, Oregon, Texas, Utah, and Washington, including seven acute inpatient psychiatric hospitals, a substance abuse residential treatment center, and an addiction treatment center.

III. Acute Inpatient Psychiatric Services

UHS's proposed acquisition of Ascend poses substantial antitrust concerns in the relevant product market of acute inpatient psychiatric services provided to commercially insured patients. Acute inpatient psychiatric services are those provided for the diagnosis, treatment, and care of patients deemed to be a threat to themselves or others or unable to perform basic life functions, due to an acute psychiatric condition. Acute inpatient psychiatric care is distinct from other psychiatric services such as partial hospitalization, intensive outpatient programs, outpatient care, and residential treatment. Other, less intensive, psychiatric services are not substitutes for acute inpatient psychiatric services.

The acute inpatient psychiatric services market is local in nature. Analysis of patient flow data and evidence gathered from market participants indicate that patients and their families prefer to find care as close to home as possible and to stay within the city where they live or work. Accordingly, most residents of El Paso and Santa Teresa obtain acute inpatient psychiatric services from providers located in El Paso or Santa Teresa. Health plans also have internal guidelines or regulatory ''geo-access'' standards requiring that services be made available within a certain, usually short, distance from their members. The acute inpatient psychiatric services market affected by the proposed acquisition is thus limited to the El Paso/Santa Teresa market.

The proposed acquisition would lead to a virtual monopoly in the provision of acute inpatient psychiatric services provided to commercially insured patients in the El Paso/Santa Teresa market, which creates a strong presumption that the acquisition would create or enhance market power or facilitate its exercise. The presumption of anticompetitive harm is further supported by evidence of the close competition between the UHS- and Ascend-owned facilities that would be eliminated by the proposed merger. Consumers in El Paso/Santa Teresa have benefitted from the head-to-head competition in the form of lower health

care costs, higher quality of care, and improved service offerings. Left unremedied, the proposed acquisition likely would cause anticompetitive harm by enabling UHS to profit by unilaterally raising the reimbursement rates negotiated with commercial health plans. These costs are ultimately borne by consumers in the form of higher premiums, co-pays, and other out-of-pocket costs. The loss of competition also reduces UHS?s incentive to improve quality and provide better service.

New entry or expansion is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition. While regulatory barriers to opening a new psychiatric facility or unit are lower in Texas and New Mexico than in other states (*e.g.,* there are no Certificate of Need regulations in either state), local zoning regulations, Medicaid and Medicare certifications, and the need to develop strong relationships with local patient referral sources hinder the ability of firms to enter the market. Cuts to Medicaid funding may also affect the financial incentive of a provider to offer inpatient psychiatric services. Thus, it is unlikely that new entry or expansion sufficient to achieve a significant market impact will occur in a timely manner.

IV. The Proposed Consent Agreement

The proposed Consent Agreement wholly remedies the anticompetitive effects in the El Paso/Santa Teresa market by requiring UHS to divest Peak, located in Santa Teresa, New Mexico, and its associated operations and businesses within six months after issuance of the Decision and Order. The potential acquirer of Peak is subject to prior approval of the Commission. The Consent Agreement also provides that, if Peak is not sold to an approved acquirer within six months, a Divestiture Trustee will be appointed and empowered to divest both Peak and Mesilla Valley. The purpose of this provision is to address the uncertainty of whether Peak alone is sufficient to attract an acquirer that would compete as effectively as UHS competed prior to the merger.

Until completion of the requisite divestiture(s), UHS is required to abide by the Order to Hold Separate and Maintain Assets, which includes a requirement that UHS hold Peak separate from its other businesses and facilities, and a requirement to take all actions necessary to maintain the economic viability, marketability, and competitiveness of the both the Peak and Mesilla Valley assets. The Consent Agreement also requires UHS to provide transitional services to the approved acquirer for one year, as needed to assist the acquirer with operating the divested assets as a viable and ongoing business. In addition, the proposed order allows the Commission to appoint a Hold Separate Trustee to oversee UHS's compliance with the Order to Hold Separate and Maintain Assets. Finally, the proposed order contains a ten-year prior notice requirement for acquisitions of acute inpatient psychiatric service providers in the local area, as well as compliance reporting requirements.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2012–25140 Filed 10–11–12; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel: Notice of Charter Renewal

This gives notice under the Federal Advisory Committee Act (Pub. L. 92–463) of October 6, 1972, that Disease, Disability, and Injury Prevention and Control Special Emphasis Panel, Centers for Disease Control and Prevention, Department of Health and Human Services, has been renewed for a 2-year period through September 18, 2014.

For information, contact John Kastenbauer, J.D., Designated Federal Officer, Disease, Disability, and Injury Prevention and Control Special Emphasis Panel, Centers for Disease Control and Prevention, Department of Health and Human Services, 1600 Clifton Road NE., Mailstop E11, Atlanta, Georgia 30333, telephone (770)488–4778 or fax (770)488–4890.

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: October 5, 2012.

John Kastenbauer,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–25096 Filed 10–11–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Advisory Board on Radiation and Worker Health (ABRWH or Advisory Board), National Institute for Occupational Safety and Health (NIOSH)

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), the Centers for Disease Control and Prevention announces the following meeting of the aforementioned committee:

Time and Date: 11:00 a.m.–3:00 p.m., November 5, 2012.

Place: Audio Conference Call via FTS Conferencing. The USA toll-free, dial-in number is 1–866–659–0537 and the pass code is 9933701.

Status: Open to the public, but without a verbal public comment period. Written comment should be provided to the contact person below in advance of the meeting.

Background: The Advisory Board was established under the Energy Employees Occupational Illness Compensation Program Act of 2000 to advise the President on a variety of policy and technical functions required to implement and effectively manage the new compensation program. Key functions of the Advisory Board include providing advice on the development of probability of causation guidelines, which have been promulgated by the Department of Health and Human Services (HHS) as a final rule; advice on methods of dose reconstruction, which have also been promulgated by HHS as a final rule; advice on the scientific validity and quality of dose estimation and reconstruction efforts being performed for purposes of the compensation program; and advice on petitions to add classes of workers to the Special Exposure Cohort (SEC).

In December 2000, the President delegated responsibility for funding, staffing, and operating the Advisory Board to HHS, which subsequently delegated this authority to the CDC. NIOSH implements this responsibility for CDC. The charter was issued on August 3, 2001, renewed at appropriate

intervals, most recently, August 3, 2011, and will expire on August 3, 2013.

Purpose: This Advisory Board is charged with (a) providing advice to the Secretary, HHS, on the development of guidelines under Executive Order 13179; (b) providing advice to the Secretary, HHS, on the scientific validity and quality of dose reconstruction efforts performed for this program; and c) upon request by the Secretary, HHS, advising the Secretary on whether there is a class of employees at any Department of Energy facility who were exposed to radiation but for whom it is not feasible to estimate their radiation dose, and on whether there is reasonable likelihood that such radiation doses may have endangered the health of members of this class.

Matters to be Discussed: The agenda for the conference call includes: SEC Petition for Battelle Laboratories—King Avenue (Columbus, Ohio); Subcommittee and Work Group Updates; SEC Petition Evaluations Update for the December 2012 Advisory Board Meeting; Plans for December 2012 Advisory Board Meeting; and Advisory Board Correspondence.

The agenda is subject to change as priorities dictate. Because there is not an oral public comment period, written comments may be submitted. Any written comments received will be included in the official record of the meeting and should be submitted to the contact person below in advance of the meeting.

Contact Person for More Information: Theodore M. Katz, M.P.A., Executive Secretary, NIOSH, CDC, 1600 Clifton Road NE., Mailstop: E–20, Atlanta, Georgia 30333, Telephone (513)533–6800, Toll Free 1–800–CDC–INFO, Email *ocas@cdc.gov.*

The Director, Management Analysis and Services Office, has been delegated the authority to sign **Federal Register** notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: October 5, 2012.

John Kastenbauer,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention.

[FR Doc. 2012–25097 Filed 10–11–12; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10237 and CMS–10137]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, the Centers for Medicare & Medicaid Services (CMS), Department of Health and Human Services, is publishing the following summary of proposed collections for public comment. Interested persons are invited to send comments regarding this burden estimate or any other aspect of this collection of information, including any of the following subjects: (1) The necessity and utility of the proposed information collection for the proper performance of the Agency's function; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

1. *Type of Information Collection Request:* Revision of a currently approved collection. *Title of Information Collection:* Part C Medicare Advantage and 1876 Cost Plan Expansion Application; *Use:* Collection of this information is mandated in Part C of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA) in Subpart K of 42 CRF 422 entitled *''Contracts with Medicare Advantage Organizations.''* In addition, the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA) amended titles XVII and XIX of the Social Security Act to improve the Medicare program.

In general, coverage for the prescription drug benefit is provided through prescription drug plans (PDPs) that offer drug-only coverage or through Medicare Advantage (MA) organizations that offer integrated prescription drug and health care products (MA–PD plans). PDPs must offer a basic drug benefit. Medicare Advantage Coordinated Care Plans (MA–CCPs) either must offer a basic benefit or may offer broader coverage for no additional cost. Medicare Advantage Private Fee for Service Plans (MA–PFFS) may choose to offer enrollees a Part D benefit. Employer Group Plans may also provide Part D benefits. If any of the contracting organizations meet basic requirements, they may also offer supplemental benefits through enhanced alternative coverage for an additional premium.

Organizations wishing to provide healthcare services under MA and/or MA–PD plans must complete an application, file a bid, and receive final approval from CMS. Existing MA plans may request to expand their contracted service area by completing the Service Area Expansion (SAE) application. Applicants may offer a local MA plan in a county, a portion of a county (i.e., a partial county) or multiple counties. Applicants may offer a MA regional plan in one or more of the 26 MA regions.

Since the publication of the 60-day notice, the information collection request has been revised to provide clarification to applicants, to ensure consistency throughout the entire application, and to reduce confusion among applicants. As a result of those changes, the overall burden associated with the collection has decreased from 22,995 to 21,581 hours. *Form Number:* CMS–10237 (OCN 0938–0935). *Frequency:* Yearly. *Affected Public:* Private Sector (Business or other for-profits, Not-for-profit institutions). *Number of Respondents:* 566. *Total Annual Responses:* 566. *Total Annual Hours:* 21,581. (For policy questions regarding this collection contact Barbara Gullick at 410–786–0563. For all other issues call 410–786–1326.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title:* Application for New and Expanding Medicare Prescription Drug Plans and Medicare Advantage Prescription Drug (MA–PD), including Cost Plans and Employer Group Waiver Plans; *Use:* The Medicare Prescription Drug Benefit program was established by section 101 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) and is codified in section 1860D of the Social Security Act (the Act). Section 101 of the MMA amended Title XVIII of the Social Security Act by redesignating Part D as Part E and inserting a new Part D, which establishes the voluntary Prescription Drug Benefit Program (''Part D''). The MMA was amended on July 15, 2008 by the enactment of the Medicare Improvements for Patients and Providers Act of 2008 (MIPPA), on March 23, 2010 by the enactment of the Patient Protection and Affordable Care Act and on March 30, 2010 by the

enactment the Health Care and Education Reconciliation Act of 2010 (collectively the Affordable Care Act).

Coverage for the prescription drug benefit is provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA–PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Waiver Plans (EGWP) may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application.

Collection of this information is mandated in Part D of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) in Subpart 3. The application requirements are codified in Subpart K of 42 CFR 423 entitled *''Application Procedures and Contracts with PDP Sponsors.''*

Effective January 1, 2006, the Part D program established an optional prescription drug benefit for individuals who are entitled to Medicare Part A or enrolled in Part B. In general, coverage for the prescription drug benefit is provided through PDPs that offer drug-only coverage, or through MA organizations that offer integrated prescription drug and health care coverage (MA–PD plans). PDPs must offer a basic drug benefit. Medicare Advantage Coordinated Care Plans (MA–CCPs) must offer either a basic benefit or may offer broader coverage for no additional cost. Medicare Advantage Private Fee for Service Plans (MA–PFFS) may choose to offer a Part D benefit. Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Plans may also provide a Part D benefit. If any of the contracting organizations meet basic requirements, they may also offer supplemental benefits through enhanced alternative coverage for an additional premium.

Applicants may offer either a PDP or MA–PD plan with a service area covering the nation (i.e., offering a plan in every region) or covering a limited number of regions. MA–PD and Cost Plan applicants may offer local plans.

There are 34 PDP regions and 26 MA regions in which PDPs or regional MA–PDs may be offered respectively. The MMA requires that each region have at least two Medicare prescription drug plans from which to choose, and at least one of those must be a PDP. Requirements for contracting with Part D Sponsors are defined in Part 423 of 42 CFR.

This clearance request is for the information collected to ensure applicant compliance with CMS requirements and to gather data used to support determination of contract awards. *Form Number:* CMS–10137(OCN: 0938–0936); *Frequency:* Yearly; *Affected Public:* Private Sector—Business or other for-profits and Not-for-profit institutions; *Number of Respondents:* 241; *Total Annual Responses:* 241; *Total Annual Hours:* 2,132. (For policy questions regarding this collection contact Linda Anders at 410–786–0459. For all other issues call 410–786–1326.)

To be assured consideration, comments and recommendations for the proposed information collections must be received by the OMB desk officer at the address below, no later than 5 p.m. on *November 13, 2012.*

OMB, Office of Information and Regulatory Affairs, Attention: CMS Desk Officer, Fax Number: (202) 395–6974, Email: *OIRA_submission@omb.eop.gov.*

Dated: October 5, 2012.

Martique Jones,

Director, Regulations Development Group, Division B, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2012–25062 Filed 10–11–12; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0001]

Risk Communication 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: Risk Communication 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 November 2, 2012, from 8 a.m. to 3 p.m.

Location: FDA White Oak Campus, Building 31 Conference Center, Great Room, 10903 New Hampshire Ave., Silver Spring, MD 20993. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Lee L. Zwanziger, Risk Communication Staff, Office of Planning, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 3278, Silver Spring, MD 20993, 301–796–9151, FAX: 301–847–8611, email: *RCAC@fda.hhs.gov,* 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 November 2, 2012, the Committee will discuss general factors in risk communication about FDA regulated products, including approaches to avoid message fatigue and related communication barriers such as prevention or warning fatigue or inaccurate risk perception.

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 October 25, 2012. Oral presentations from the public will

be scheduled between approximately 10:30 a.m. and 11:30 a.m. on November 2, 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 October 25, 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 October 26, 2012. Interested persons can also log on to *https://collaboration.fda.gov/rcac/* to hear and see the proceedings.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

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 Lee L. Zwanziger 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: October 9, 2012.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2012–25101 Filed 10–11–12; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

National Advisory Council on the National Health Service Corps Notice of Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given of the following meeting:

Name: National Advisory Council on the National Health Service Corps (NHSC).

Dates and Times: November 1, 2012—8:30 a.m.–4:30 p.m., November 2, 2012—8:00 a.m.–12:00 p.m.

Place: Health Resources and Services Administration (HRSA), Parklawn Building (and via audio conference call), 5600 Fishers Lane, Room 16–49, Rockville, MD 20857.

Status: The meeting will be open to the public.

Agenda: The Council is convening in Rockville, Maryland, to hear HRSA and NHSC program updates and discuss NHSC's retention strategy and inter-agency workforce efforts. A portion of the meeting will be open for public comment and questions on November 2.

The public can join the meeting via audio conference call on the dates and times specified above using the following information: Dial-in number: 1–888–455–9651; Passcode: 7699967.

For Further Information Contact: Njeri Jones, Bureau of Clinician Recruitment and Service, Health Resources and Services Administration, Parklawn Building, Room 13–64, 5600 Fishers Lane, Rockville, Maryland 20857; email: *NJones@hrsa.gov;* Telephone: 301–443–2541.

Dated: October 5, 2012.

Bahar Niakan,

Director, Division of Policy and Information Coordination.

[FR Doc. 2012–25192 Filed 10–11–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Rural Health Network Development Program

AGENCY: Health Resources and Services Administration (HRSA), HHS.

ACTION: Notice of Non-competitive Replacement Award to Siloam Springs Regional Health Cooperative, Inc.

SUMMARY: The Health Resources and Services Administration (HRSA) is issuing a non-competitive replacement award under the Rural Health Network Development Program to the Siloam Springs Regional Health Cooperative, Inc. This non-competitive replacement award will continue activities to improve the treatment and prevention of chronic disease, increase provider knowledge and effective use of health information technology and perform network development activities to ensure the sustainability and viability of a rural health network in order to serve rural, medically underserved residents in rural, northwest Arkansas and northeast Oklahoma.

SUPPLEMENTARY INFORMATION:

Former Grantee of Record: ARcare.

Original Period of Grant Support: May 1, 2011, to April 30, 2014.

Replacement Awardee: Siloam Springs Regional Health Cooperative, Inc.

Amount of Replacement Award: $179,748.

Period of Replacement Award: The period of support for this award is October 1, 2012, to April 30, 2014.

Authority: Section 330A(f) of the Public Health Service Act (42 U.S.C. 254(c)(f), as amended.

Catalog of Federal Domestic Assistance Number: 93.912.

Justification for the Exception to Competition: The primary goals of the project funded through the Rural Health Network Development Grant Program are to improve the capacity of network members to treat and prevent chronic disease, increase provider knowledge and effective use of health information technology, and strengthen network sustainability. The current grantee, ARcare, was originally awarded the Rural Health Network Development Grant D06RH21666 on May 1, 2011, to serve as the grantee of record representing the rural health network serving counties in northwest Arkansas and northeast Oklahoma. Since May 1, 2011, the Siloam Springs Regional Health Cooperative, Inc. (SSRHC), an organization composed of the participating network members, was primarily responsible for administering the program activities of the Rural Health Network Development Project. SSRHC has now obtained 501(c)3 status; and ARcare notified HRSA that, while they will remain involved in the project, they would like to relinquish their responsibilities as grantee of record to SSRHC to ensure efficient administration of the award and strengthen the Network's future viability and growth. SSRHC has demonstrated a history of successfully managing and achieving project goals and now has the organizational structure to support the fiscal management responsibilities of the grant. This replacement award will

enable SSRHC to expand access to, coordinate, and improve the quality of essential health care services in the medically underserved counties of northwest Arkansas and northeast Oklahoma.

FOR FURTHER INFORMATION CONTACT: Leticia Manning, Public Health Analyst, Office of Rural Health Policy, Health Resources and Services Administration, Room 5A–55, 5600 Fishers Lane, Rockville, Maryland 20857; (301) 443–8335; email *Leticia.Manning@hrsa.hhs.gov.*

Dated: October 4, 2012.

Mary K. Wakefield,

Administrator.

[FR Doc. 2012–25195 Filed 10–11–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 Child Health and Human Development Special Emphasis Panel; Optimizing Social Communication in Autism: Translation and Applied Studies.

Date: November 7, 2012.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6100 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Marita R. Hopmann, Ph.D., Scientific Review Officer, Division Of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6911, *hopmannm@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 5, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25066 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the Board of Scientific Counselors, National Institute of Mental Health.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended, for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Institute of Mental Health, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors, National Institute of Mental Health.

Date: November 5–7, 2012.

Time: November 5, 2012, 11:30 a.m. to November 7, 2012, 3:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators, to include the Unit on Learning and Decision Making, the Section on Integrative Neuroimaging, the Section on Neurocircuitry, the Section on Cognitive Neuropsychology, the Section on Functional Imaging Methods, the Unit on Learning and Plasticity, and the Section on Neuroadaptation and Protein Metabolism.

Place: Hilton Washington/Rockville, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Rebecca C. Steiner, Ph.D., Executive Secretary, National Institute of Mental Health, NIH, 6001 Executive Blvd., Room 6149, MSC 9606, Bethesda, MD 20892–9606, 301–443–4525, *steinerr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award; 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: October 4, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25067 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Cancer 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 Board of Scientific Counselors for Clinical Sciences and Epidemiology National Cancer Institute.

The meeting will be closed to the public as indicated below in accordance with the provisions set forth in section 552b(c)(6), Title 5 U.S.C., as amended for the review, discussion, and evaluation of individual intramural programs and projects conducted by the National Cancer Institute, including consideration of personnel qualifications and performance, and the competence of individual investigators, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Board of Scientific Counselors for Clinical Sciences and Epidemiology, National Cancer Institute, BSC Clinical Sciences and Epidemiology Meeting.

Date: November 13, 2012.

Time: 8:30 a.m. to 3:30 p.m.

Agenda: To review and evaluate personal qualifications and performance, and competence of individual investigators.

Place: National Institutes of Health, Building 31, Conference Room 6, 31 Center Drive, Bethesda, MD 20892.

Contact Person: Brian E. Wojcik, Ph.D., Senior Review Administrator, Institute Review Office, Office of the Director, National Cancer Institute, 6116 Executive Boulevard, Room 2201, Bethesda, MD 20892, (301) 496–7628, *wojcikb@mail.nih.gov.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://deainfo.nci.nih.gov/advisory/bsc/cse/cse.htm.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.392, Cancer Construction; 93.393, Cancer Cause and Prevention

Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower; 93.399, Cancer Control, National Institutes of Health, HHS)

Dated: October 5, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25068 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Peer Review of R13 Grant Applications.

Date: November 15, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, 45 Center Drive, Room 3An18, Bethesda, MD 20892.

Contact Person: Lee Warren Slice, Ph.D., Scientific Review Officer, David Geffen School of Medicine, University of California, Los Angeles, Warren Hall, 11–151, 900 Veteran Avenue, Los Angeles, CA 90095, 310–206–0909, *lslice@mednet.ucla.edu.*

Name of Committee: National Institute of General Medical Sciences Initial Review Group; Training and Workforce Development Subcommittee—B.

Date: November 15–16, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Executive Plaza North, 6130 Executive Boulevard, Room H, Rockville, MD 20892.

Contact Person: Arthur L. Zachary, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, Natcher Building, Room 3An–12, Bethesda, MD 20892, *zacharya@nigms.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives, National Institutes of Health, HHS)

Dated: October 5, 2012.

Melanie J. Gray,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25069 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 Child Health and Human Development Initial Review Group, Obstetrics and Maternal-Fetal Biology Subcommittee.

Date: October 23, 2012

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Double Tree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Peter Zelazowski, Ph.D. Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–6902, *peter.zelazowski@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. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 5, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25071 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 Child Health and Human Development Special Emphasis Panel, Reproductive Centers.

Date: November 7–9, 2012.

Time: 7:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Dennis E. Leszczynski, Ph.D., Scientific Review Officer, Division of Scientific Review, National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5B01, Bethesda, MD 20892, 301–435–2717, *leszcyd@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 5, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25073 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The 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 Child Health and Human Development Initial Review Group; Health, Behavior, and Context Subcommittee.

Date: October 22, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852.

Contact Person: Michele C. Hindi-Alexander, Ph.D., Scientific Review Officer, Division of Scientific Review, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5b01, Bethesda, MD 20892, 301–435–8382, *hindialm@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. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: October 5, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25072 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel Clinical and Translational Imaging Applications.

Date: October 22, 2012.

Time: 10:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Eileen W. Bradley, DSC, Chief, SBIB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5100, MSC 7854, Bethesda, MD 20892, (301) 435–1179, *bradleye@csr.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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, Member Conflict: NeuroAIDS and Substance Abuse.

Date: October 22, 2012.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Mary Clare Walker, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5208, MSC 7852, Bethesda, MD 20892, (301) 435–1165, *walkermc@csr.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.

Name of Committee: Center for Scientific Review Special Emphasis Panel, PA09–206: Advanced Tools and Technologies for Cerebrospinal Fluid, Shunts SBIR.

Date: November 1, 2012.

Time: 7:30 p.m. to 8:30 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: Eugene Carstea, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5194, MSC 7846, Bethesda, MD 20892, (301) 408–9756, *carsteae@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group, Behavioral and Social Consequences of HIV/AIDS Study Section.

Date: November 6–7, 2012.

Time: 8:00 a.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites Washington DC—Convention Center, 900 10th Street NW., Washington, DC 20001.

Contact Person: Mark P. Rubert, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5218, MSC 7852, Bethesda, MD 20892, 301–806–6596, *rubertm@csr.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group, AIDS Discovery and Development of Therapeutics Study Section.

Date: November 6, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Mayflower Park Hotel, 405 Olive Way, Seattle, WA 98101.

Contact Person: Shiv A. Prasad, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5220, MSC 7852, Bethesda, MD 20892, 301–443–5779, *prasads@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Basic and Integrative Bioengineering.

Date: November 6, 2012.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: David R. Filpula, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6181, MSC 7892, Bethesda, MD 20892, 301–435–2902, *filpuladr@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR11–301, 303: Development of Appropriate Pediatric Formulations, and Pediatric Drug Delivery System.

Date: November 6, 2012.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert C. Elliott, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR–11–

346: Interventions for Health Promotion and Disease Prevention, in Native American Populations.

Date: November 7, 2012.

Time: 8:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Peter J. Perrin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0682, *perrinp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR12–017: Shared Instrumentation: Confocal Microscopy.

Date: November 7–8, 2012.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Renaissance Baltimore Harborplace Hotel, 202 E Pratt Street, Baltimore, MD 21202.

Contact Person: Joseph Thomas Peterson, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9694, *petersonjt@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Small Business: Cell, Computational and Molecular Biology.

Date: November 7, 2012.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892.

Contact Person: Allen Richon, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6184, MSC 7892, Bethesda, MD 20892, 301–435–1024, *allen.richon@nih.hhs.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, PAR–12–182: Native American Research Centers for Health.

Date: November 7–9, 2012.

Time: 4:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Embassy Suites at the Chevy Chase Pavilion, 4300 Military Road NW., Washington, DC 20015.

Contact Person: Mushtaq A. Khan, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2176, MSC 7818, Bethesda, MD 20892, 301–435–1778, *khanm@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Program Project: Center for Macromolecular Crystallography.

Date: November 7–9, 2012.

Time: 5:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Argonne Guest House, Argonne National Laboratory, 9700 S. Cass Avenue., Bldg. 460, Argonne, IL 60439.

Contact Person: Nuria E. Assa-Munt, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4164, MSC 7806, Bethesda, MD 20892, (301) 451–1323, *assamunu@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: October 5, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25070 Filed 10–11–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2011–1106]

Dynamic Positioning Operations Guidance for Vessels Other Than Mobile Offshore Drilling Units Operating on the U.S. Outer Continental Shelf

AGENCY: Coast Guard, DHS.

ACTION: Notice of Recommended Interim Voluntary Guidance.

SUMMARY: On May 4, 2012 the Coast Guard published a notice of recommended interim voluntary guidance titled ''Mobile Offshore Drilling Unit Dynamic Positioning Guidance''. The notice recommended owners and operators of Mobile Offshore Drilling Units (MODUs) follow Marine Technology Society (MTS) Dynamic Positioning (DP) operations guidance for MODUs. The Coast Guard is now also recommending owners and operators of all vessels other than MODUs conducting Outer Continental Shelf (OCS) activities on the U.S. OCS follow the appropriate MTS DP operations guidance for these vessels. In particular, the Coast Guard recommends owners and operators of these vessels operate within an Activity Specific Operating Guideline for each activity and operate with its Critical Activity Mode of Operation when that activity is critical.

DATES: The policy outlined in this document is effective October 12, 2012.

ADDRESSES: This notice and the documents referenced within are available in the docket and can be viewed by going to *www.regulations.gov,* inserting USCG–2011–1106 in the ''Keyword'' box, and then clicking ''Search.'' The recommended interim voluntary guidance titled ''Mobile Offshore Drilling Unit (MODU) Dynamic Positioning (DP) Guidance'' is also available at *www.uscg.mil* and can be viewed by clicking the link to the Office of Design and Engineering Standards (CG–ENG) under the ''Units,'' ''USCG Headquarters Organization,'' and ''CG–5P'' tabs, and scrolling down to ''Policy Documents.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this notice or the policy, call or email Commander Joshua Reynolds, Office of Design and Engineering Standards, Human Element and Ship Design Division (CG–ENG–1), telephone (202) 372–1355, or email *Joshua.D.Reynolds@uscg.mil.* If you have questions on viewing material in the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background and Intent To Publish Rule

On July 7, 2010, in response to a request from the Coast Guard, the National Offshore Safety Advisory Committee (NOSAC) issued the report ''Recommendations for Dynamic Positioning System Design and Engineering, Operational and Training Standards''. The report recommended the Coast Guard establish minimum Dynamic Positioning (DP) reliability standards and contained draft guidance from the Marine Technology Society (MTS) DP Committee for Mobile Offshore Drilling Units (MODUs), logistics and construction vessels, which the MTS has since completed. On May 4, 2012, the Coast Guard published a notice of recommended interim voluntary guidance titled ''Mobile Offshore Drilling Unit Dynamic Positioning Guidance'' 77 FR 26562. The notice highlighted that DP incidents on MODUs can result in severe consequences including loss of life, pollution, and property damage and recommended owners and operators of MODUs follow MTS DP operations guidance for MODUs. In particular, the Coast Guard recommended owners and operators of MODUs operate within a Well Specific Operating Guideline (WSOG) while attached to the seafloor of the U.S. Outer Continental Shelf (OCS) and operate within its Critical Activity Mode of Operations (CAMO) during critical activities.

The Coast Guard recognizes that DP incidents on logistics and construction vessels also can result in severe

consequences. Because of this potential, and the recommendation from the NOSAC to set minimum DP reliability standards, the Coast Guard intends to publish a rule that addresses minimum DP design and operating standards for all vessels conducting OCS activities using DP on the U.S. OCS.

Interim Voluntary DP Guidance

Until such time as there is a regulatory requirement, the Coast Guard recommends owners and operators of all vessels other than MODUs conducting OCS activities on the U.S. OCS voluntarily follow guidance provided in the ''DP Operations Guidance Prepared through the Dynamic Positioning Committee of the Marine Technology Society to aid in the safe and effective management of DP Operations'', Part 2, Appendix 2, DP Project/Construction Vessels (July 2012)'' or ''Appendix 3, DP Logistics vessels (July 2012)'' as appropriate. These documents are available at *http://www.dynamic-positioning.com/dp_operations_guidance.cfm.* In particular, the Coast Guard recommends owners and operators of these vessels operate within an Activity Specific Operating Guideline (ASOG) for each OCS activity and operate within the vessel's CAMO when that OCS activity is critical. Each ASOG should clearly state whether the activity it covers is critical. The Coast Guard further recommends that any vessel engaged in DP Simultaneous Operations (SIMOPS) follow applicable WSOGs and/or ASOGs for DP SIMOPS and operate within their respective CAMOs.

The guidance contained in the notice is not a substitute for applicable legal requirements, nor is it itself a regulation. It is not intended to nor does it impose legally binding requirements on any party. It represents the Coast Guard's current thinking on this topic and may assist industry, mariners, the general public, and the Coast Guard, as well as other Federal and State regulators, in applying statutory and regulatory requirements. You can use an alternative approach if the approach satisfies the requirements of the applicable statutes and regulations.

Authority: This notice is issued under the authority of 5 U.S.C. 552(a), 43 U.S.C. 1331, *et seq.,* and 33 CFR 1.05–1.

Dated: October 2, 2012.

J.G. Lantz,

Director of Commercial Regulations and Standards, U.S. Coast Guard.

[FR Doc. 2012–25132 Filed 10–11–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

[Docket No. USCG–2012–0936]

Commercial Fishing Safety Advisory Committee; Meeting

AGENCY: Coast Guard, DHS.

ACTION: Notice of federal advisory committee meeting.

SUMMARY: The Commercial Fishing Safety Advisory Committee (CFSAC) will meet in Washington, DC to discuss various issues relating to safety in the commercial fishing industry. This meeting will be open to the public.

DATES: The Committee will meet on October 30, 2012, from 8:30 a.m. to 5 p.m., and on October 31, 2012, from 8:30 a.m. to 5:00 p.m. This meeting may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before October 25, 2012.

ADDRESSES: The Committee will meet at the Coast Guard Headquarters Building (Room 6103), 2100 2nd Street SW., Washington, DC 20593. Attendees will be required to provide a picture identification card and pass through magnetometer in order to gain admittance to the U.S. Coast Guard Headquarters Building. Visitors should also arrive at least 30 minutes in case of long lines at the entrance.

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section, as soon as possible.

To facilitate public participation, we are inviting public comment on the issues to be considered by the committee as listed in the ''Agenda'' section below. You may submit written comments no later than October 25, 2012, and they must be identified by docket number [USCG–2012–0936] using one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *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. We encourage use of electronic submissions because security screening may delay delivery of mail.
- *Fax:* (202) 493–2251.
- *Hand Delivery:* Same as mail address above, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal Holidays. The telephone number is 202–366–9329.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and docket number [USCG–2012–0936]. All submissions received will be posted without alteration at *www.regulations.gov,* including any personal information provided. 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).

Docket: Any background information or presentations available prior to the meeting will be published in the docket. For access to the docket to read background documents or submissions received by the CFSAC, go to *http://www.regulations.gov.,* insert ''USCG–2012–0936'' in the ''Keyword'' box, and then click ''Search''.

Public comments and questions may be taken by the Designated Federal Official (DFO) throughout the meeting as each issue is presented or discussed. Additionally, a public presentation/comment period will be offered at the end of each day of the meeting, October 30, and 31, 2012, if needed. Speakers are requested to limit their comments to 5 minutes. Please note that the public comment periods, scheduled for 4 p.m. to 5 p.m., will end following the last call for comments. Contact the individual listed below to register as a speaker.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Kemerer, Alternate Designated Federal Official (ADFO) of CFSAC, Commandant (CG–CVC–3), U.S. Coast Guard Headquarters, 2100 Second Street SW., Mail Stop 7581, Washington, DC 20593–7581; telephone 202–372–1249, fax 202–372–1917, email: *jack.a.kemerer@uscg.mil.* If you have any questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. (Pub. L. 92–463). The CFSAC is authorized by 46 U.S.C. 4508 and the Committee's purpose is to provide advice and recommendations to the U.S. Coast Guard and the Department of Homeland Security on matters relating to the safety of commercial fishing industry vessels.

Agenda

The CFSAC will meet to review, discuss and formulate recommendations on topics contained in the agenda:

Day 1 of the meeting will include reports, presentations, and subcommittee sessions as follows:

(1) Status of Commercial Fishing Vessel Safety Rulemaking projects resulting from requirements set forth in the Coast Guard Authorization Act of 2010.

(2) Commercial Fishing Vessel Safety District Coordinators reports on activities and initiatives, and implementation of mandatory dockside safety examinations.

(3) Industry Representatives updates on safety and survival equipment, and class rules for fishing vessels.

(4) Presentation on fatality rates by regions and fisheries, and update on safety and risk reduction related projects by the National Institute for Occupational Safety and Health.

(5) Presentation on safety standards by the National Oceanic and Atmospheric Administration, National Marine Fisheries Service.

(6) Subcommittee sessions on (a) training program requirements for individuals in charge of a vessel, and (b) standards for alternative safety compliance program(s) development.

(7) Public comment period.

Day 2 of the meeting will primarily be dedicated to continuing subcommittee sessions on training requirements and alternative safety programs, but will also include:

(1) Reports and recommendations from the subcommittees to the full committee for approval.

(2) Other safety recommendations and safety program strategies from the committee.

(3) Future plans and long range goals for the committee.

(4) Public comment period.

Paul F. Thomas,

Captain, U.S. Coast Guard, Director of Inspections and Compliance.

[FR Doc. 2012–25124 Filed 10–11–12; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5601–N–40]

Federal Property Suitable as Facilities To Assist the Homeless

AGENCY: Office of the Assistant Secretary for Community Planning and Development, HUD.

ACTION: Notice.

SUMMARY: This Notice identifies unutilized, underutilized, excess, and surplus Federal property reviewed by HUD for suitability for use to assist the homeless.

FOR FURTHER INFORMATION CONTACT: Juanita Perry, Department of Housing and Urban Development, 451 Seventh Street SW., Room 7266, Washington, DC 20410; telephone (202) 402–3970; TTY number for the hearing- and speech-impaired (202) 708–2565 (these telephone numbers are not toll-free), or call the toll-free Title V information line at 800–927–7588.

SUPPLEMENTARY INFORMATION: In accordance with 24 CFR part 581 and section 501 of the Stewart B. McKinney Homeless Assistance Act (42 U.S.C. 11411), as amended, HUD is publishing this Notice to identify Federal buildings and other real property that HUD has reviewed for suitability for use to assist the homeless. The properties were reviewed using information provided to HUD by Federal landholding agencies regarding unutilized and underutilized buildings and real property controlled by such agencies or by GSA regarding its inventory of excess or surplus Federal property. This Notice is also published in order to comply with the December 12, 1988 Court Order in *National Coalition for the Homeless* v. *Veterans Administration,* No. 88–2503–OG (D.D.C.).

Properties reviewed are listed in this Notice according to the following categories: Suitable/available, suitable/unavailable, suitable/to be excess, and unsuitable. The properties listed in the three suitable categories have been reviewed by the landholding agencies, and each agency has transmitted to HUD: (1) Its intention to make the property available for use to assist the homeless, (2) its intention to declare the property excess to the agency's needs, or (3) a statement of the reasons that the property cannot be declared excess or made available for use as facilities to assist the homeless.

Properties listed as suitable/available will be available exclusively for homeless use for a period of 60 days from the date of this Notice. Where property is described as for ''off-site use only'' recipients of the property will be required to relocate the building to their own site at their own expense. Homeless assistance providers interested in any such property should send a written expression of interest to HHS, addressed to Theresa Ritta, Division of Property Management, Program Support Center, HHS, room 5B–17, 5600 Fishers Lane, Rockville, MD 20857; (301) 443–2265. (This is not a toll-free number.) HHS will mail to the interested provider an application packet, which will include instructions for completing the application. In order to maximize the opportunity to utilize a suitable property, providers should submit their written expressions of interest as soon as possible. For complete details concerning the processing of applications, the reader is encouraged to refer to the interim rule governing this program, 24 CFR part 581.

For properties listed as suitable/to be excess, that property may, if subsequently accepted as excess by GSA, be made available for use by the homeless in accordance with applicable law, subject to screening for other Federal use. At the appropriate time, HUD will publish the property in a Notice showing it as either suitable/available or suitable/unavailable.

For properties listed as suitable/unavailable, the landholding agency has decided that the property cannot be declared excess or made available for use to assist the homeless, and the property will not be available.

Properties listed as unsuitable will not be made available for any other purpose for 20 days from the date of this Notice. Homeless assistance providers interested in a review by HUD of the determination of unsuitability should call the toll free information line at 1–800–927–7588 for detailed instructions or write a letter to Ann Marie Oliva at the address listed at the beginning of this Notice. Included in the request for review should be the property address (including zip code), the date of publication in the **Federal Register**, the landholding agency, and the property number.

For more information regarding particular properties identified in this Notice (i.e., acreage, floor plan, existing sanitary facilities, exact street address), providers should contact the appropriate landholding agencies at the following addresses: AIR FORCE: Mr. Robert Moore, Air Force Real Property Agency, 143 Billy Mitchell Blvd., San Antonio, TX 78226, (210) 925–3047; (This is not toll-free numbers).

Dated: October 4, 2012.

Ann Marie Oliva,

Deputy Assistant Secretary for Special Needs, Acting.

TITLE V, FEDERAL SURPLUS PROPERTY PROGRAM FEDERAL REGISTER REPORT FOR 10/12/2012

Suitable/Available Properties

Building

Colorado

2 Buildings

MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220001
Status: Unutilized
Directions: 6550 and 6552
Comments: 3,743 sf. for 6550; 578 sf. for 6652; good conditions; housing/garage; asbestos

2 Buildings
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220003
Status: Unutilized
Directions: 64023 and 64024
Comments: 3,560 sf. for each; housing; poor conditions; need repairs; asbestos

Bldg. 64103
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220004
Status: Unutilized
Comments: 4,270 sf.; housing; poor conditions; need repairs; asbestos

8 Buildings
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220005
Status: Unutilized
Directions: 66041, 66054, 67062, 67072, 67073, 67532, 67542, 67554
Comments: 3,938 sf. for each; housing; poor conditions; need repairs; asbestos

3 Buildings
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220006
Status: Unutilized
Directions: 47010, 47011, 47012
Comments: 3,324 sf. for each; housing; poor conditions; need repairs; asbestos

37 Buildings
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220007
Status: Unutilized
Directions: 66545, 66546, 66593, 66594, 66042, 66043, 66050, 66051, 66062, 67000, 67012, 67020, 67021, 67032, 67040, 67041, 67065, 67066, 67070, 67071, 67500, 67501, 67513, 67520, 67521, 67533, 67534, 67545, 67546, 67550, 67551, 67573, 67574, 67582, 67593, 67594
Comments: 3,348 sf. for each; housing; poor conditions; need repairs; asbestos

24 Buildings
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220008
Status: Underutilized
Directions: 66552,66581, 66040, 66052, 66053, 66061, 67004, 67024,67031, 67063, 67064, 67074, 67504, 67510, 67524, 67530, 67543, 67544, 67552, 67553, 67561, 67570, 67581, 67590
Comments: 3,820 sf. for each; housing; poor conditions; need repairs; asbestos

24 Buildings
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220017
Status: Unutilized
Directions: 47103, 47104, 66060, 67002, 67003, 67010, 67022, 67023, 67042, 67043, 67051, 67052, 67053, 67511, 67512, 67522, 67523, 67531, 67560, 67571, 67572, 67580, 67591, 67592
Comments: 3,810 sf. for each; housing; poor conditions; need repairs; asbestos possible

12 Buildings
MFH
USAF CO 80840
Landholding Agency: Air Force
Property Number: 18201220018
Status: Unutilized
Directions: 66600, 66601, 66055, 67060, 67061, 67540, 67541, 67555, 67556, 67600, 67601, 66056
Comments: 3,644 sf. for each; housing; poor conditions; need repairs; asbestos identified

Florida

Facility 9550
Eglin AFB
Eglin FL 32542
Landholding Agency: Air Force
Property Number: 18201230056
Status: Unutilized
Comments: 360 sf.; range support bldg.; vacant nine (9) mons.; poor conditions; asbestos; contact Range Control for prior approval ea. time to access facility

Georgia

2 Buildings
Moody AFB
Moody AFB GA 31699
Landholding Agency: Air Force
Property Number: 18201220025
Status: Unutilized
Directions: 574, 740
Comments: 793 sf. for b–574; 92 sf. for b–740; usage varies; properties located in secured area; need military escort every time transferee needs to access buildings

Idaho

26 Buildings
Mountain Home AFB
Mountain Home ID 83648
Landholding Agency: Air Force
Property Number: 18201230041
Status: Underutilized
Directions: 45000, 45004, 45007, 45008, 45011, 45012, 45015, 45019, 45022, 45023, 45027, 45031, 45035, 45036, 45039, 45040, 45043, 45103, 45107, 45111, 45112, 45115, 45116, 45119, 45120, 45123
Comments: Off-site removal only; 780 sf. for ea. parking; minor repairs/renovations needed; restricted area; contact AF for info. on accessibility/removals reqs.

74 Buildings
Mountain Home AFB
Mountain Home ID 83648
Landholding Agency: Air Force
Property Number: 18201230042
Status: Underutilized
Directions: 45127, 45130, 45131, 45134, 45135, 45139, 45143, 45146, 45147, 45152, 45156, 45159, 45160, 45163, 45164, 46168, 45172, 45203, 45204, 45207, 45208, 45212, 45216, 45217, 45220, 45221, 45225, 45228, 45229, 45233, 45237, 45238, 45241, 45242, 45245, 45249, 45253, 45254, 45257, 45261, 45264, 45265, 45268, 45272, 45272, 45305, 45308, 45309, 45312, 45313, 45317, 45321, 45322, 45325, 45329, 45332, 45333, 45337, 45341, 45344, 45345, 45348, 45349, 45353, 45357, 45358, 45361, 45365, 45366, 45367, 45372, 45373, 45376, 45377
Comments: Off-site removal only; 780 sf. for ea. parking; minor repairs/renovations needed; restricted area; contact AF for info. on accessibility/removals reqs.

Illinois

Bldg. 500
Plum Hill MARS
Belleville IL 62221
Landholding Agency: Air Force
Property Number: 18201220035
Status: Unutilized
Comments: 3,519 sf.; communication facility; no utilities; possible ground contamination; need repairs and remediation

Bldg. 500
Plum Hill MARS
Belleville IL 62221
Landholding Agency: Air Force
Property Number: 18201220036
Status: Unutilized
Comments: 3,519 sf.; communication facility; no utilities; possible contamination; needs repairs & remediation

Michigan

3 Buildings
Selfridge ANGB
Selfridge MI 48045
Landholding Agency: Air Force
Property Number: 18201220020
Status: Unutilized
Directions: 326,780,710
Comments: Off-site removal only; sf varies; office/school/barracks; air conditions; need repairs

New Jersey

4 Buildings
JBMDL
Trenton NJ 08641
Landholding Agency: Air Force
Property Number: 18201220031
Status: Unutilized
Directions: 2606, 2612, 2613, 2621
Comments: Off-site removal only; sf. varies btw. 26,671–27,043 sf.; secured area; need prior approval from Security Police

2 Buildings
Joint Base McGuire-Dix-Lakehurst
Ft. Dix NJ 08640
Landholding Agency: Air Force
Property Number: 18201230052
Status: Unutilized
Directions: 5250-Hospital (384,057sf.) & 5251-Walson A/C Plant (2,170 sf.)
Comments: Off-site removal only; sf varies; hospital & a/c plant; air to poor conditions; asbestos; secured area; contact AF Real Property Office to gain access/removal

New Mexico

Bldg. 310
103 West Street
Cannon NM 88103
Landholding Agency: Air Force
Property Number: 18201220041
Status: Underutilized

Comments: Off-site removal only; 20,000 sf.; maintenance shop; secured area; need prior approval to access property

Ohio

Facility 80045
1050 Forrer Blvd.
Kettering OH 45429
Landholding Agency: Air Force
Property Number: 18201230061
Status: Underutilized
Comments: 101,153 sf.;admin./lab; structurally sound

Texas

6 Buildings
Medina Trng. Annex
Lackland AFB TX
Landholding Agency: Air Force
Property Number: 18201220038
Status: Unutilized
Directions: 587, 595, 596, 597, 598, 599
Comments: Off-site removal only; 2,418 sf. for each; igloos; secured area; prior approval needed to access; deteriorated conditions; needs extensive repairs

Unsuitable Properties

Building

Colorado

2 Buildings
Tower/Bullseye Airfield
Calhan CO 80808
Landholding Agency: Air Force
Property Number: 18201220002
Status: Underutilized
Directions: 9603 and 9604
Comments: Nat'l security concerns; public access denied and no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Florida

Facilities 28407 & 28411
1656 Lighthouse Rd.
Cape Canaveral FL 32925
Landholding Agency: Air Force
Property Number: 18201220009
Status: Excess
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

2 Buildings
Hurlburt Field
Hurlburt Field FL 32544
Landholding Agency: Air Force
Property Number: 18201220010
Status: Underutilized
Directions: 90318 and 90319
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

10 Buildings
Cape Canaveral
Cape Canaveral FL 32925
Landholding Agency: Air Force
Property Number: 18201220039
Status: Excess
Directions: 28411, 28415, 44500, 49928, 28401, 24445, 24404, 24403, 1715, 70540
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Bldg. 297
8005 Hillsborough Loop Dr.
MacDill FL 33621
Landholding Agency: Air Force
Property Number: 18201230049
Status: Underutilized
Comments: Located w/in secured area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

9 Buildings
MacDill AFB
MacDill FL 33621
Landholding Agency: Air Force
Property Number: 18201230050
Status: Unutilized
Directions: 23, 189, 821, 828, 829, 1075, 1083, 1084
Comments: Located w/in restricted active military installation; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

8 Buildings
Eglin AFB
Eglin FL 32542
Landholding Agency: Air Force
Property Number: 18201230057
Status: Underutilized
Directions: 223, 255, 411, 584, 1278, 1284, 1289, 4023
Comments: Located in restricted controlled gov't installation; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

2 Buildings
Eglin AFB
Eglin FL 32542
Landholding Agency: Air Force
Property Number: 18201230058
Status: Unutilized
Directions: 586, 9267
Comments: Located un restricted controlled gov't installation; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Illinois

3 Buildings
Scott AFB
Scott AFB IL 62225
Landholding Agency: Air Force
Property Number: 18201220034
Status: Unutilized
Directions: 1984, 1985, 530
Comments: High security active duty installation; nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Indiana

Facilities 99 &1371
Stor Igloos
Terre Haute IN 47803
Landholding Agency: Air Force
Property Number: 18201220019
Status: Unutilized
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Kansas

7 Buildings
McConnell AFB
McConnell KS 67210
Landholding Agency: Air Force
Property Number: 18201220033
Status: Underutilized
Directions: 408, 415, 424, 425, 696, 750, 1120
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Louisiana

3 Buildings
Barksdale AFB
Barksdale AFB LA 71110
Landholding Agency: Air Force
Property Number: 18201220032
Status: Unutilized
Directions: 5724, 7318, 7136
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Maryland

2 Buildings
Martin State Airport
Baltimore MD 21220
Landholding Agency: Air Force
Property Number: 18201220022
Status: Excess
Directions: 1120 & 1121
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Massachusetts

129 Water Tank
Reilly St.
OTIS ANGB MA 02542
Landholding Agency: Air Force
Property Number: 18201230045
Status: Excess
Comments: Located w/in secured area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

137 Pump House
Reilly House
OTIS ANGB MA
Landholding Agency: Air Force
Property Number: 18201230048
Status: Excess
Comments: Located w/in secured area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Michigan

3 Buildings
Alpena Co. Reg. Apt.
Alpena MI 49707
Landholding Agency: Air Force
Property Number: 18201230047
Status: Underutilized
Directions: 112, 116, 120
Comments: Located w/in secured area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Mississippi

4 Buildings
Kessler AFB
Kessler AFB MS 39534
Landholding Agency: Air Force
Property Number: 18201220037
Status: Underutilized
Directions: 4813, 4815, 4906, 4910
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Bldg. 21005
6225 M St.
Meridian MS 39307
Landholding Agency: Air Force
Property Number: 18201230046
Status: Unutilized
Comments: Access limited to military personnel only; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Building 630
713 Lockhart
Columbus MS 39710
Landholding Agency: Air Force
Property Number: 18201230060
Status: Underutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Montana

8 Buildings
JKSE
Great Falls MT 59404
Landholding Agency: Air Force
Property Number: 18201230044
Status: Underutilized
Directions: 307, 47,32,45,46,48,26,22
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Nebraska

2 Buildings
Offutt AFB
Offutt NE 68113
Landholding Agency: Air Force
Property Number: 18201220026
Status: Excess
Directions: 443, 620
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

New Hampshire

PEASE ANGB
302 Newmarket St.
Newington NH 03803
Landholding Agency: Air Force
Property Number: 18201230043
Status: Unutilized
Comments: Public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

New Jersey

Building 2602
Joint Base McGuire-Dix Lakehurst
Trenton NJ 08641
Landholding Agency: Air Force
Property Number: 18201220044
Status: Unutilized
Comments: Nat'l security concerns; approval for the public to gain access w/out comprising nat'l security is not feasible; will promote a breach of security
Reasons: Secured Area

4 Buildings
Joint Base McGuire-Dix-Lakehurst
Ft. Dix NJ 08640
Landholding Agency: Air Force
Property Number: 18201230051
Status: Unutilized
Directions: 9723, 9728, 9411, 9403
Comments: Located w/in secured area where public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Bldg. 9415
9410 Old Shore Rd.
Ft. Dix NJ 08640
Landholding Agency: Air Force
Property Number: 18201230053
Status: Unutilized
Comments: Located w/in restricted area where public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Traffic Check House
3573 Lancaster Rd.
Trenton NJ 08641
Landholding Agency: Air Force
Property Number: 18201230054
Status: Unutilized
Comments: Located w/in secured post; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

New Mexico

3 Buildings
Kirtland AFB
Kirtland AFB NM 87117
Landholding Agency: Air Force
Property Number: 18201220011
Status: Underutilized
Directions: 253, 255, 638
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Bldg. 30116
5801 Manzano St SE
Kirtland AFB NM 87117
Landholding Agency: Air Force
Property Number: 18201220012
Status: Underutilized
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

6 Buildings
Kirtland AFB
Kirtland AFB NM 87117
Landholding Agency: Air Force
Property Number: 18201220013
Status: Unutilized
Directions: 37514, 37511, 37509, 37503, 30144, 30108
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Bldgs. 573, 855, 859
Holloman AFB
Holloman AFB NM 88330
Landholding Agency: Air Force
Property Number: 18201220023
Status: Unutilized
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

5 Buildings
Holloman AFB
Holloman AFB NM 88330
Landholding Agency: Air Force
Property Number: 18201220030
Status: Unutilized
Directions: 19, 838, 1197, 847, 1198
Comments: Nat'l security concerns; public access denied due to anti-terrorism & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

South Carolina

11 Buildings
Shaw AFB
Sumter SC 29152
Landholding Agency: Air Force
Property Number: 18201220042
Status: Unutilized
Directions: 1851, 1850, 1852, 1856, 1858, B413, B420, B1713, B1049, B702, B1128
Comments: Facilities are located on a secured military installation; no public access & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Bldg. 211
110 Graves Ave.
Joint Base Charleston SC 29404
Landholding Agency: Air Force
Property Number: 18201230055
Status: Unutilized
Comments: Located in restricted area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Tennessee

Bldg. 708
Nashville IAP
Nashville TN 37217
Landholding Agency: Air Force
Property Number: 18201230059
Status: Underutilized
Comments: Authorized military personnel only; restricted area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

Texas

11 Buildings
Ft. Sam Houston
San Antonio TX 78234
Landholding Agency: Air Force
Property Number: 18201220014
Status: Unutilized
Directions: 1149, 1151, 1152, 1153, 1154, 1158, 1159, 1160, 1161, 1162, 1163
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

12 Buildings
Ft. Sam Houston
San Antonio TX 78234
Landholding Agency: Air Force
Property Number: 18201220015
Status: Unutilized
Directions: 2410, 2411, 2412, 2425, 2427, 2429, 2430, 2432, 3551, 3552, 3553, 3557
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Bldg. 435
Goodfellow AFB
Goodfellow AFB TX 76908
Landholding Agency: Air Force
Property Number: 18201220016
Status: Excess
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

4 Buildings
Storage Munitions Cubicle
Lackland AFB TX
Landholding Agency: Air Force
Property Number: 18201220028
Status: Unutilized
Directions: 402, 403, 404, 585
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Bldg. 1092
Sheppard AFB
Sheppard AFB TX 76311
Landholding Agency: Air Force
Property Number: 18201220029
Status: Unutilized
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

15 Buildings
Laughlin AFB
Del Rio TX 78843
Landholding Agency: Air Force
Property Number: 18201220040
Status: Unutilized
Directions: 47, 64, 113, 125, 136, 257, 284, 358, 360, 401, 510, 511, 2024, 8081, 9007
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

6 Buildings
BE Stor Shed
Randolph AFB TX
Landholding Agency: Air Force
Property Number: 18201220043
Status: Underutilized
Directions: B1281, B1282, B1284, B1285, B1286, B1287
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Virginia

Bldg. 1994
Eagle Ave
Hampton VA 23665
Landholding Agency: Air Force
Property Number: 18201220024
Status: Underutilized
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

9 Buildings
Langley AFB
Langley AFB VA 23665
Landholding Agency: Air Force
Property Number: 18201220027
Status: Underutilized
Directions: 1092, 1093, 1094, 1095, 1096, 1097, 1098, 750, 51
Comments: Nat'l security concerns; public access denied & no alternative method to gain access w/out comprising nat'l security
Reasons: Secured Area

Wyoming

Bldg. 945
7505 Booker Rd.
Cheyenne WY
Landholding Agency: Air Force
Property Number: 18201230062
Status: Unutilized
Comments: Located in a secured area; public access denied & no alternative method to gain access w/out compromising nat'l security
Reasons: Secured Area

[FR Doc. 2012–24921 Filed 10–11–12; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX12NM00COM0000]

Agency Information Collection Activities: Comment Request

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of extension of a currently approved information collection, 1028–0094, Energy Cooperatives to Support the National Coal Resources Data System.

SUMMARY: We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. To comply with the Paperwork Reduction Act of 1995 (PRA) and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This collection is scheduled to expire on January 31, 2013.

DATES: Submit written comments by December 11, 2012.

ADDRESSES: You may submit comments on this information collection to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive, MS 807, Reston, VA 20192 (mail); (703) 648–7199 (fax); or *smbaloch@usgs.gov* (email). Please Reference Information 1028–0094 in the subject line.

For Further Information Please Contact: Joe East, Geologist, 703–648–6450 (phone); *jeast@usgs.gov* (email), or 12201 Sunrise Valley Drive, MS 956, Reston, VA 20192 (mail).

SUPPLEMENTARY INFORMATION:

I. Abstract

The primary objective of the National Coal Resources Data System (NCRDS) is to advance the understanding of the energy endowment of the United States (U.S.) by gathering and organizing digital geologic information related to coal, coalbed gas, shale gas and other energy resources and related information regarding these resources. These data are needed to support regional or national assessments concerning coal and coal bed gas occurrences. Requesting external cooperation is the best way for NCRDS to collect energy data and perform research and analyses on the characterization of coals and organic-rich shale, and obtain other information (including geophysical or seismic data, sample collection for generation of thermal maturity data) that can be used in solid-fuel resource assessments and related studies.

The USGS will issue a call for proposals to support researchers from State Geological Surveys and associated accredited Universities that can provide geologic data to support the NCRDS and other energy assessment projects being conducted by the Energy Resources Program. Data submitted to NCRDS by external cooperators constitute more than two-thirds of the USGS point-source stratigraphic database (USTRAT) on coal occurrence. In 2012, NCRDS supported 30 projects in 23 States. This program is conducted under various authorities, including 30 U.S.C. 208–1, 42 U.S.C. 15801, and 43 U.S.C. 31 *et seq*. This collection will consist of applications, proposals and reports (annual and final).

II. Data

OMB Control Number: 1028–094.

Title: Energy Cooperatives to Support the National Coal Resources Data System (NCRDS).

Respondent Obligation: Required to obtain or retain benefits.

Frequency of Collection: One time every 5 years for applications and final reports; annually for progress reports.

Affected Public: Individuals; State, local and tribal governments; State Geological Surveys, universities, and businesses.

Estimated Annual burden hours: 367.

Estimated Annual Number of Respondents: 26.

Estimated Annual Number of Responses: 35 (9 applications 26 reports).

Estimated Annual Reporting and Recordkeeping ''Non-Hour Cost'': None.

III. Public Disclosure Statement

The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency 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.

IV. Comments

We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) how to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology. Please note that the comments submitted in response to this notice are a matter of public record. 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 we will be able to do so.

Dated: October 4, 2012.

Brenda Pierce,

Program Coordinator, USGS Energy Resources Program.

[FR Doc. 2012–25213 Filed 10–11–12; 8:45 am]

BILLING CODE 4311–AM–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LL WO31000.L13100000.PB0000.24 1E]

Renewal of Approved Information Collection

AGENCY: Bureau of Land Management, Interior.

ACTION: 30-day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) to continue the collection of information pertaining to Federal and Indian oil and gas leasing and drainage protection (except on the Osage Reservation). The Office of Management and Budget (OMB) previously approved this information collection activity, and assigned it control number 1004–0185.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. For maximum consideration, written comments should be received on or before November 13, 2012.

ADDRESSES: Please submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004–0185), Office of Management and Budget, Office of Information and Regulatory Affairs, fax 202–395–5806, or by electronic mail at *oira_docket@omb.eop.gov*. Please provide a copy of your comments to the BLM. You may do so via mail, fax, or electronic mail.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: to Jean Sonneman at 202–245–0050.

Electronic mail: Jean_Sonneman@blm.gov.

Please indicate ''Attn: 1004–0185'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Donnie Shaw, at 202–912–7155. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, to leave a message for Mr. Shaw. You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain*.

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond. In order to obtain and renew an OMB control number, Federal agencies are required to seek public comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d) and 1320.12(a)).

As required at 5 CFR 1320.8(d), the BLM published a 60-day notice in the **Federal Register** on June 27, 2012 (77 FR 38319), and the comment period ended August 27, 2012. The BLM received no comments. The BLM now requests comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments as directed under **ADDRESSES** and **DATES**. Please refer to OMB control number 1004–0185 in your correspondence. 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.

The following information is provided for the information collection:

Title: Onshore Oil and Gas Leasing and Drainage Protection (43 CFR Parts 3100, 3120, and 3150, and Subpart 3162).

Forms: This is a nonform collection.

OMB Control Number: 1004–0185.

Abstract: The BLM proposes to extend the currently approved collection of information. The collection enables the BLM to monitor and enforce compliance with requirements pertaining to:

1. Statutory acreage limitations;
2. Waiver, suspension, or reduction of rental or royalty payments;
3. Various types of agreements, contracts, consolidations and combinations;
4. Subsurface storage of oil and gas;
5. Transfers, name changes, and corporate mergers;
6. Lease renewal, relinquishment, termination, and cancellation;
7. Leasing under railroads and certain other types of rights-of-way;
8. Lands available for competitive leasing; and
9. Drainage protection.

Frequency of Collection: On occasion, except for Option Statements (43 CFR 3100.3–3), which must be filed within

90 days after June 30 and December 31 of each year. All responses under this control number are required to obtain or retain a benefit.

Estimated Number and Description of Respondents Annually: 2,484 Federal and Indian oil and gas lessees, operators, record title owners, and holders of options to acquire an interest in Federal or Indian leases.

Estimated Reporting and Recordkeeping ''Hour'' Burden Annually: 6,684 hours.

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden Annually: $109,439.

The following table details the individual components and respective hour burdens of this information collection request:

Type of response A.	Number of responses B.	Hours per response C.	Total hours (Column B × Column C) D.
Notice of option holdings 43 CFR 3100.3–1(b)	30	1	30
Option statement 43 CFR 3100.3–3	50	1	50
Proof of acreage reduction 43 CFR 3101.2–4(a)	10	1	10
Excess acreage petition 43 CFR 3101.2–4(a)	10	1	10
Ad hoc acreage statement 43 CFR 3101.2–6	10	1	10
Joinder evidence statement 43 CFR 3101.3–1	50	1	50
Waiver, suspension, or reduction of rental or royalty 43 CFR 3103.4–1	20	2	40
Communitization or drilling agreements 43 CFR 3105.2	150	2	300
Operating, drilling, or development contracts interest statement 43 CFR 3105.3	50	2	100
Application to combine interests for joint refining or transportation of oil 43 CFR 3105.4	20	1	20
Subsurface storage application 43 CFR 3105.5	50	1	50
Consolidation of leases 43 CFR 3105.6	1	1	1
Heirs and devisees statement 43 CFR 3106.8–1	40	1	40
Change of name report 43 CFR 3106.8–2	60	1	60
Corporate merger notice 43 CFR 3106.8–3	100	2	200
Lease renewal application 43 CFR 3107.8	30	1	30
Relinquishment 43 CFR 3108.1	150	0.5	75
Class I reinstatement petition 43 CFR 3108.2–2	87	1	87
Class II reinstatement petition 43 CFR 3108.2–3	59	1	59
Class III reinstatement petition 43 CFR 3108.2–4	7	1	7
Application for lease under right-of-way 43 CFR 3109.1	20	1	20
Lands available for leasing 43 CFR 3120.1–1(e)	280	2.5	700
Protests and appeals 43 CFR 3120.1–3	90	1.5	135
Preliminary drainage protection report 43 CFR 3162.2–9	1,000	2	2,000
Detailed drainage protection report 43 CFR 3162.2–9	100	24	2,400
Additional drainage protection report 43 CFR 3162.2–9	10	20	200
Totals	2,484	.....	6,684

Jean Sonneman,

Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. 2012–25173 Filed 10–11–12; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWO35000.L14300000.ES0000]

Renewal of Approved Information Collection

AGENCY: Bureau of Land Management, Interior.

ACTION: 30-day notice and request for comments.

SUMMARY: The Bureau of Land Management (BLM) has submitted an information collection request to the Office of Management and Budget (OMB) to continue the collection of information from applicants for land for recreation or public purposes. The Office of Management and Budget (OMB) previously approved this information collection activity, and assigned it control number 1004–0012.

DATES: The OMB is required to respond to this information collection request within 60 days but may respond after 30 days. For maximum consideration, written comments should be received on or before November 13, 2012.

ADDRESSES: Please submit comments directly to the Desk Officer for the Department of the Interior (OMB #1004–0012), Office of Management and Budget, Office of Information and Regulatory Affairs, fax 202–395–5806, or by electronic mail at *oira_docket@omb.eop.gov.* Please provide a copy of your comments to the BLM. You may do so via mail, fax, or electronic mail.

Mail: U.S. Department of the Interior, Bureau of Land Management, 1849 C Street NW., Room 2134LM, Attention: Jean Sonneman, Washington, DC 20240.

Fax: to Jean Sonneman at 202–245–0050.

Electronic mail: Jean_Sonneman@blm.gov.

Please indicate ''Attn: 1004–0012'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Jeff Holdren, at 202–912–7335. Persons who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, to leave a message for Mr. Holdren. You may also review the information collection request online at *http://www.reginfo.gov/public/do/PRAMain.*

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act (44 U.S.C. 3501–3521) and OMB regulations at 5 CFR part 1320 provide that an agency may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. Until OMB approves a collection of information, you are not obligated to respond. In order to obtain and renew an OMB control number, Federal agencies are required to seek public comment on information collection and

recordkeeping activities (see 5 CFR 1320.8(d) and 1320.12(a)).

As required at 5 CFR 1320.8(d), the BLM published a 60-day notice in the **Federal Register** on June 13, 2012 (77 FR 35421), and the comment period ended August 13, 2012. The BLM received two comments. Neither comment addressed, or was germane to, this information collection. Therefore, the BLM has not changed the collection in response to either comment.

The BLM now requests comments on the following subjects:

1. Whether the collection of information is necessary for the proper functioning of the BLM, including whether the information will have practical utility;
2. The accuracy of the BLM's estimate of the burden of collecting the information, including the validity of the methodology and assumptions used;
3. The quality, utility and clarity of the information to be collected; and
4. How to minimize the information collection burden on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other forms of information technology.

Please send comments as directed under **ADDRESSES** and **DATES**. Please refer to OMB control number 1004–0012 in your correspondence. 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.

The following information is provided for the information collection:

Title: Application for Land for Recreation or Public Purposes (43 CFR 2740 and 2912).

Forms:

- Form 2740–1, Application for Land for Recreation or Public Purposes.

OMB Control Number: 1004–0012.

Abstract: The Bureau of Land Management (BLM) uses the information collection to decide whether or not to lease or sell certain public lands to applicants under the Recreation and Purposes Act, 43 U.S.C. 869 to 869–4. The Act authorizes the Secretary of the Interior to lease or sell, for recreational or public purposes, certain public lands to State, Territory, county, and local governments; nonprofit corporations; and nonprofit associations.

Frequency of Collection: Once.

Estimated Number and Description of Respondents Annually: 21 State, Territory, country and local governments; 1 nonprofit association; and 1 nonprofit corporation.

Estimated Reporting and Recordkeeping ''Hour'' Burden Annually: 920 hours (40 hours per application).

Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden Annually: $2,300 ($100 per application).

Jean Sonneman,

Bureau of Land Management, Information Collection Clearance Officer.

[FR Doc. 2012–25177 Filed 10–11–12; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNVB01000 L51100000.GN0000.LVEMF12CF010 241A; NVN–082096; NVN–084632; NVN–091272; 12–08807; MO# 4500039779; TAS: 14X5017]

Notice of Availability of the Final Environmental Impact Statement for the Mount Hope Project, Eureka County, NE

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of availability.

SUMMARY: In accordance with the National Environmental Policy Act of 1969 and the Federal Land Policy and Management Act of 1976, as amended, the Bureau of Land Management (BLM) Mount Lewis Field Office, Battle Mountain, Nevada has prepared a Final Environmental Impact Statement (EIS) for the Mount Hope Project and by this notice is announcing its availability.

DATES: The BLM will not issue a final decision on the proposal for a minimum of 30 days from the date that the Environmental Protection Agency publishes its notice in the **Federal Register**.

ADDRESSES: Copies of the Mount Hope Project Final EIS are available at the Battle Mountain District Office, 50 Bastian Road, Battle Mountain, Nevada, during regular business hours of 7:30 a.m. to 4:30 p.m., Monday through Friday, except holidays. Interested persons may also review the Final EIS on the Internet at: *www.blm.gov/nvst/en/fo/battle_mountain_field.html*.

FOR FURTHER INFORMATION CONTACT: For further information contact Gloria Tibbetts, Planning and Environmental Coordinator, telephone: 775–635–4060; address: 50 Bastian Road, Battle Mountain, Nevada 89820; email: *gtibbetts@blm.gov*. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: Eureka Moly, LLC (EML) has submitted a Plan of Operations (NVN–082096) to the BLM Mount Lewis Field Office for the proposed Mount Hope Molybdenum Mining Project. The proposed project would be located in central Nevada approximately 23 miles northwest of Eureka, Nevada. The project is a proposed molybdenum mine and includes a power transmission line, a water well field, and all associated mine-processing facilities. The project is to be located on both public and private lands in Eureka County, Nevada, and is expected to have a mine life of 80 years. The surface disturbance associated with the proposed activities totals 8,092 acres of public land and 263 acres of private land located within the 22,886-acre project area. The project proposal is to extract molybdenite from public lands where EML holds mining claims and private land to the optimal extent possible. After extraction, EML would reclaim the project area in a manner that is environmentally responsible and in compliance with Federal mining laws, the Federal Land Policy and Management Act (FLPMA), Nevada Mine Reclamation Law, and other applicable laws and regulations. The BLM, in accordance with the FLPMA, is to respond to the applicant's Plan of Operations to conduct mining under the General Mining Law.

The Final EIS describes and analyzes the project's site-specific impacts (including cumulative) on all affected resources. Four action alternatives including: (1) The Proposed Action, (2) Partial Backfill Alternative, (3) Off-Site Transfer of Ore Concentrate for Processing Alternative, and (4) Slower, Longer Project Alternative, were analyzed in addition to the No Action Alternative.

The Proposed Action would consist of an open pit mine with associated pit dewatering, a 230-kilovolt transmission line, a water well field, and ancillary mining facilities, including a molybdenite concentrate roaster and packaging plant and a ferromolybdenum plant for production of ferromolybdenum alloy. The project

would have an 18- to 24-month construction phase, 44 years of mining and ore processing, 30 years of reclamation, and 5 years of monitoring. Approximately 400 potential jobs would be provided in the area for this timeframe with a peak employment of 615 personnel during construction activities. The project is consistent with the Shoshone-Eureka Resource Area Management Plan and does not impact any areas with special designations.

The Partial Backfill Alternative would be essentially similar to the Proposed Action except that the open pit would be partially backfilled at the end of mining to eliminate the potential for a pit lake to form.

The Off-Site Transfer of Ore Concentrate for Processing Alternative would also be similar to the Proposed Action except that the ore processing facilities would include only milling operations and production of the molybdenum sulfide concentrate.

The Slower, Longer Project Alternative would have the same components as the Proposed Action, but operations would be conducted at approximately one-half the production rate of the Proposed Action, which would result in a project that would last approximately twice as long. The BLM analyzed this alternative in detail based on a request from Eureka County, a Cooperating Agency on the EIS.

Mitigation measures have been identified for multiple resources under each alternative to minimize potential environmental impacts and to assure that the proposed project would not result in undue or unnecessary degradation of public lands. Eight additional alternatives were considered and rationale for their elimination from detailed analysis is discussed. These alternatives include (1) Complete Backfilling Alternative, (2) Different Waste Rock Disposal Facility Heights Alternative, (3) Increased Ore Processing to Match the Mining Schedule Alternative, (4) Decreased Mining to Match the Ore Processing Schedule Alternative, (5) Reduced Project Alternative, (6) Different Facility Locations within the Project Area Alternative, (7) Different Powerline Alternative, and (8) Different Potentially Acid Generating Waste Rock Management Alternative. Based on the analysis in the Final EIS, the BLM has determined that the Preferred Alternative is the Proposed Action, with accompanying mitigation measures.

On March 2, 2007, a Notice of Intent to Prepare an EIS was published in the **Federal Register** (72 FR 9579) inviting scoping comments on the proposed action. Public scoping meetings for the project were held on March 27 and 28, 2007 in Eureka and Battle Mountain, Nevada. Six written comments were received via mail and/or email during the scoping period and three additional letters were received after the closure of the formal scoping period. All comments that were received have been incorporated in a Scoping Summary Report and were considered in the preparation of this Final EIS. On December 2, 2011 a Notice of Availability of the Draft EIS was published in the **Federal Register** (76 FR 75554) on the Draft EIS to the public for a 90-day comment period. Two public comment meetings were held on January 18 and 19, 2012 in Eureka and Crescent Valley, Nevada.

More than 1,900 comments were received from 941 separate parties. Comments primarily pertained to potential impacts from the groundwater drawdown, socioeconomic impacts to the local communities, and impacts to wildlife and other natural resources. All of these comments were considered and are addressed in Appendix H of the Final EIS. Some additional analysis and clarifying text was included in the Final EIS as a result of the comments.

Authority: 40 CFR 1506.6, 40 CFR 1506.10.

Christopher J. Cook,

Mount Lewis Field Manager.

[FR Doc. 2012–25182 Filed 10–11–12; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NER–CACO–10593: 2310–0081–422]

Draft Environmental Impact Statement for the Herring River Restoration Project, Cape Cod National Seashore, Massachusetts

AGENCY: National Park Service, Interior.

ACTION: Notice of Availability.

SUMMARY: The National Park Service (NPS) announces the availability of a Draft Environmental Impact Statement (DEIS) for the Herring River Restoration Project in Cape Cod National Seashore, Massachusetts. The DEIS provides a systematic analysis of alternative approaches to restore the Herring River estuary to a more productive and natural condition after a century of diking and draining.

DATES: The NPS will accept comments on the DEIS from the public for 60 days after the date that the Environmental Protection Agency notices the availability of the DEIS in its regular Friday **Federal Register** listing. A public meeting will be held during the review period to facilitate the submission of public comment. Once scheduled, the meeting date will be announced via the Cape Cod National Seashore Web site (*http://www.nps.gov/caco/*), the NPS's Planning Environment and Public Comment (PEPC) Web site (*http://parkplanning.nps.gov/herring_river*), and a press release to area media.

ADDRESSES: The DEIS for the Herring River Restoration Project will be available for public review online at the NPS's PEPC Web site (*http://parkplanning.nps.gov/herring_river*). You may submit your comments by any one of several methods. The preferred method of comment is via the internet at (*http://parkplanning.nps.gov/herring_river*). You may also mail comments to Herring River Restoration Plan, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667. Finally, you may hand-deliver comments to Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02667.

FOR FURTHER INFORMATION CONTACT: George E. Price, Jr., Superintendent, Cape Cod National Seashore, 99 Marconi Site Road, Wellfleet, MA 02267; telephone (508) 771–2144.

SUPPLEMENTARY INFORMATION: The Herring River Restoration Project is a joint project of the Cape Cod National Seashore, the Town of Wellfleet, and the Town of Truro, Massachusetts Division of Ecological Restoration, U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and the Natural Resource Conservation Service.

The Herring River is the largest estuary on outer Cape Cod, encompassing more than 1,100 acres of degraded wetlands in a complicated network of five valleys: The Herring River, Mill Creek, Pole Dike Creek, Bound Brook, and Duck Harbor. The Chequessett Neck Road dike was built in 1908 at the mouth of the Herring River to restrict natural tidal flows. Ditches were constructed to drain the normally saturated flood plain soil. The once extensive salt marshes have been transformed into stands of invasive plants, shrubby thickets, and forests. The old salt marsh peat, deprived of the tides, has decomposed and compressed, sinking the surface of the flood plain as much as three feet. The decomposition of peat has released sulfuric acid that kills fish and other aquatic life, and low summertime dissolved oxygen has also harmed aquatic life.

The DEIS analyzes three action alternatives and the no action

alternative, as described below: Alternative A would leave in place the current tide control structure at Chequessett Neck Road and continue management of the estuary without restoration.

Alternative B would employ an adaptive management strategy to restore tides in the lower reach of the Herring River up to a maximum high tide of approximately six feet. At this tide level flood mitigation of sensitive properties can be achieved without a secondary dike at Mill Creek.

Alternative C would employ an adaptive management strategy to restore tides up to the maximum Chequessett Neck Road dike capacity (10 foot vertical tide gate opening) with a new dike at Mill Creek that blocks all tidal influence. This alternative would maximize restoration in all sub-basins except Mill Creek. Mill Creek would remain unrestored, but no new flood proofing measures would be needed in Mill Creek.

Alternative D would employ an adaptive management strategy to restore tides up to the maximum Chequessett Neck Road dike capacity (10 foot vertical tide gate opening) with a new dike at Mill Creek. Mill Creek tides would be controlled by this secondary structure to the same level as that of Alternative B, the maximum level that can be achieved after flood proofing several low-lying properties. Tidal restoration would be maximized in all other sub-basins.

For Alternatives B and D, two options are considered for mitigating project impacts to the Chequessett Yacht & Country Club (CYCC) golf course, a private golf course in Mill Creek: (1) Raise low-lying fairways a minimum of two feet above proposed inundation levels, or (2) relocate low-lying fairways to an undeveloped upland area owned by CYCC.

Alternative D, with the option to raise existing low-lying fairways a minimum of two feet above proposed inundation levels, has been identified as the NPS Preferred Alternative. This alternative best fulfills the restoration objectives of the project while mitigating adverse impacts to developed properties.

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: August 8, 2012.

Michael A. Caldwell,

Acting Regional Director, National Park Service, Northeast Region.

[FR Doc. 2012–24888 Filed 10–11–12; 8:45 am]

BILLING CODE 4310–WV–P

DEPARTMENT OF INTERIOR

National Park Service

[NPS–NERO–FLNI–11426; 4140–SZD]

Notice of November 3, 2012, Meeting for Flight 93 National Memorial Advisory Commission

AGENCY: National Park Service, Interior.

ACTION: Meeting notice.

SUMMARY: This notice sets forth the date of the November 3, 2012, meeting of the Flight 93 Advisory Commission.

DATES: The public meeting of the Advisory Commission will be held on Saturday, November 3, 2012, at 10:00 a.m. (Eastern).

Location: The meeting will be held at the Flight 93 National Memorial Office, 109 West Main Street, Suite 104, Somerset, PA 15501.

Agenda:

The November 3, 2012, Commission meeting will consist of the following:

1. Opening of Meeting, Review and Approval of Commission Minutes
2. Reports
3. Old Business
4. New Business
5. Public Comments
6. Closing Remarks

FOR FURTHER INFORMATION CONTACT: Further information concerning this meeting may be obtained from the Superintendent, Flight 93 National Memorial, P. O. Box 911, Shanksville, PA 15560, telephone (814) 893–6322.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the Superintendent at least seven days prior to the meeting. 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: September 25, 2012.

Jeffrey P. Reinbold,

Superintendent, Flight 93 National Memorial.

[FR Doc. 2012–25098 Filed 10–11–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

Notice To Reopen and Extend the Scoping Comment Period for the Environmental Impact Statement for the Four Corners Power Plant and Navajo Mine Energy Project

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Reopening and extension of the scoping comment period.

SUMMARY: We are allowing additional time for the public to submit comments on significant issues and alternatives that we should consider in the planning and preparation of an environmental impact statement (EIS) for the Four Corners Power Plant and Navajo Mine Energy Project. We are extending the end of the scoping comment period from September 17, 2012 to November 1, 2012.

DATES: To ensure consideration in developing the draft EIS, we must receive your electronic or written comments by the close of the scoping period on November 1, 2012.

ADDRESSES: Comments may be submitted in writing or by email. At the top of your letter or in the subject line of your email message, please indicate that the comments are ''Four Corners-Navajo Mine EIS Comments.''

- *Email comments should be sent to: fcppnavajoenergyeis@osmre.gov.*
- *Mail/Hand-Delivery/Courier:* Written comments should be sent to: Marcelo Calle, OSM Western Region, 1999 Broadway, Suite 3320, Denver, Colorado 80202–3050.

FOR FURTHER INFORMATION CONTACT: For further information about the Project and/or to have your name added to the mailing list, contact: Marcelo Calle, OSM Project Coordinator, at 303–293–5035. 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: On July 18, 2012 (77 FR 42329), we published a notice of intent (NOI) to prepare an EIS for the Four Corners Power Plant and Navajo Mine Energy Project. The NOI requested public comments on the scope of the EIS and significant issues that should be addressed in the EIS. The close of the scoping comment period for the notice of intent to prepare an EIS for the Four Corners Power Plant and Navajo Mine Energy Project published on July 18, 2012, was September 17, 2012. In response to requests for an extension of the comment period, we are granting a 45 day extension from September 17, 2012 to November 1, 2012. All comments received between September 17, 2012, and November 1, 2012, will be considered.

The July 18, 2012, NOI listed the dates and times of the public scoping meetings and discussed the alternatives and related impacts under consideration. To summarize, the EIS will analyze the impacts for the BHP Navajo Coal Company Proposed Pinabete Permit and for the Navajo Mine Permit Renewal, both of which are located on the Navajo Reservation in San Juan County, New Mexico. The EIS will also analyze the impacts for the Arizona Public Service Company Proposed Four Corners Power Plant (FCPP) lease amendment, located on the Navajo Reservation in San Juan County, New Mexico, and associated transmission line rights-of-way renewals for lines located on the Navajo and Hopi Reservations in San Juan County, New Mexico and Navajo, Coconino and Apache Counties in Arizona. In addition, the EIS will analyze impacts for the Public Service Company of New Mexico transmission line rights-of-way renewal associated with the FCPP and located on the Navajo Reservation in New Mexico.

Availability of Comments

OSM will make comments, including name of respondent, address, phone number, email address, or other personal identifying information, available for public review during normal business hours. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments may not have standing to appeal the subsequent decision.

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—will be publicly available. 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: August 30, 2012.

Bill Clark,

Acting Regional Director, Western Region.

[FR Doc. 2012–24948 Filed 10–11–12; 8:45 am]

BILLING CODE 4310–05–M

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–772]

Certain Polyimide Films, Products Containing Same, and Related Methods Commission Determination To Affirm the Final Initial Determination With Respect to the Issues on Review and To Terminate the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to affirm, as modified, the final initial determination (''final ID'' or ''ID'') of the presiding administrative law judge (''ALJ'') in the above-captioned investigation under section 337 of the Tariff Act of 1930, as amended, and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–3065. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on May 4, 2011, based on a complaint filed on behalf of Kaneka Corporation of Osaka, Japan (''Kaneka''). 76 FR 25373 (May 4, 2011). The complaint alleges violations of Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, in the sale for importation, importation, or sale after importation of certain polyimide films, products containing same, and related methods by reason of infringement of one or more of claims 1–3 and 9–10 of U.S. Patent No. 6,264,866 (''the '866 patent''); claims 1–6 of U.S. Patent No. 6,746,639 (''the '639 patent''); claims 1–5 of U.S. Patent No. 7,018,704 (''the '704 patent''); and claims 1–20 of U.S. Patent No. 7,691,961 (''the '961 patent''). The Commission's notice of investigation named as respondents SKC Kolon PI, Inc. of Gyeonggi-do, South Korea and SKC Corporation of Covington, Georgia (collectively, ''SKC'').

On February 23, 2012, the Commission issued notice of its determination not to review an ID (Order No. 26) that Kaneka has satisfied the importation requirement with respect to all versions of the following SKC products: IN30 (75 um), IN70 (19um), IN 70 (25um), IN70 (50um), IF30 (7.5um), IF70 (12.5um), LV100, LV200, and LV300.

On February 27, 2012, the Commission issued notice of its determination not to review an ID (Order No. 25) terminating the investigation with respect to claims 4–5 of the '704 patent and claims 4, 11, 16, 17, and 20 of the '961 patent.

An evidentiary hearing was held from March 12, 2012, to March 16, 2012.

On May 10, 2012, the ALJ issued a final ID finding no violation of section 337 in the above-identified investigation. Specifically, the ALJ found that there was no violation with respect to the '866 patent, the '639 patent, the '704 patent, or the '961 patent by SKC. The ALJ also issued a recommended determination on remedy and bonding.

On May 22, 2012, Kaneka filed a petition for review of the final ID and on May 23, 2012, SKC filed a contingent petition for review. On May 30, 2012, SKC filed a response to Kaneka's petition, and on May 31, 2012, Kaneka filed a response to SKC's contingent petition.

On August 1, 2012, the Commission issued notice of its determination to partially review the final ID. 77 FR 47092 (August 7, 2012). With respect to the '866 patent, the Commission determined to review the finding that Kaneka does not satisfy the technical prong of the domestic industry requirement. *Id.* With respect to the '961 patent, the Commission determined to review the ALJ's finding that certain of the accused products infringe and certain of the accused products do not

infringe claim 9. *Id.* With respect to the '704 patent, the Commission determined not to review the ALJ's conclusion that the asserted claims of the '704 patent are invalid for indefiniteness. *Id.* The Commission further determined to review and vacate as moot the ID's remaining findings with respect to the '704 patent. The Commission determined not to review the remainder of the ID. *Id.*

On August 15, 2012, Kaneka and SKC each filed submissions on review. On August 22, 2012, each filed reply submissions.

On review, having examined the final ID, the submissions of the parties, and the relevant portions of the record in this investigation, the Commission has determined to affirm the ID with respect to the issues on review. With respect to the '866 patent, the Commission has determined to affirm the ALJ's determination that Kaneka has failed to satisfy the technical prong of the domestic industry requirement on modified grounds. With respect to the '961 patent, the Commission has determined to affirm the ALJ's finding that the IN70 (50μm) product infringes claim 9 and the other accused products do not. The investigation is terminated.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and under Part 210 of the Commission's Rules of Practice and Procedure (19 CFR Part 210).

By order of the Commission.

Issued: October 5, 2012.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–25077 Filed 10–11–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,689; TA–W–81,689A]

Niles America Wintech, Inc., Warehousing Division, a Valeo Company, Including On-Site Leased Workers from, Adecco Employment Services, Winchester, KY; Niles America Wintech, Inc., Assembly and Testing Division, a Valeo Company, Including On-Site Leased Workers from Adecco Employment Services, Winchester, KY; Notice of Affirmative Determination Regarding Application for Reconsideration

By application dated August 28, 2012 a petitioning worker, requested administrative reconsideration of the negative determination regarding workers' eligibility to apply for Trade Adjustment Assistance (TAA) applicable to workers and former workers of Niles America Wintech, Inc., Warehousing Division and Assembly and Testing Division, including on-site leased workers from Adecco Employment Services, Winchester, Kentucky (collectively referred to as the subject firm). The determination was issued on July 31, 2012. The Department's Notice of determination was published in the **Federal Register** on August 16, 2012 (77 FR 49462).

The initial investigation resulted in a negative determination based on the findings that the subject firm did not import services like or directly competitive with the order management, shipping, receiving, and warehousing services supplied by the subject workers.

Further, the subject firm did not shift the supply of order management, shipping, receiving and warehousing services (or like or directly competitive services) to a foreign country or acquire the supply of such services from a foreign country.

The initial investigation also revealed that the subject firm is not a Supplier to or act as a Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, 19 U.S.C. 2272(a).

In addition, the subject firm did not satisfy the group eligibility requirements under Section 222(e) of the Act, either because Criterion (1) has not been met since the workers' firm has not been publically identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in an affirmative finding of serious injury, market disruption, or material injury, or threat thereof.

Finally, with respect to Section 222(a) and Section 222(b) of the Act, the investigation revealed that Criterion (1) has not been met because a significant number or proportion of the workers in such workers' firm, have not become totally or partially separated, during the relevant time period, nor are they threatened to become totally or partially separated.

In request for reconsideration, the petitioner supplied new information regarding the number of workers who have been separated or have been threatened with separation.

The Department of Labor has carefully reviewed the request for reconsideration and the existing record, and has determined that the Department will conduct further investigation to determine if the workers meet the eligibility requirements of the Trade Act of 1974, as amended.

Conclusion

After careful review of the application, I conclude that the claim is of sufficient weight to justify reconsideration of the U.S. Department of Labor's prior decision. The application is, therefore, granted.

Signed at Washington, DC, this 26th day of September, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–25135 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, as amended (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for trade adjustment assistance for workers by (TA–W) number issued during the period of *September 24, 2012 through September 28, 2012.*

In order for an affirmative determination to be made for workers of a primary firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(a) of the Act must be met.

I. Under Section 222(a)(2)(A), the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The sales or production, or both, of such firm have decreased absolutely; and

(3) One of the following must be satisfied:

(A) Imports of articles or services like or directly competitive with articles produced or services supplied by such firm have increased;

(B) Imports of articles like or directly competitive with articles into which one or more component parts produced by such firm are directly incorporated, have increased;

(C) Imports of articles directly incorporating one or more component parts produced outside the United

States that are like or directly competitive with imports of articles incorporating one or more component parts produced by such firm have increased;

(D) Imports of articles like or directly competitive with articles which are produced directly using services supplied by such firm, have increased; and

(4) The increase in imports contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm; or

II. Under Section 222(a)(2)(B) all of the following must be satisfied:

(1) A significant number or proportion of the workers in such workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) One of the following must be satisfied:

(A) there has been a shift by the workers' firm to a foreign country in the production of articles or supply of services like or directly competitive with those produced/supplied by the workers' firm;

(B) there has been an acquisition from a foreign country by the workers' firm of articles/services that are like or directly competitive with those produced/supplied by the workers' firm; and

(3) The shift/acquisition contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in public agencies and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(b) of the Act must be met.

(1) A significant number or proportion of the workers in the public agency have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The public agency has acquired from a foreign country services like or directly competitive with services which are supplied by such agency; and

(3) The acquisition of services contributed importantly to such workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected secondary workers of a firm and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(c) of the Act must be met.

(1) A significant number or proportion of the workers in the workers' firm have become totally or partially separated, or are threatened to become totally or partially separated;

(2) The workers' firm is a Supplier or Downstream Producer to a firm that employed a group of workers who received a certification of eligibility under Section 222(a) of the Act, and such supply or production is related to the article or service that was the basis for such certification; and

(3) Either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm described in paragraph (2) accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm described in paragraph (2) contributed importantly to the workers' separation or threat of separation.

In order for an affirmative determination to be made for adversely affected workers in firms identified by the International Trade Commission and a certification issued regarding eligibility to apply for worker adjustment assistance, each of the group eligibility requirements of Section 222(f) of the Act must be met.

(1) The workers' firm is publicly identified by name by the International Trade Commission as a member of a domestic industry in an investigation resulting in—

(A) An affirmative determination of serious injury or threat thereof under section 202(b)(1);

(B) An affirmative determination of market disruption or threat thereof under section 421(b)(1); or

(C) An affirmative final determination of material injury or threat thereof under section 705(b)(1)(A) or 735(b)(1)(A) of the Tariff Act of 1930 (19 U.S.C. 1671d(b)(1)(A) and 1673d(b)(1)(A));

(2) The petition is filed during the 1-year period beginning on the date on which—

(A) a summary of the report submitted to the President by the International Trade Commission under section 202(f)(1) with respect to the affirmative determination described in paragraph (1)(A) is published in the **Federal Register** under section 202(f)(3); or

(B) notice of an affirmative determination described in subparagraph (1) is published in the **Federal Register**; and

(3) The workers have become totally or partially separated from the workers' firm within—

(A) the 1-year period described in paragraph (2); or

(B) notwithstanding section 223(b)(1), the 1-year period preceding the 1-year period described in paragraph (2).

Affirmative Determinations for Worker Adjustment Assistance

The following certifications have been issued. The date following the company name and location of each determination references the impact date for all workers of such determination.

The following certifications have been issued. The requirements of Section 222(a)(2)(A) (increased imports) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
81,718	Daimler Buses of North America, Inc., Daimler North America, Noramtec, First Choice Staffing, etc.	Oriskany, NY	June 8, 2011.
81,871	Fusion Contact Centers, LLC	Santa Maria, CA	August 6, 2011.
81,900	Gunite Corporation, incl. Bridge Staffing, Express Employment, Personnel Partners, Aerotek.	Elkhart, IN	August 16, 2011.

The following certifications have been issued. The requirements of Section 222(a)(2)(B) (shift in production or services) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
81,889	MasterBrand Cabinets, Inc., Ameristaff and Prillman.	Martinsville, VA	August 10, 2011.
81,903	Senco Brands, Inc., Express Employment Professionals.	Cincinnati, OH	December 11, 2011.
81,903A	Adecco, Working On-Site at Senco Brands, Inc.	Cincinnati, OH	August 1, 2011.
81,909	Supervalu, Inc., Finance Department, incl. on-site leased workers from Matthews Professional.	Pleasant Prairie, WI	August 22, 2011.
81,925	Oracle America, Inc., RMA Program Management, Randstad Managed Serv, Oracle America, RMA Program.	Redwood Shores, CA	August 27, 2011.
81,933	Parker Hannifin Corporation, Sporlan Division, PRO Resource Staffing Service.	New Haven, IN	August 30, 2011.
81,943	Verifications, Inc., Aerotek and Kelly Services.	Aberdeen, SD	September 5, 2011.
81,943A	Verifications, Inc., Aerotek and Kelly Services.	Mitchell, SD	September 5, 2011.
81,957	Edmund Optics, Inc., Bear Staffing and Manpower.	Pennsburg, PA	September 7, 2011.

The following certifications have been issued. The requirements of Section 222(c) (downstream producer for a firm whose workers are certified eligible to apply for TAA) of the Trade Act have been met.

TA–W No.	Subject firm	Location	Impact date
81,879	RG Steel Wheeling, LLC, Division of RG Steel, LLC, Wheeling Corrugating Company.	Beech Bottom, WV	August 7, 2011.

Negative Determinations for Worker Adjustment Assistance

In the following cases, the investigation revealed that the eligibility criteria for worker adjustment assistance have not been met for the reasons specified.

The investigation revealed that the criteria under paragraphs(a)(2)(A) (increased imports) and (a)(2)(B) (shift in production or services to a foreign country) of section 222 have not been met.

TA–W No.	Subject firm	Location	Impact date
81,846	Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division.	Alpharetta, GA	
81,846A	Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division.	Hunt Valley, MD	
81,846B	Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division.	Naperville, IL	
81,846C	Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division.	St. Louis, MO	
81,846D	Goodman Networks, Inc., Core Network Engineering (Deployment Engineering) Division.	Plano, TX	
81,941	OptumInsight Government Solutions, OptumInsight, Inc., UnitedHealth Group, On-site at CA Depart of Health.	Sacramento, CA	

I hereby certify that the aforementioned determinations were issued during the period of *September 24, 2012 through September 28, 2012.* These determinations are available on the Department's Web site *tradeact/taa/taa search form.cfm* under the searchable listing of determinations or by calling the Office of Trade Adjustment Assistance toll free at 888–365–6822.

Dated: October 1, 2012.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–25137 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Investigations Regarding Eligibility to Apply for Worker Adjustment Assistance

Petitions have been filed with the Secretary of Labor under Section 221 (a) of the Trade Act of 1974 (''the Act'') and are identified in the Appendix to this notice. Upon receipt of these petitions, the Director of the Office of Trade Adjustment Assistance, Employment and Training Administration, has instituted investigations pursuant to Section 221 (a) of the Act.

The purpose of each of the investigations is to determine whether the workers are eligible to apply for adjustment assistance under Title II, Chapter 2, of the Act. The investigations will further relate, as appropriate, to the determination of the date on which total or partial separations began or threatened to begin and the subdivision of the firm involved.

The petitioners or any other persons showing a substantial interest in the subject matter of the investigations may request a public hearing, provided such request is filed in writing with the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than October 22, 2012.

Interested persons are invited to submit written comments regarding the subject matter of the investigations to the Director, Office of Trade Adjustment Assistance, at the address shown below, not later than October 22, 2012.

The petitions filed in this case are available for inspection at the Office of the Director, Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor, Room N–5428, 200 Constitution Avenue NW., Washington, DC 20210.

Signed at Washington, DC, this 3rd day of October 2012.

Elliott S. Kushner,

Certifying Officer, Office of Trade Adjustment Assistance.

APPENDIX

[31 TAA petitions instituted between 9/24/12 and 9/28/12]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
81986	Genzyme, A Sanofi Company, Network Operations Center (NOCC IT Department) (State/One-Stop).	Framingham, MA	09/24/12	09/20/12
81987	Cincinnati Bell, RSC/BSC and Order Support Representatives (Union).	Norwood, Lebanon, and Cincinnati, OH.	09/24/12	09/19/12
81988	Georgia-Pacific Consumer Products LP (Union)	Green Bay, WI	09/24/12	09/05/12
81989	Siemens Energy, Inc. (State/One-Stop)	Fort Madison, IA	09/24/12	09/20/12
81990	American Airlines (Union)	Tulsa, OK	09/24/12	09/19/12
81991	Delphi Electronics & Safety (Company)	Kokomo, IN	09/24/12	09/20/12
81992	Cox Media Group Ohio, Dayton Daily News (Workers)	Dayton, OH	09/24/12	09/20/12
81993	Experian (State/One-Stop)	Schaumburg, IL	09/24/12	09/20/12
81994	Ahlstrom West Carrollton LLC (Company)	West Carrollton, OH	09/24/12	09/20/12
81995	Bank of America—Account Specialists (Workers)	Seattle, WA	09/24/12	09/19/12
81996	Novartis Pharmaceutical Corporation (State/One-Stop)	Schaumberg, IL	09/24/12	08/27/12
81997	TE Connectivity (Formerly Tyco) (State/One-Stop)	Shakopee, MN	09/24/12	09/21/12
81998	APC Workforce Solutions II, LLC (dba ZeroChaos) (State/One-Stop).	Quincy, MA	09/24/12	09/21/12
81999	Ferrara Candy Company (formerly Farley's & Sathers) (State/One-Stop).	Round Lake, MN	09/24/12	09/21/12
82000	Parker Hannifin Corporation (State/One-Stop)	Beaufort, SC	09/24/12	09/24/12
82001	Royal Appliance Manufacturing Company dba TTI Floor Care N. America & Subsi (Company).	Canton, OH	09/25/12	09/25/12
82002	E! Entertainment Television Style, G4 Media NBC Universal (State/One-Stop).	Los Angeles, CA	09/25/12	09/24/12
82003	RR Donnelley (Workers)	Johnson City, TN	09/25/12	09/24/12
82004	TRG Customer Solutions (Workers)	Oil City, PA	09/25/12	09/19/12
82005	Boston Scientific (Workers)	Maple Grove, MN	09/25/12	09/25/12
82006	Tellabs (State/One-Stop)	Naperville, IL	09/26/12	09/25/12
82007	Maysteel LLC (Company)	Creedmoor, NC	09/26/12	09/25/12
82008	BRP US, Inc. (State/One-Stop)	Benton, IL	09/26/12	09/25/12
82009	ITT Interconnect Solutions (State/One-Stop)	Santa Ana, CA	09/26/12	09/25/12
82010	Dell Marketing LP, Americas Transactional Group (State/One-Stop).	Round Rock, TX	09/27/12	09/26/12
82011	Winzen Film, Inc. (Workers)	Sulphur Springs, TX	09/27/12	09/18/12
82012	Oxford Collections (Workers)	Gaffney, SC	09/27/12	09/26/12
82013	Hewlett-Packard Company (State/One-Stop)	Vancouver, WA	09/27/12	08/04/12
82014	Advanstar (State/One-Stop)	Duluth, MN	09/27/12	09/26/12
82015	PCS Phosphate (Workers)	Aurora, NC	09/27/12	09/26/12

APPENDIX—Continued

[31 TAA petitions instituted between 9/24/12 and 9/28/12]

TA–W	Subject firm (petitioners)	Location	Date of institution	Date of petition
82016	Trostel, Limited (Company)	Whitewater, WI	09/28/12	09/27/12

[FR Doc. 2012–25133 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

Notice of a Virtual Meeting of the Advisory Committee on Apprenticeship (ACA)

AGENCY: Employment and Training Administration (ETA), Labor.

ACTION: Notice of a virtual meeting.

SUMMARY: Pursuant to Section 10 of the Federal Advisory Committee Act (FACA) (Pub. L. 92–463; 5 U.S.C. APP. 1), notice is hereby given to announce an open virtual meeting of the Advisory Committee on Apprenticeship (ACA) on November 14–15, 2012, which can be accessed from the Office of Apprenticeship's (OA) homepage: *http://www.doleta.gov/oa/.* The ACA is a discretionary committee established by the Secretary of Labor, in accordance with FACA, as amended 5 U.S.C., App. 2, and its implementing regulations (41 CFR 101–6 and 102–3).

All meetings of the ACA are open to the public. A virtual meeting of the ACA provides a cost savings to the government while still offering a venue that allows for public participation and transparency, as required by FACA.

DATES: The meeting will begin at approximately 1:00 p.m. Eastern Time on Wednesday, November 14, 2012, and will continue until approximately 3:00 p.m. The meeting will reconvene on Thursday, November 15, 2012, at approximately 1:00 p.m. Eastern Time and adjourn at approximately 3:00 p.m.

FOR FURTHER INFORMATION CONTACT: The Designated Federal Official, Mr. John V. Ladd, Administrator, Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Room N–5311, Washington, DC 20210. Telephone: (202) 693–2796, (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: This virtual meeting will take place via webinar and audio-video conferencing technology. Web and audio instructions to participate in this meeting will be prominently posted on the OA homepage: *http://www.doleta.gov/oa/.*

Members of the public are encouraged to attend the meeting virtually. For members of the public wishing to attend in person, a listening room with limited seating will be made available upon request. The location for the listening room will be: U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue NW., Washington, DC 20210. The agenda may be updated should priority items come before the Committee between the time of this publication and the scheduled date of the ACA meeting. All meeting updates will be posted to OA's homepage: *http://www.doleta.gov/oa/.* All meeting participants, whether attending virtually or in person, should submit a notice of intention to attend by Wednesday, November 7, 2012, via email to Mr. John V. Ladd at *oa.administrator@dol.gov,* subject line ''Virtual ACA Meeting.'' The webinar will be limited to 200 participants, unless OA receives more than 200 submissions to attend. If individuals have special needs and/or disabilities that will require special accommodations, please contact Kenya Huckaby on (202) 693–3795 no later than Wednesday, November 7, 2012.

Any member of the public who wishes to file written data or comments pertaining to the agenda may do so by sending the data or comments to Mr. John V. Ladd via email at *oa.administrator@dol.gov,* subject line ''Virtual ACA Meeting,'' or submitting to the Office of Apprenticeship, Employment and Training Administration, U.S. Department of Labor, Room N–5311, 200 Constitution Avenue NW., Washington, DC 20210. Such submissions will be included in the record for the meeting if received by Wednesday, November 7, 2012.

Purpose of the Meeting and Topics To Be Discussed

The primary purpose of the meeting is to provide the ACA with an opportunity to reconvene after the summit honoring the 75th anniversary of the National Apprenticeship Act, finalize their recommendations to the Secretary of Labor, and begin to proactively develop implementation strategies for the upcoming term. The meeting agenda will include the following:

- ➢ Improving Completion Rates
- ➢ Final Recommendations and Report to the Secretary
- ➢ Pre-Apprenticeship Update
- ➢ Community Based Organizations (CBO) White Paper
- ➢ Efforts to Improve Opportunities for Veterans
- ➢ Sector Caucus Breakout Sessions and Report Outs
- ➢ Annual Outlook: Finalize Workgroups and Implementation Strategies for Fiscal Year (FY) 2013
- ➢ Other Matters of Interest to the Apprenticeship Community
- ➢ Public Comment

Any member of the public who wishes to speak at the meeting should indicate the nature of the intended presentation and the amount of time needed by furnishing a written statement to the Designated Federal Official, Mr. John V. Ladd, by Wednesday, November 7, 2012. The Chairperson will announce at the beginning of the meeting the extent to which time will permit the granting of such requests.

Signed at Washington, DC, this 4th day of October, 2012.

Jane Oates,

Assistant Secretary for the Employment and Training Administration.

[FR Doc. 2012–25121 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–FR–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–81,351]

Truseal Technologies, Inc., A Division of Quanex Building Products Corporation, Barbourville, Kentucky; Notice of Negative Determination on Reconsideration

On April 27, 2012, the Department of Labor issued an Affirmative Determination Regarding Application for Reconsideration for the workers and former workers of Truseal Technologies, a Division of Quanex Building Products Corporation, Barbourville, Kentucky (subject firm). The subject firm produces flashing used in building construction

and sealants used in window and door products and photovoltaic panels. Workers are not separately identifiable by article produced.

The negative determination was based on the Department's findings of no subject firm sales or production declines and no shift of production to a foreign country.

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justified reconsideration of the decision.

The request for reconsideration alleges that the subject firm has shifted to Germany the production of articles like or directly competitive with the flashing and sealant produced by the subject firm and that this information was provided by a company official.

During the reconsideration investigation, the Department received confirmation from the subject firm of no shift to (or acquisition from) a foreign country the production of articles like or directly competitive with the flashing and sealant produced by the subject firm. Rather, the subject firm consolidated production to an existing, affiliated domestic facility.

During the reconsideration investigation, the Department also contacted the company official identified in the request for reconsideration. The company official clarified that, while the subject firm does have a facility in Germany, there was no shift in production to any facility than the Cambridge, Ohio facility and the workers who filed the request for reconsideration had misunderstood him.

Previously-submitted information revealed that subject firm employment, sales, and production did not decline prior to the plant closure in August 2012. Rather, employment, sales, and production increased in 2011 from 2010 levels.

Therefore, after careful review of previously-submitted information, the request for reconsideration, and information obtained during reconsideration investigation, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After careful reconsideration, I affirm the original notice of negative determination of eligibility to apply for worker adjustment assistance for workers and former workers of Truseal Technologies, a Division of Quanex Building Products Corporation, Barbourville, Kentucky.

Signed in Washington, DC on this 27th day of September, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–25136 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Employment and Training Administration

[TA–W–80,525]

Long Elevator & Machine Company, Inc., Including Workers Whose Wages Were Reported Through Kone, Inc., Riverton, IL; Notice of Negative Determination on Reconsideration

On May 21, 2012, the Department of Labor issued an Affirmative Determination Regarding Application for Reconsideration for workers and former workers of Long Elevator & Machine Company, Inc., including workers whose wages were reported through Kone, Inc., Riverton, Illinois (hereafter referred to as Long Elevator & Machine Company or the subject firm). The Department's Notice was published in the **Federal Register** on June 6, 2012 (77 FR 33490). The workers' firm was engaged in activities related to the supply of elevator production and repair services. The subject worker group was engaged in activities related to the supply of elevator repair services, which included production of repair parts (elevator component parts).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts not previously considered; or

(3) If in the opinion of the Certifying Officer, a mis- interpretation of facts or of the law justified reconsideration of the decision.

The initial investigation resulted in a negative determination based on no shift in production of elevator component parts to a foreign country and no increased imports of elevator component parts (or like or directly competitive articles). Rather, the supply of elevator repair services and production of elevator components at the subject firm was consolidated to another facility within the United States by the parent company, Kone, Inc.

In the request for reconsideration, a worker alleged that the subject firm's parent company had shifted abroad the production of articles like or directly competitive with those produced at the subject firm facility of Long Elevator & Machine Company.

During the reconsideration investigation, the Department clarified information provided by workers, sought confirmation of previously-submitted information from the subject firm, and obtained new information from the subject firm.

Information obtained during the reconsideration investigation confirmed that neither the subject firm nor its parent company shifted to (or acquired from) a foreign country the production of articles like or directly competitive with the elevator component parts produced by the subject workers and that neither the subject firm nor its parent company shifted to (or acquired from) a foreign country the supply of services like or directly competitive with the repair services supplied by the subject workers.

Because each component part is specific to an elevator and the replacement parts produced at the Riverton, Illinois facility are for existing elevators, the component parts used in new elevators are not directly competitive with those for repaired elevators.

Although Kone, Inc. has facilities abroad which produce new elevators for installation, elevators are not like or directly competitive with elevator parts because component parts are not like or directly competitive with finished articles (elevators). The subject firm confirmed that component parts which are like or directly competitive with those formerly produced at the Riverton, Illinois facility are produced at other domestic facilities.

Therefore, after careful review of existing information, the request for reconsideration, and new information obtained during the reconsideration investigation, the Department determines that 29 CFR 90.18(c) has not been met.

Conclusion

After careful reconsideration, I affirm the original notice of negative determination of eligibility to apply for

worker adjustment assistance for workers and former workers of Long Elevator & Machine Company, Inc., including workers whose wages were reported through Kone, Inc., Riverton, Illinois.

Signed in Washington, DC on this 27th day of September, 2012.

Del Min Amy Chen,

Certifying Officer, Office of Trade Adjustment Assistance.

[FR Doc. 2012–25134 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–FN–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0083]

Proposed Extension of Existing Information Collection; Daily Inspection of Surface Coal Mines; Certified Person; Reports of Inspection (Pertains to Surface Coal Mines)

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to assure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration is soliciting comments concerning the extension of the information collection for 30 CFR 77.1713. OMB last approved this information collection request (ICR) on February 1, 2010.

DATES: All comments must be postmarked or received by midnight Eastern Standard Time on December 11, 2012.

ADDRESSES: Comments concerning the information collection requirements of this notice must be clearly identified with ''OMB 1219–0083'' and sent to the Mine Safety and Health Administration (MSHA). Comments may be sent by any of the methods listed below.

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Facsimile:* 202–693–9441, include ''OMB 1219–0083'' in the subject line of the message.
- *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. For hand delivery, sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Greg Moxness, Chief, Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *moxness.greg@dol.gov* (email); 202–693–9440 (voice); or 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

The Secretary shall, in accordance with procedures set forth in Section 101(a) of the Federal Mine Safety and Health Act of 1977 (Mine Act), and Section 553 of Title 5, United States Code, develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines. 30 U.S.C. 811(a). Additionally, section 103(h) of the Mine Act requires mine operators to establish and maintain ''such records, make such reports, and provide such information, as the Secretary * * * may reasonably require from time to time to enable [her] to perform [her] functions under this Act.'' 30 U.S.C. 813(h).

Section 77.1713, Title 30 of the Code of Federal Regulations (30 CFR 77.1713) requires coal mine operators to conduct examinations of each active working area of surface mines, active surface installations at these mines, facilities and preparation plants not associated with underground coal mines for hazardous conditions during each shift. A report of hazardous conditions detected must be entered into a record book along with a description of any corrective actions taken.

A number of potential hazards can exist at surface coal mines and facilities. Highwalls, mining equipment, travelways, and the handling of mining materials each present potentially hazardous conditions. Prior to the promulgation of 30 CFR 77.1713 in 1971, numerous miners had either lost their lives or received injuries of varying degrees of seriousness at areas affected by the subject standard. The majority of the injuries and fatalities resulted from hazardous conditions not detected and corrected. By conducting an on shift examination for hazardous conditions, mine operators better ensure a safe working environment for the miners and a reduction in accidents.

II. Desired Focus of Comments

The Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed extension of the information collection related to Daily Inspection of Surface Coal Mines; Certified Person; Reports of Inspection (Pertains to Surface Coal Mines). MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Address the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submissions of responses), to minimize the burden of the collection of information on those who are to respond.

The public may examine publicly available documents, including the public comment version of the supporting statement, at MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. OMB clearance requests are available on MSHA's Web site at *http://www.msha.gov* under ''Rules & Regs'' on the right side of the screen by selecting *Information Collections Requests, Paperwork Reduction Act Supporting Statements.* The document will be available on MSHA's Web site for 60 days after the publication date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because comments will not be edited to remove any identifying or contact information, MSHA cautions the commenter against including any information in the submission that should not be publicly disclosed. Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

III. Current Actions

The information obtained from mine operators is used by MSHA during inspections to determine compliance

with safety and health standards. MSHA has updated the data in respect to the number of respondents and responses, as well as the total burden hours and burden costs supporting this information collection extension request.

MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Summary

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Daily Inspection of Surface Coal Mines; Certified Person; Reports of Inspection (Pertains to Surface Coal Mines).

OMB Number: 1219–0083.

Affected Public: Business or other for-profit.

Cite/Reference/Form/etc: 30 CFR 77.1713.

Total Number of Respondents: 1,464.

Frequency: 312.

Total Number of Responses: 913,536.

Total Burden Hours: 685,152 hours.

Total Other Annual Cost Burden: $0.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Authority: 44 U.S.C. 3506(c)(2)(A).

Dated: October 5, 2012.

George F. Triebsch,

Certifying Officer.

[FR Doc. 2012–25075 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

[OMB Control No. 1219–0039]

Proposed Extension of Existing Information Collection; Gamma Radiation Surveys

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for public comments.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995. This program helps to assure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Mine Safety and Health Administration is soliciting comments concerning the extension of the information collection for 30 CFR 57.5047. OMB last approved this information collection request (ICR) on February 1, 2010.

DATES: All comments must be postmarked or received by midnight Eastern Standard Time on December 11, 2012.

ADDRESSES: Comments concerning the information collection requirements of this notice must be clearly identified with ''OMB 1219–0039'' and sent to the Mine Safety and Health Administration (MSHA). Comments may be sent by any of the methods listed below.

- *Federal E-Rulemaking Portal: http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Facsimile:* 202–693–9441, include ''OMB 1219–0039'' in the subject line of the message.
- *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations, and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. For hand delivery, sign in at the receptionist's desk on the 21st floor.

FOR FURTHER INFORMATION CONTACT: Greg Moxness, Chief, Economic Analysis Division, Office of Standards, Regulations, and Variances, MSHA, at *moxness.greg@dol.gov* (email); 202–693–9440 (voice); or 202–693–9441 (facsimile).

SUPPLEMENTARY INFORMATION:

I. Background

Gamma radiation occurs where radioactive materials are present. It has been associated with lung cancer and other debilitating occupational diseases. Natural sources include rocks, soils, and ground water. Gamma radiation hazards may be found near radiation sources at surface operations using X-ray machines, weightometers, nuclear and diffraction units. Nuclear gauges mounted outside tanks, pipes, bins, hoppers or other types of vessels; gamma rays are used to sense the level and density of liquids, slurries or solids.

Gamma rays penetrate the body and can kill or damage cells in their path which can affect many of the body's organs. The adverse health effects from exposure to gamma radiation can vary depending upon the type of cell affected and the extent of damage.

Under Section 103(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act), the Mine Safety and Health Administration (MSHA) is required to ''* * * issue regulations requiring operators to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under any applicable mandatory health or safety standard promulgated under this Act.'' In addition, 30 CFR 57.5047(a) requires that gamma radiation surveys be conducted annually in all underground mines where radioactive ores are mined. 30 CFR 57.5047(c) requires that gamma radiation dosimeters be provided for all persons exposed to average gamma radiation measurements in excess of 2.0 milliroentgens per hour in the working place. This paragraph also requires the operator keep records of cumulative individual gamma radiation exposures.

II. Desired Focus of Comments

The Mine Safety and Health Administration (MSHA) is soliciting comments concerning the proposed extension of the information collection related to Gamma Radiation Surveys. MSHA is particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information has practical utility;
- Evaluate the accuracy of the MSHA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Suggest methods to enhance the quality, utility, and clarity of the information to be collected; and
- Address the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submissions of responses), to minimize the burden of the collection of information on those who are to respond.

The public may examine publicly available documents, including the public comment version of the supporting statement, at MSHA, Office of Standards, Regulations, and

Variances, 1100 Wilson Boulevard, Room 2350, Arlington, VA 22209–3939. OMB clearance requests are available on MSHA's Web site at *http://www.msha.gov* under ''Rules & Regs'' on the right side of the screen by selecting *Information Collections Requests, Paperwork Reduction Act Supporting Statements*. The document will be available on MSHA's Web site for 60 days after the publication date of this notice. Comments submitted in writing or in electronic form will be made available for public inspection. Because comments will not be edited to remove any identifying or contact information, MSHA cautions the commenter against including any information in the submission that should not be publicly disclosed. Questions about the information collection requirements may be directed to the person listed in the **FOR FURTHER INFORMATION** section of this notice.

III. Current Actions

The information obtained from mine operators is used by MSHA during inspections to determine compliance with this health standard. MSHA has updated the data in respect to the number of respondents and responses, as well as the total burden hours and burden costs supporting this information collection extension request.

MSHA does not intend to publish the results from this information collection and is not seeking approval to either display or not display the expiration date for the OMB approval of this information collection.

There are no certification exceptions identified with this information collection and the collection of this information does not employ statistical methods.

Summary

Type of Review: Extension.

Agency: Mine Safety and Health Administration.

Title: Gamma Radiation Surveys.

OMB Number: 1219–0039.

Affected Public: Business or other for-profit.

Cite/Reference/Form/etc: 30 CFR 57.5047(a) and (c).

Total Number of Respondents: 4.

Frequency: 1.

Total Number of Responses: 4.

Total Burden Hours: 8 hours.

Total Other Annual Cost Burden: $0.

Comments submitted in response to this notice will be summarized and included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Authority: 44 U.S.C. 3506(c)(2)(A).

Dated: October 5, 2012.

George F. Triebsch,

Certifying Officer.

[FR Doc. 2012–25076 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–43–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Petitions for Modification of Application of Existing Mandatory Safety Standards

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Notice.

SUMMARY: Section 101(c) of the Federal Mine Safety and Health Act of 1977 and 30 CFR part 44 govern the application, processing, and disposition of petitions for modification. This notice is a summary of petitions for modification submitted to the Mine Safety and Health Administration (MSHA) by the parties listed below to modify the application of existing mandatory safety standards codified in Title 30 of the Code of Federal Regulations.

DATES: All comments on the petitions must be received by the Office of Standards, Regulations and Variances on or before November 13, 2012.

ADDRESSES: You may submit your comments, identified by ''docket number'' on the subject line, by any of the following methods:

1. *Electronic Mail: zzMSHA-comments@dol.gov.* Include the docket number of the petition in the subject line of the message.
2. *Facsimile:* 202–693–9441.
3. *Regular Mail or Hand Delivery:* MSHA, Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2350, Arlington, Virginia 22209–3939, Attention: George F. Triebsch, Director, Office of Standards, Regulations and Variances. Persons delivering documents are required to check in at the receptionist's desk on the 21st floor. Individuals may inspect copies of the petitions and comments during normal business hours at the address listed above.

MSHA will consider only comments postmarked by the U.S. Postal Service or proof of delivery from another delivery service such as UPS or Federal Express on or before the deadline for comments.

FOR FURTHER INFORMATION CONTACT: Barbara Barron, Office of Standards, Regulations and Variances at 202–693–9447 (Voice), *barron.barbara@dol.gov* (Email), or 202–693–9441 (Facsimile). [These are not toll-free numbers.]

SUPPLEMENTARY INFORMATION:

I. Background

Section 101(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act) allows the mine operator or representative of miners to file a petition to modify the application of any mandatory safety standard to a coal or other mine if the Secretary of Labor determines that:

(1) An alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard; or

(2) That the application of such standard to such mine will result in a diminution of safety to the miners in such mine.

In addition, the regulations at 30 CFR 44.10 and 44.11 establish the requirements and procedures for filing petitions for modification.

II. Petitions for Modification

Docket Numbers: M–2012–161–C and M–2012–162–C.

Petitioner: Pocahontas Coal Company, LLC, 109 Appalachian Drive, Beckley, West Virginia 25801.

Mines: Josephine Mine No. 2, MSHA I.D. No. 46–07191, and Josephine Mine No. 3, located in Raleigh County, West Virginia.

Regulation Affected: 30 CFR 75.1101–1(b) (Deluge-type water spray systems).

Modification Request: The petitioner requests a modification of the existing standard to eliminate the use of blow-off dust covers for the spray nozzles of a deluge-type water spray system. The petitioner states that the functionality test will be conducted weekly. The petitioner further states that:

(1) Functional tests are currently being conducted weekly and pressure and flow rates for the deluge system are adequately maintained. In some tests, the dust covers do not come off all spray nozzles.

(2) By conducting functional tests weekly, all spray nozzles can be inspected and maintained on a weekly basis.

(3) The dust covers protect the spray nozzles that are tested yearly, and by testing the spray nozzles weekly, the covers are not necessary.

The petitioner asserts that the proposed alternative method will at all times guarantee the miners no less than the same measure of protection as that afforded by the existing standard.

Dated: October 5, 2012.

George F. Triebsch,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 2012–25065 Filed 10–11–12; 8:45 am]

BILLING CODE 4510–43–P

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0235]

Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comments.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is seeking comments on its draft ''Tribal Protocol Manual'' dated September 2012. After the Tribal Protocol Manual is issued, the NRC intends to use it as a starting point for developing a policy statement on consultation with Native American tribes. The NRC is committed to an open and collaborative regulatory environment in the development of its policies and licensing actions, and therefore is committed to meaningful consultation and coordination with Native American tribes.

In addition to the request for comments on the draft Tribal Protocol Manual, the NRC also seeks suggestions on the development of the proposed tribal consultation policy statement from tribal governments and organizations, the public, and other interested parties. The questions found in section II are offered for consideration. Respondents are not limited to these questions and are encouraged to submit any comments/feedback they think would benefit the NRC in developing a tribal consultation policy statement.

DATES: Submit comments on the draft Tribal Protocol Manual or on the proposed tribal consultation policy statement by April 1, 2013. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0235. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0235. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *NRC Home Page:* A graphic displaying the Tribal Protocol Manual will be prominently displayed on the NRC home page (*http://www.nrc.gov*) for a period of time, after which it will be moved to the ''Spotlight'' Section.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

FOR FURTHER INFORMATION CONTACT: Cardelia H. Maupin, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2312; email: *Cardelia.Maupin@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0235 when contacting the NRC about the availability of information regarding this draft Tribal Protocol Manual or the proposed tribal consultation policy statement. You may access information related to these documents, which the NRC possesses and is publicly available, by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0235.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly-available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced. The draft ''Tribal Protocol Manual'' dated September 2012, is available electronically under ADAMS Accession Number: ML12261A423.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0235 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

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

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

II. Discussion

In January 2009, the Commission directed the staff to develop an internal protocol for interactions with Native American tribal governments [1] that allows for custom tailored approaches to address the interests of both the NRC and the tribal governments on a case-by-case basis.[2] On November 5, 2009, President Obama issued a Presidential Memorandum that reaffirmed Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and emphasized the importance of strengthening government-to-government relationships with Native American tribes. In SECY–09–0180, ''U.S. Nuclear Regulatory Commission Interaction with Native American Tribes,'' (ADAMS Accession No. ML092800263), dated

[1] For the purposes of this notice, the terms ''Native American tribal governments'' and ''Native American tribes'' are used interchangeably. In addition, these terms also include the term ''Native Hawaiian organization,'' as that term is defined in 36 CFR 800.16(s)(1).

[2] Staff Requirements Memorandum, ''Briefing on Uranium Recovery,'' M081211 (ML090080206) January 8, 2009.

December 11, 2009, NRC staff reviewed its various interactions with Native American tribes, and noted that these interactions were limited to a small number of activities under the NRC regulatory authority. At that time, staff concluded that a ''case-by-case'' approach had proven effective in interactions with Native American tribes by allowing for custom-tailored approaches that met Commission and tribal needs, and that no formal policy was needed. The NRC staff also noted that the internal guidance on tribal protocol would further enhance staff's engagement with Native American tribes. The internal NRC guidance, ''Tribal Protocol Manual: Guidance for NRC Employees'' was developed and issued in March 2010.

As described in enclosure 1 to SECY–09–0180, the NRC has consulted with several tribes, including some instances of government-to-government meetings, regarding various NRC regulatory and licensing activities. The subjects of these actions have included reactor inspections of the Prairie Island Nuclear Generating Plant (PINGP) in Welsh, Minnesota, the renewal of PINGP's operating license, the proposed Yucca Mountain high-level waste repository in Nevada, uranium milling operations in New Mexico and Arizona, the potential placement of a power reactor in Galena, Alaska, and the reclamation of the Sequoyah Fuels Corporation site in Gore, Oklahoma. Recently, a heightened interest in uranium recovery development and new nuclear reactor construction has resulted in a significant increase in the number and complexity of consultations between the NRC and Native American tribes in order to address the obligations and requirements of Section 106 of the National Historic Preservation Act (NHPA).

The NHPA was enacted in 1966 to coordinate and support public and private efforts to identify, evaluate, and protect historic properties. Section 106 of the NHPA directs Federal agencies to consider the effects of their proposed actions on historic properties as a part of their decisionmaking process. Specifically, the regulations of the Advisory Council on Historic Preservation, which implement Section 106, set forth requirements for a Federal agency's consultation with Native American tribes.[3]

In light of these increased interactions with Native American tribes and to improve communication with tribal governments, the Commission, by Staff Requirements Memorandum (COMWDM–12–0001), ''Tribal Consultation Policy Statement and Protocol,'' (ADAMS Accession No. ML121430233), dated May 22, 2012, directed the NRC staff to develop a proposed policy statement and protocol on consultation with Native American tribal governments. As a part of these efforts, the NRC staff identified minor revisions to the March 2010 ''Tribal Protocol Manual: Guidance for NRC Employees,'' and produced the draft Tribal Protocol Manual, dated September 2012. The NRC staff recognizes that additional changes to improve the draft Tribal Protocol Manual may be needed and is thus seeking public comment on the document in order to consider a broad range of experiences and perspectives on tribal interactions, including consultation and government-to-government meetings. Therefore, the NRC is requesting comments on the draft Tribal Protocol Manual and the development of a proposed tribal consultation policy statement from tribal governments and organizations, the public, and other interested parties. The questions in section III are intended to assist the NRC in developing an effective tribal consultation policy statement.

III. Questions on the proposed policy statement

Tribal governments and organizations, the public, and other interested parties submitting comments are not limited to responding to the questions set forth below and are encouraged to submit any comments or other feedback they think would benefit the NRC in developing a tribal consultation policy statement.

- How can the NRC strengthen government-to-government relationships with Native American tribes?
- What practices have the NRC or other Federal agencies employed that have been effective in identifying tribal interests and resolving tribal concerns about proposed agency actions?
- Are there specific Tribal Policy Statements in other Federal agencies that could serve as
- A starting point for the NRC efforts?
- What unique tribal issues should the NRC be aware of as a non-landholding,[4] regulatory agency that issues licenses under the Atomic Energy Act?

For the Nuclear Regulatory Commission.

Dated at Rockville, Maryland, this 4th day of October 2012.

Larry W. Camper,

Acting Director, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2012–25115 Filed 10–11–12; 8:45 am]

BILLING CODE 7590–01–P

[3] 36 CFR 800.2(c)(2).

[4] A landholding agency, such as the Bureau of Land Management, holds or controls land as part of carrying out its agency mission.

NUCLEAR REGULATORY COMMISSION

[NRC–2012–0237]

Proposed Revision Treatment of Non-Safety Systems for Passive Advanced Light Water Reactors

AGENCY: Nuclear Regulatory Commission.

ACTION: Standard review plan-draft section revision; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC or the Commission) is soliciting public comment on NUREG–0800, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants: LWR Edition,'' on a proposed new section to its Standard Review Plan (SRP), Section 19.3, ''Regulatory Treatment of Non-Safety Systems (RTNSS) for Passive Advanced Light Water Reactors.'' The current SRP does not contain guidance on the proposed RTNSS for Passive Advance Light Water Reactors.

DATES: Submit comments by November 13, 2012. Comments received after this date will be considered, if it is practical to do so, but the Commission is able to ensure consideration only for comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2012–0237. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0237. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov*.
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.
- *Fax comments to:* RADB at 301–492–3446.

For additional direction on accessing information and submitting comments, see ''Accessing Information and

Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Ms. Amy E. Cubbage, Office of New Reactors, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone at 301–415–2875 or email at *Amy.Cubbage@nrc.gov*.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2012–0237 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and are publicly available, by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2012–0237.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html*. To begin the search, select ''*ADAMS Public Documents*'' and then select ''*Begin Web-based ADAMS Search*.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov*. The ADAMS accession number for each document referenced in this notice (if that document is available in ADAMS) is provided the first time that a document is referenced. The SRP, Section 19.3 is under ADAMS Accession ML12128A405.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2012–0237 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

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

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

II. Further Information

The NRC seeks public comment on a proposed new section of SRP Section 19.3, ''Regulatory Treatment of Non-Safety Systems (RTNSS) for Passive Advanced Light Water Reactors.'' This section has been developed to assist NRC staff with the review of applications for certain construction permits, early site permits, licenses, license amendments, and combined licenses and to inform new reactor applicants and other affected entities of proposed SRP guidance regarding an acceptable method by which to evaluate guidance on application review on the subject of loss of large areas of the plant due to explosions and fires. Following NRC staff evaluation of public comments, the NRC intends to incorporate the final approved guidance into the next revision of NUREG–0800.

Dated at Rockville, Maryland, this 4th day of October 2012.

For the Nuclear Regulatory Commission.

Amy E. Cubbage,

Chief, Policy Branch, Division of Advanced Reactors and Rulemaking, Office of New Reactors.

[FR Doc. 2012–25110 Filed 10–11–12; 8:45 am]

BILLING CODE 7590–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 30e–1; SEC File No. 270–21, OMB Control No. 3235–0025.

Notice is hereby given that, under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''Paperwork Reduction Act''), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Rule 30e–1 (17 CFR 270.30e–1) under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (''Investment Company Act'') generally requires a registered investment company (''fund'') to transmit to its shareholders, at least semi-annually, reports containing the information that is required to be included in such reports by the fund's registration statement form under the Investment Company Act. The purpose of the collection of information required by rule 30e–1 is to provide fund shareholders with current information about the operation of their funds in accordance with Section 30 of the Investment Company Act.

Approximately 2,490 funds, with a total of approximately 10,750 portfolios, respond to rule 30e–1 annually. Based on conversations with fund representatives, we estimate that it takes approximately 84 hours to comply with the collection of information associated with rule 30e–1 per portfolio. This time is spent, for example, preparing, reviewing, and certifying the reports. Accordingly, we calculate the total estimated annual internal burden of responding to rule 30e–1 to be approximately 903,000 hours (84 hours × 10,750 portfolios). In addition to the burden hours, based on conversations with fund representatives, we estimate that the total cost burden of compliance with the information collection requirements of rule 30e–1 is approximately $31,061 per portfolio. This includes, for example, the costs for funds to prepare, print, and mail the reports. Accordingly, we calculate the total external cost burden associated with rule 30e–1 to be approximately $333,905,750.

Estimates of the average burden hours are made solely for the purposes of the Paperwork Reduction Act and are not derived from a comprehensive or even representative survey or study of the costs of Commission rules and forms. The collection of information under rule 30e–1 is mandatory. The information provided under rule 30e–1 will not be kept confidential. 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 public may view the background documentation for this information collection at the following Web site: *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the

Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312; or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: October 5, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25089 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Form N–5, SEC File No. 270–172, OMB Control No. 3235–0169.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Form N–5 (17 CFR 239.24 and 274.5)—Registration Statement of Small Business Investment Companies Under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) Form N–5 is the integrated registration statement form adopted by the Commission for use by a small business investment company which has been licensed as such under the Small Business Investment Act of 1958 and has been notified by the Small Business Administration that the company may submit a license application, to register its securities under the Securities Act of 1933 (''Securities Act''), and to register as an investment company under section 8 of the Investment Company Act of 1940 (''Investment Company Act''). The purpose of registration under the Securities Act is to ensure that investors are provided with material information concerning securities offered for public sale that will permit investors to make informed decisions regarding such securities. The Commission staff reviews the registration statements for the adequacy and accuracy of the disclosure contained therein. Without Form N–5, the Commission would be unable to carry out the requirements to the Securities Act and Investment Company Act for registration of small business investment companies. The respondents to the collection of information are small business investment companies seeking to register under the Investment Company Act and to register their securities for sale to the public under the Securities Act.

Based on discussions with fund representatives and the Commission's experience with the filing of Form N–5 and with disclosure documents generally, we estimate that the reporting burden of compliance with Form N–5 is approximately 352 hours per respondent. The Commission has received one Form N–5 filing in the last three years, for an average annual hourly burden of 117 hours. The cost of compliance varies considerably depending on factors such as whether a filing is a new registration statement or an update to a previously effective registration statement; whether the fund being registered presents novel or complex legal issues or is similar to other funds; whether amendments are required in response to staff comments; and whether outside counsel and accountants are necessary for preparation of the filing. Based on discussions with fund representatives and the Commission's experience with the filing of Form N–5 and with comparable disclosure documents, we estimate that the cost of compliance may range from less than $15,000 (for a routine filing) to over $60,000 (for a registration statement presenting significant legal issues per response) with an average cost per filing of $30,000. There has been one Form N–5 filing in the last three years. We therefore estimate that the average annual cost burden to the industry is $10,000.

Providing the information on Form N–5 is mandatory. Responses will not be kept confidential. Estimates of the burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms. 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 public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: October 5, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25090 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension: Form N–8B–2.

SEC File No. 270–186, OMB Control No. 3235–0186.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the ''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for extension of the previously approved collection of information discussed below.

Form N–8B–2 (17 CFR 274.12) is the form used by unit investment trusts (''UITs'') other than separate accounts that are currently issuing securities, including UITs that are issuers of periodic payment plan certificates and UITs of which a management investment company is the sponsor or depositor, to comply with the filing and disclosure requirements imposed by section 8(b) of the Investment Company Act of 1940 (15 U.S.C. 80a–8(b)). Form N–8B–2 requires disclosure about the organization of a UIT, its securities, the personnel and affiliated persons of the depositor, the distribution and

redemption of securities, the trustee or custodian, and financial statements. The Commission uses the information provided in the collection of information to determine compliance with section 8(b) of the Investment Company Act.

Based on the Commission's industry statistics, the Commission estimates that there would be approximately two initial filings on Form N–8B–2 and 6 post-effective amendment filings to the Form annually. The Commission estimates that each registrant filing an initial Form N–8B–2 would spend 10 hours in preparing and filing the Form and that the total hour burden for all initial Form N–8B–2 filings would be 20 hours. Also, the Commission estimates that each UIT filing a post-effective amendment to Form N–8B–2 would spend 6 hours in preparing and filing the amendment and that the total hour burden for all post-effective amendments to the Form would be 36 hours. By combining the total hour burdens estimated for initial Form N–8B–2 filings and post-effective amendments filings to the Form, the Commission estimates that the total annual burden hours for all registrants on Form N–8B–2 would be 56. Estimates of the burden hours are made solely for the purposes of the Paperwork Reduction Act, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

The information provided on Form N–8B–2 is mandatory. The information provided on Form N–8B–2 will not be kept confidential. 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 public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Comments must be submitted to OMB within 30 days of this notice.

Dated: October 5, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25091 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Interactive Data; SEC File No. 270–330, OMB Control No. 3235–0645.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') this request for extension of the previously approved collection of information discussed below.

The ''Interactive Data'' collection of information requires issuers filing registration statements under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and reports under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) to submit specified financial information to the Commission and post it on their corporate Web sites, if any, in interactive data format using eXtensible Business Reporting Language (XBRL). This collection of information is located primarily in registration statement and report exhibit provisions, which require interactive data, and Rule 405 of Regulation S–T (17 CFR 232.405), which specifies how to submit and post interactive data. The exhibit provisions are in Item 601(b)(101) of Regulation S–K (17 CFR 229.601(b)(101)), Forms F–9 and F–10 under the Securities Act (17 CFR 239.39 and 17 CFR 239.40) and Forms 20–F, 40–F and 6–K under the Exchange Act (17 CFR 249.220f, 17 CFR 249.240f and 17 CFR 249.306).

In interactive data format, financial statement information could be downloaded directly into spreedsheets and analyzed in a variety of ways using commercial off-the-shelf software. The specified financial information already is and will continue to be required to be submitted to the Commission in traditional format under existing requirements. The purpose of the interactive data requirement is to make financial information easier for investors to analyze and assist issuers in automating regulatory filings and business information processing. We estimate that 10,229 respondents per year will each submit an average of 4.5 reponses per year for an estimated total of 46,031 responses. We further estimate an internal burden of 59 hours per response for a total annual internal burden of 2,715,829 hours (59 hours per response × 46,031 responses).

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 public may view the background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: October 5, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25092 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67982; File No. SR–CME–2012–30]

Self-Regulatory Organizations; Chicago Mercantile Exchange Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Comply With CFTC Part 22 Regulations

October 4, 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 September 21, 2012, Chicago Mercantile Exchange Inc. (''CME'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which Items have been prepared primarily by CME. The Commission is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

CME proposes to amend certain of its rules to comply with the Commodity Futures Trading Commission's (''CFTC'') Part 22 Regulations. The text of the proposed rule change is available at the CME's Web site at *http://www.cmegroup.com,* at the principal office of CME, and at the Commission's Public Reference Room.

II. Self-Regulatory Organizations Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, CME 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 III below. CME 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

CME is registered as a derivatives clearing organization with the CFTC and operates a substantial business clearing futures and swaps contracts subject to the jurisdiction of the CFTC. CME proposes to adopt revisions to CME Rules 818.B, 930.H, 971 and 973 and to the CME Chapter 8F rules to comply with the CFTC's Part 22 Regulations that will become effective on November 8, 2012. The proposed rule changes would become operational on Monday, November 5, 2012.

The CFTC's Part 22 regulations for the ''Legally Segregated, Operationally Commingled'' (''LSOC'') customer protection regime for cleared swaps: (1) introduce new defined terms including Cleared Swap, Cleared Swaps Customer, Cleared Swaps Customer Account and Cleared Swaps Customer Collateral; and (2) incorporate by reference certain customer protection regulations for customer segregated (futures) accounts, including CFTC Regulations 1.20, 1.25, 1.27 to 1.30, and 1.49. Derivatives clearing organizations like CME and CFTC-registered futures commission merchants must comply with Part 22 by no later than Thursday, November 8, 2012.

The Part 22 regulations supplant the current customer OTC ''sequestered'' rules in Chapter 8F of the CME rule book, which were implemented in October 2010. CME is therefore removing customer ''sequestered'' Rules 8F100 to 8F136 and related definitions from its rule book. In addition, CME, CBOT and NYMEX are revising Rules 818.B, 930.H, 971 and 973 in each of their rule books to reflect the removal of CME's customer ''sequestered'' rules and utilization of the new terms identified above from the CFTC Part 22 regulations.

CME also made a filing, CME Submission 12–240, with its primary regulator, the CFTC, with respect to the proposed rule changes.

CME believes the proposed changes are consistent with the requirements of the Exchange Act including Section 17A. The rule changes are being proposed to comply with the CFTC's Part 22 Regulations which are designed to protect investors. As such, the proposed changes are designed to promote the prompt and accurate clearance and settlement of securities transactions and derivatives agreements, contracts and transactions to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency and, in general, help to protect investors and the public interest. CME, a derivatives clearing organization registered with the CFTC, further notes that it is required to implement the proposed changes to comply with applicable CFTC regulations. CME notes that the policies of the Commodity Exchange Act (''CEA'') with respect to clearing are comparable to a number of the policies underlying the Exchange Act, such as promoting market transparency for derivatives markets, promoting the prompt and accurate clearance of transactions and protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CME does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

CME has not solicited, and does not intend to solicit, comments regarding this proposed rule change. CME has not received any unsolicited written comments from interested parties.

III. 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–CME–2012–30 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–CME–2012–30. 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 CME and on CME's Web site at *http://www.cmegroup.com/market-regulation/rule-filings.html.*

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–CME–2012–30 and should be submitted on or before November 2, 2012.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

Section 19(b) of the Act [3] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. The Commission finds that the proposed rule change is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act, and the rules and regulations thereunder applicable to CME.[4] Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act, which requires, among other things, that the rules of a registered clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest.[5]

In its filing, CME requested that the Commission approve this proposed rule change on an accelerated basis for good cause shown. CME cites as the reason for this request CME's operation as a derivatives clearing organization subject to regulation by the CFTC and that the proposed changes are required to comply with new CFTC regulations that become effective on November 8, 2012.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[6] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register** because, as a registered derivatives clearing organization, CME must amend certain of its rules to comply with the CFTC's Part 22 Regulations that will become effective on November 8, 2012.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–CME–2012–30) be, and hereby is, approved on an accelerated basis.

[3] 15 U.S.C. 78s(b).

[4] 15 U.S.C. 78q–1. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25078 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67983; File No. SR–ICC–2012–17]

Self-Regulatory Organizations; ICE Clear Credit LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Revise Rules Related To Legal Segregation With Operational Commingling

October 4, 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 September 21, 2012, ICE Clear Credit LLC (''ICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule changes described in Items I and II below, which Items have been prepared primarily by ICC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

ICC submits proposed amendments to its Rules to implement the enhanced margin segregation model for cleared swaps that the Commodity Futures Trading Commission (''CFTC'') adopted in Part 22 of the CFTC regulations (generally referred to as ''legal segregation with operational commingling'' or ''LSOC''). CFTC rules require ICC (like other derivatives clearing organizations) to implement LSOC by November 8, 2012. As result of the LSOC requirements, ICC principally proposes to (i) introduce new procedures for allocating initial margin to the positions carried for each customer on a customer-by-customer basis, (ii) introduce new procedures for calling for, holding and returning customer margin in light of the requirement to allocate initial margin on a customer-by-customer basis, and (iii) change the default ''waterfall'' to limit ICC's ability to use customer margin in the event that a clearing member defaults, consistent with the requirements of LSOC. The LSOC requirements are intended to mitigate the risk that one customer of a clearing member would suffer a loss because of a default by another clearing member. ICC will also be removing existing provisions of the Rules that addressed the holding of excess margin and will not be necessary in ICC's initial implementation of LSOC.

ICC proposes to amend Parts 3, 4, 8, 20 and 20A of the ICC Rules, as well as related definitions, to incorporate Part 22 of the CFTC Regulations. The other proposed changes in the ICC Rules reflect conforming changes and drafting clarifications and do not affect the substance of the ICC Rules or forms of cleared products. All capitalized terms not defined herein are defined in the ICC Rules.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICC included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments it received on the proposed rule changes. The text of these statements may be examined at the places specified in Item III below. ICC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of these statements.[3]

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

As noted above, the principal purpose of the proposed rule amendments is intended to update the particular characteristics of the Rules applicable to the segregation of customer margin. Specifically, the proposed rule changes affect Parts 3, 4, 8, 20 and 20A of the ICC Rules, and related definitions, by providing, in summary, that initial margin allocated to a particular customer's positions may not be used to cover losses arising from another customer's positions. Each of these changes is described in detail as follows.

In Part 1 of the ICC Rules, the definitions of ''custodial asset policies,'' ''custodial client omnibus margin account,'' ''eligible custodial assets,''

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission has modified the text of the summaries prepared by ICC to reflect information communicated during phone calls with Michelle Weiler, Assistant General Counsel, on October 2 and October 3, 2012.

''excess margin,'' ''net client omnibus margin account,'' ''net margin requirement,'' and ''Participant excess margin'' have been deleted to reflect the LSOC model and particularly the elimination of provisions relating to holding excess margin at ICC. New definitions for ''client omnibus margin account'' and ''non-Participant party portfolio'' have been added to accommodate the LSOC model, including the customer-by-customer tracking of initial margin and positions.

Existing Rule 304(b), which pertains to offsets, has been revised to conform to LSOC requirements that ICC calculate and collect Client-Related Initial Margin on a gross basis as opposed to a net basis. Existing Rule 307 has been revised so that the Statement of Open Positions now lists the Net House Margin Requirement and the Net Client-Related Mark-To-Market Margin Requirement, and Existing Rule 308 has been modified so that the Statement of Initial Margin states the Net House Margin Requirement and the Non-Participant Party Portfolio Margin Requirement for each Non-Participant Party Portfolio.

Existing Rule 401(a) has been revised so that it only applies to house margin. ICC has adopted a new Rule 401(b) that governs for client-related margin, which is the margin posted by a Participant in respect of Client-Related Positions. To comply with LSOC as it relates to ''initial margin,'' under new Rule 401(b)(i), ICC will calculate the initial margin requirement separately for each Non-Participant Party Portfolio and compare it to the value of initial margin provided by the Participant and allocated by ICC under CFTC Rules to that portfolio. In each margin cycle, ICC will call for additional initial margin for each Non-Participant Party Portfolio for which there is a shortfall. ICC will separately make available for return to the Participant any excess initial margin held with respect to a Non-Participant Party Portfolio.

For ''mark-to-market margin'' under new Rule 401(b)(ii), ICC will continue to calculate a net amount for all Client-Related Positions in all Non-Participant Party Portfolios and compare it to the value of the mark-to-market margin held by ICC or the value of the mark-to-market margin held or deemed held by the Participant. For each margin cycle, ICC will make a net call or payment of mark-to-market margin, as appropriate.

Under the proposed revised Rule 402(h), ICC has incorporated the new CFTC Rule 22.15, which limits ICC's use of the Initial Margin posted in respect of Client-Related Positions. Revisions to Rule 406 eliminate various provisions that are now covered by CFTC regulations and are no longer necessary with the implementation of the LSOC framework. Further, under the proposed new Rule 406(l), ICC states that it will not accept the deposit of Margin from a Participant in respect of Client-Related Positions in excess of the amount required by ICC.

ICC proposes to revise Rule 20–605(c)(i)(A) in order to modify the default ''waterfall'' for application of resources in the Closing-out Process for Client-Related Positions upon a Participant default to reflect new CFTC Rule 22.15. The principal change to the rule is in subclause (C), which provides that ICC is only entitled to use Initial Margin allocated to a particular Non-Participant Party Portfolio to cover losses from that portfolio. Initial Margin for Client-Related Positions could not otherwise be applied by ICC as part of the default waterfall. Rule 20–605(c)(i)(A) and (B) also contain various non-substantive drafting improvements and clarifications as compared to the existing Rule. Revisions to Rule 20–605(d) address ICC's ability to allocate margin to a particular Non-Participant Party Portfolio for purposes of the default waterfall. ICC has also made conforming changes to Chapter 8 of the Rules, which addresses the use of the guaranty fund in the default waterfall.

The proposed changes to Part 20A of the ICC Rules, which address transfer of positions, are also intended to conform to the changes in the default waterfall.

Finally, in addition to rule changes designed to address Part 22 of the CFTC Regulations, existing Rule 405 has been deleted because it is no longer applicable.

B. Self-Regulatory Organization's Statement on Burden on Competition

ICC does not believe the proposed rule change would have any impact, or impose any burden, on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments relating to the proposed rule change have not been solicited or received. ICC will notify the Commission of any written comments received by ICC.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–ICC–2012–17 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–ICC–2012–17. 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 filings will also be available for inspection and copying at the principal office of ICC and on ICC's Web site at *https://www.theice.com/publicdocs/regulatory_filings/ICEClearCredit_092112.pdf.*

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–ICC–2012–17 and should be submitted on or before November 2, 2012.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

Section 19(b) of the Act [4] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule

[4] 15 U.S.C. 78s(b).

change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. The Commission finds that the proposed rule change is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act, and the rules and regulations thereunder applicable to ICC.[5] Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act, which requires, among other things, that the rules of a registered clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest.[6]

In its filing, ICC requested that the Commission approve this proposed rule change on an accelerated basis for good cause shown. ICC believes there is good cause for accelerated approval because the rule change is required to be in compliance with Part 22 of the CFTC Regulations, which will become effective on November 8, 2012.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[7] for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register** because, as a derivatives clearing organization registered with the CFTC, ICC must amend certain of its rules to comply with CFTC's Part 22 Regulations that will become effective on November 8, 2012.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–ICC–2012–17) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25079 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[5] 15 U.S.C. 78q–1. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] 15 U.S.C. 78s(b)(2).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67992; File No. SR–CBOE–2012–095]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Closing Rotation Procedures for S&P 500 Index Options

October 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 28, 2012, Chicago Board Options Exchange, Incorporated (''Exchange'' or ''CBOE'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act [3] and Rule 19b–4(f)(6) thereunder.[4] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The filing proposes to adopt Interpretation and Policy .06 under CBOE Rule 6.2B relating to closing rotation procedures to determine the month-end closing price for each series of S&P 500 Index options based on the theoretical fair value of such series. The text of the proposed rule change is available on the Exchange's Web site at *http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to codify and formalize the process by which, at each month-end, the closing price of each series of S&P 500 Index (''SPX'') options are aligned with the closing value of (i) the underlying stock index in the cash market, and (ii) the related SPX futures contracts traded on the Chicago Mercantile Exchange (''CME'').

Background

Beginning in December 1999, the CME instituted a special settlement procedure to determine a fair value settlement price of its domestic stock index futures for the December month-end based on the closing value of the underlying stock index, rather than the actual closing price of the index futures contract.[5] The fair value of each index futures contract is calculated based on the value of the underlying stock index as of the cash market close at 3:00 p.m.,[6] even though futures trading continues until 3:15 p.m. For these month-end settlement days, this 3:00 p.m. theoretical fair value replaces the actual 3:15 p.m. final trading price as the settlement value of the stock index futures contract for all purposes—including account value reporting and end-of-day variation margin calls.[7]

The Exchange understands that the CME created this fair value settlement price at the request of certain institutional investors. These institutional investors require an independent third-party valuation of the fair value of their futures positions as of the 3:00 p.m. close of the underlying cash markets. Many market participants are active in both the futures and cash markets and want the values of their futures positions to align with the value of their underlying cash market positions. If the month-end settlement price in their stock index futures positions were based on the 3:15 p.m.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] The CME originally instituted this practice for the December 31, 1999 year-end, but has adopted the practice for each month-end closing date since January 2001.

[6] All times referred to herein are Chicago time.

[7] *See generally* CME Group, Month-End Fair Value Procedures, *available at http://www.cmegroup.com/trading/equity-index/fairvaluefaq.html.*

close of futures trading, while the month-end closing price of their cash market positions in the stock index were based on the 3:00 p.m. cash market close, tracking error would likely occur as 3:15 p.m. futures prices reflect information that became available after the 3:00 p.m. cash market close.[8] This tracking error due to the difference in closing time would cause these institutional investors' financial reporting to misrepresent their actual overall portfolio performance.

The market for SPX futures and the market for SPX options are highly interconnected. Many investors in SPX options traded on the Exchange are also active in SPX futures contracts traded on the CME, hedging positions in one with positions in the other. In fact, investors often calculate the value of SPX options with reference to the value of the related SPX futures. Since the CME began its month-end fair value procedure in December 1999, the Exchange determined that it would be disruptive to fair and orderly markets to allow the closing prices of SPX options at month-end (based on the actual 3:15 p.m. Exchange close) to significantly diverge from the settlement value of the related SPX futures (determined based on the fair value at the 3:00 p.m. cash market close). Such a divergence would cause numerous difficulties for investors active in both SPX options and SPX futures, including: (i) Month-end portfolio reports would misrepresent an investor's overall positions because the value of the investor's SPX options and SPX futures positions would reflect different moments in time, falsely indicating tracking error or the level of offsetting hedges, and (ii) an investor that is perfectly hedged between its SPX options and its SPX futures positions could nonetheless (A) be called for additional unnecessary margin, or (B) have necessary margin returned to them, because the futures settlement value (and therefore margin calculation) was based on the 3:00 p.m. fair value, while the SPX options closing prices were based on the actual 3:15 p.m. Exchange close.

One potential approach to prevent this divergence would have been, on the last business day of each month, to end trading in SPX options series at 3:00 p.m. This would cause the closing prices on the Exchange to naturally align with the 3:00 p.m. fair value assigned to SPX futures by the CME. However, the Exchange determined that this would itself be disruptive, as it would result in the market for SPX futures on the CME being open for trading at a time when the market for SPX options on the Exchange was closed. This misalignment would disrupt the trading activities of many market participants, leaving them unable to actively hedge their SPX futures positions in SPX options. The Exchange therefore adopted a practice to align the closing price of SPX options with the settlement value of SPX futures.

Current Procedures

Throughout each trading day, the Exchange disseminates bid and offer quotations in each series of SPX options traded on the Exchange. Upon receipt of the final quotations from the Exchange, the Options Clearing Corporation (''OCC'') determines the final closing price of each series of SPX options by calculating the midpoint between the final bid and final offer quotations. Generally, the final quotations disseminated by the Exchange on each day reflect the final quotations as of 3:15 p.m. However, pursuant to Exchange Rules 6.2, 6.2A, 6.2B and 24.13, the Exchange determined to deviate from normal rotation policy and procedure in the interest of a fair and orderly markets on those month-end business days when the CME adopted a 3:00 p.m. fair value as the settlement price. On these days, the Exchange holds special non-trading closing rotations to determine the closing price of each SPX options series based on the theoretical fair value at the 3:00 p.m. cash market close.[9] After the 3:15 p.m. Exchange close, the Exchange, based on quotes provided by the Lead Market-Maker (''LMM''), conducts a non-trading closing rotation solely to determine the ''fair value'' closing prices of its SPX options based on all relevant inputs, including the settlement value for the related SPX futures contract announced by the CME and the views of any other market participants. Shortly after 3:15 p.m., the Exchange then disseminates non-tradable final bid and offer quotations, and their midpoint equals the fair value price. Upon receipt of these post-3:15 p.m. final quotations, the OCC calculates the closing price based on the midpoint, which equals to the 3:00 p.m. fair value.

Thus, unlike other trading days where the SPX options closing prices are based on the final actual quotes as of 3:15 p.m., for these month-end dates, the SPX options closing prices are based on the theoretical 3:00 p.m. fair value. As with the CME, on the days when this procedure is used, although no actual trades occur at these prices, these theoretical fair value closing prices are treated as the closing prices for all purposes, including dissemination through the Options Price Reporting

[8] The CME has explained the reason for maintaining its 3:00 p.m. fair value procedure as follows:

Stock index products on the [CME] normally close and settle fifteen minutes after the daily close of trading in cash equities. The cash/futures basis may be affected to the extent that futures may fluctuate—sometimes sharply—during those final fifteen minutes. As such, this may become a difficulty for institutional traders practicing coordinated cash/futures strategies. Still, the opportunity to lay off equity market exposure during those fifteen minutes subsequent to the cash close has proven quite beneficial. The use of [fair value] settlement procedures is intended to address this so-called ''tracking error'' while still permitting trade to continue for fifteen minutes past the 3:00 p.m. cash close. Conceptually, the fair value settlement is determined when the cash market closes at 3:00 p.m., since any new information following 3:00 p.m. will not affect the closing price of the stocks and the indexes. However, information or events subsequent to the cash close may still impact futures prices. Market participants should be aware of the possibility that futures may trade at prices apart from fair value settlement prices between 3:00 p.m. and the close of the market at 3:15 p.m. on days on which [fair value] settlement procedures are applied.

See id.

[9] The Exchange has kept the market informed of this procedure through frequent Regulatory Circulars. *See* CBOE Regulatory Circular RG99–233 (Dec. 21, 1999), *available at https://www.cboe.org/publish/regcir/rg99–233.pdf*; CBOE Regulatory Circular RG00–049 (Mar. 29, 2000), *available at https://www.cboe.org/publish/regcir/rg00–049.pdf*; CBOE Regulatory Circular RG01–014 (Jan. 25, 2001), *available at http://www.cboe.com/publish/RegCir/RG01–014.pdf*; CBOE Regulatory Circular RG01–040 (Mar. 29, 2001), *available at https://www.cboe.org/publish/regcir/rg01–040.pdf*; CBOE Regulatory Circular RG01–058 (Apr. 27, 2001), *available at https://www.cboe.org/publish/regcir/rg01–058.pdf*; CBOE Regulatory Circular RG02–019 (Apr. 4, 2002), *available at http://www.cboe.com/publish/RegCir/RG02–019.pdf*; CBOE Regulatory Circular RG02–039 (June 12, 2002), *available at http://www.cboe.com/publish/RegCir/RG02–039.pdf*; CBOE Regulatory Circular RG02–073 (Sept. 17, 2002), *available at http://www.cboe.com/publish/RegCir/RG02–073.pdf*; CBOE Regulatory Circular RG02–118 (Dec. 19, 2002), *available at http://www.cboe.org/publish/regcir/rg02–118.pdf*; CBOE Regulatory Circular RG03–016 (Mar. 19, 2003), *available at http://www.cboe.com/publish/RegCir/RG03–016.pdf*; CBOE Regulatory Circular RG03–039 (June 11, 2003), *available at http://www.cboe.com/publish/RegCir/RG03–039.pdf*; CBOE Regulatory Circular RG03–075 (Sept. 10, 2003), *available at http://www.cboe.com/publish/RegCir/RG03–075.pdf*; CBOE Regulatory Circular RG03–082 (Sept. 22, 2003), *available at http://www.cboe.com/publish/RegCir/RG03–082.pdf*; CBOE Regulatory Circular RG03–110 (Dec. 17, 2003), *available at http://www.cboe.com/publish/RegCir/RG03–110.pdf*; CBOE Regulatory Circular RG04–132 (Dec. 30, 2004), *available at http://www.cboe.com/publish/RegCir/RG04–132.pdf*; CBOE Regulatory Circular RG05–130 (Dec. 29, 2005), *available at http://www.cboe.com/publish/RegCir/RG05–130.pdf*; CBOE Regulatory Circular RG06–130 (Dec. 19, 2006), *available at http://www.cboe.org/publish/regcir/rg06–130.pdf*; CBOE Regulatory Circular RG08–004 (Jan. 8, 2008), *available at http://www.cboe.com/publish/RegCir/RG08–004.pdf*; CBOE Regulatory Circular RG09–151 (Dec. 30, 2009), *available at http://www.cboe.org/publish/regcir/rg09–151.pdf*; and CBOE Regulatory Circular RG12–023 (Jan. 30, 2012), *available at http://www.cboe.org/publish/regcir/rg12–023.pdf.*

Authority (''OPRA'') and OCC margin calculations.

Proposed Interpretation

The Exchange proposes to adopt Interpretation and Policy .06 to Rule 6.2B (the ''Interpretation'') to codify in its rulebook the Exchange's existing practice with respect to the end-of-month SPX options fair value procedures.

The Exchange continues to believe that it is integral to fair and orderly markets in SPX options that the closing price of each series of SPX options traded on the Exchange be based on the value as of the same time as the closing price of the related SPX futures traded on the CME. Because the CME has made a practice of determining the closing price of SPX futures on the last business day of each month based on the 3:00 p.m. fair value, the Exchange believes the closing price of each related SPX options series should similarly be based on the 3:00 p.m. price. Investors active in both the options and futures markets would face numerous difficulties if the closing values of SPX options and SPX futures were allowed to significantly diverge. For example, as noted above, if the closing price of a series of SPX options was to be based on the 3:15 close of trading, while the related SPX futures settlement price was based on the 3:00 p.m. fair value, an investor that was perfectly hedged between the options and futures could nonetheless be subject to potentially significant margin calls due to market movements between 3:00 p.m. and 3:15 p.m.—even though such market movement would not actually impact the level of risk of the perfectly hedged portfolio.

As discussed above, on those days when the CME has instituted its 3:00 p.m. fair value settlement procedure, the Exchange determined to deviate from normal rotation policies and procedures in the interest of fair and orderly markets and conduct fair value closing rotations. The Exchange has done so on a regular basis in response to changes in CME procedures, in order to prevent any disruption to fair and orderly markets that would occur from the closing price of SPX options being determined as of the 3:15 p.m. close and the settlement value of SPX futures being determined as of 3:00 p.m. fair value. However, the CME appears to have adopted its 3:00 p.m. fair value procedure on a permanent basis for each month-end trading date.[10] Therefore, rather than continuing to rely on its authority to deviate from normal rotation policies and procedures, the Exchange has determined to adopt the Interpretation to codify the Exchange's existing practice in its rulebook.

The Interpretation codifies the Exchange's current procedures without material change. Specifically, on the last business day of each calendar month, following the 3:15 p.m. close of trading in SPX options, the Exchange will conduct special non-trading closing rotations for each series of SPX options in order to determine their theoretical fair value as of the 3:00 p.m. close of the cash market. The LMM for each series of SPX options will be responsible for calculating the fair value of that series.

The ''fair value'' of a series of SPX options represents the price at which the series should theoretically trade in relation to cash values in the absence of transaction costs. It is typically calculated as a function of the underlying index value plus the financing cost of owning the underlying stock portfolio, less dividends paid up to the expiration of the option.

To reach this fair value, each LMM will consider various inputs, including the prevailing interest rates, expected dividends, and input from market participants. Additionally, because the fair value of the related futures contract reflects a similar calculation, the Exchange expects that particular weight will be given to the as-of 3:00 p.m. fair value of the related SPX futures contract disseminated by the CME. Upon determination of the fair value, the LMMs will calculate bid and offer quotations, the midpoint of which will equal the calculated fair value, and provide these non-tradable quotations to the Exchange.

The Exchange will disseminate these non-tradable fair value quotations via OPRA after the 3:15 close, within approximately three to five minutes of closing. The OCC will then determine the final closing price of each series of SPX options by calculating the midpoint between these final fair value bid and final fair value offer quotations, which will equal fair value. This fair value closing price will be used as the closing price for all purposes, including the OCC's calculation of variation margin requirements.

The Exchange recognizes that LMMs may have an interest in the outcome of the month-end value determination based on the composition of their own proprietary positions. For example, an LMM may have an incentive to lean their fair value determination in a direction that would minimize the potential variation margin the LMM would be called for by the OCC with respect to their proprietary holdings. However, the Exchange believes that this risk is limited because, as a mathematical formula, fair value can be generally approximated by third parties, allowing for independent checks on the LMMs' calculations. In addition, the Exchange does and will conduct robust surveillance and oversight of LMMs' fair value quotations activities to monitor for potential attempts at manipulation.

Finally, as described above, the need to disseminate after 3:15 p.m. the fair value closing quotations for SPX options based on the 3:00 p.m. fair value on the last business day of each month is due to the current CME procedures in place for SPX futures. However, the Exchange cannot predict whether the CME may determine to forego its special month-end fair value procedure at any time in the future. The proposed interpretation therefore provides the Exchange with discretion not to disseminate the 3:00 p.m. fair value quotations as determined by the LMMs after the 3:15 p.m. close, if not doing so would be in the interest of fair and orderly markets. The Exchange anticipates that it would only not do so in the event that the CME determines not to apply its special month-end fair value settlement procedure for SPX futures, either on a particular month-end trading date or otherwise. In such an event, the Exchange anticipates allowing the actual 3:15 p.m. closing quotations to act as the final quotations, as occurs on other trading days, so that both the closing quotations of SPX options at such a month-end and the settlement value of the related SPX futures would each reflect the same end of trading time.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'')[11] and the rules and regulations thereunder and, in particular the requirement of Section 6(b) of the Act.[12] Specifically, the Exchange believes the proposed rule change furthers the objectives of Section 6(b)(5)[13] in that it 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market

[10] The Exchange notes, however, that the CME does not appear to maintain a specific rule in connection with its fair value procedure, and therefore may change its practice at any time.

[11] 15 U.S.C. 78a.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

system. In particular, the proposed rule change furthers the interest of fair and orderly markets by avoiding the artificial tracking error that could result if the underlying value of the closing price of SPX options were allowed to significantly diverge at month-end from the closing value of the underlying stock index and the settlement value of the related SPX futures contract. Additionally, the proposed rule change is designed to improve the Exchange's ability to prevent fraudulent and manipulative practices by adopting a surveillance program to monitor the LMMs' month-end fair value quoting activities.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

A. Significantly affect the protection of investors or the public interest;

B. Impose any significant burden on competition; and

C. Become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate,

it has become effective pursuant to Section 19(b)(3)(A) [14] of the Act and Rule 19b–4(f)(6) [15] thereunder.[16]

At any time within 60 days of the filing of this 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.

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6).

[16] In addition, Rule 19b–4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2012–095 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2012–095. 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 available publicly. All submissions should refer to File Number SR–CBOE–2012–095 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25080 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67993; File No. SR–ISE–2012–80]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Fees for Singly Listed Options

October 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 26, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change, as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The ISE proposes to amend its Schedule of Fees. The text of the proposed rule change is available on the Exchange's Web site (*http://www.ise.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 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

ISE proposes to increase the execution fee for Priority Customer [3] orders, from $0.18 per contract to $0.20 per contract, in certain singly-listed products listed and traded on the Exchange (''Singly Listed Symbols'').[4] The Exchange also proposes to increase the fee for Crossing Orders [5] for Priority Customers in Singly Listed Symbols, from $0.18 per contract to $0.20 per contract. With this proposed fee change, the Exchange seeks to standardize the fees charged to Priority Customer orders in Singly Listed Symbols with the fees the Exchange currently charges Firm Proprietary and Professional Customer orders that trade in these products. The execution fee and the fee for Crossing Orders for both Firm Proprietary and Professional Customer orders is currently $0.20 per contract in Singly Listed Symbols.

While the Exchange currently does not charge a fee for Priority Customer orders in Non-Select Symbols that are multiply-listed, the Exchange believes it is appropriate to charge Priority Customers for trading in Singly Listed Symbols to enable the Exchange, in part, to recoup the costs associated with maintaining these products. The Exchange notes that a number of its competitors currently charge a fee to Priority Customer orders in singly-listed products traded on their exchange. For example, NASDAQ OMX PHLX LLC (''PHLX'') charges Priority Customers $0.35 per contract for trading in singly-listed options on that exchange.[6] The Chicago Board Options Exchange, Inc. (''CBOE'') charges Priority Customers up to $0.44 per contract in certain index options that are singly-listed on that exchange.[7]

The Exchange also proposes to amend the list of Singly Listed Symbols on its Schedule of Fees in order to remove certain delisted symbols from the list of Singly Listed Symbols. Singly Listed Symbols are subject to the fees and rebates listed in Section I of the Exchange's Schedule of Fees. The Exchange is proposing to remove the following symbols from the list of Singly Listed Symbols, as that term is defined in the Preface of the Schedule of Fees: DMA, FUM, HSX, OOG, BYT, HVY, RUF, JLO, SIN, RND, HHO, PMP, POW, TNY, WMX, IXZ, UKX, and NXTQ. The Exchange has delisted these products and therefore, these products no longer trade on the Exchange and are no longer subject to the fees and rebates listed in Section I of the Schedule of Fees. Additionally, the Exchange had previously entered into a licensing agreement with the owners of certain of the indexes and adopted a surcharge to recoup the costs associated with licensing these indexes.[8] Since the Exchange no longer trades a number of the licensed indexes, i.e., NXTQ, FUM, HSX, POW, TNY, WMX and UKX, the Exchange proposes to remove the license surcharge associated with these products from its Schedule of Fees.

The Exchange has designated this proposal to be operative on October 1, 2012.

2. Basis

The Exchange believes that its proposal to amend its Schedule of Fees is consistent with Section 6(b) of the Act [9] in general, and furthers the objectives of Section 6(b)(4) of the Act [10] in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members. The Exchange's proposal to amend the fees for Singly Listed Symbols is reasonable because the Exchange is seeking to recoup costs associated with the continued listing and trading of these products.[11] The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory because the proposed fees will more closely align Priority Customer fees with other market participant fees in these products. In addition, the Exchange believes that the proposed fees are reasonable, equitable and not unfairly discriminatory because the fees are consistent with price differentiation that exists today at all option exchanges.

The Exchange believes that it is reasonable to remove DMA, FUM, HSX, OOG, BYT, HVY, RUF, JLO, SIN, RND, HHO, PMP, POW, TNY, WMX, IXZ, UKX, and NXTQ from the list of Select Symbols because these symbols have been delisted and no longer trade on the Exchange. The Exchange believes that it is equitable and not unfairly discriminatory to remove these symbols from the list of Select Symbols because all members, uniformly, would not be assessed either the rebates or the fees pursuant to Section I of the Schedule of Fees with respect to these symbols. The Exchange further believes that updating its Schedule of Fees to remove singly-listed products that are no longer traded on the Exchange will provide Exchange Members with clarity as to the symbols that are singly-listed on the Exchange and their applicable fees.

B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section

[3] ISE rules distinguish between Priority Customers and Professional Customer. A Priority Customer is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* ISE Rule 100(a)(37A). A Professional Customer is a person or entity that is not a broker/dealer and is not a Priority Customer. *See* ISE Schedule of Fees. A Professional Order is an order that is for the account of a person or entity that is not a Priority Customer. *See* ISE Rule 100(a)(37C).

[4] Singly Listed Symbols are identified by their ticker symbols on the Exchange's Schedule of Fees.

[5] A Crossing Order is an order executed in the Exchange's various auction mechanisms, and also includes Qualified Contingent Cross orders. *See* ISE Schedule of Fees.

[6] *See* PHLX Fee Schedule, Section III, at *http://www.nasdaqtrader.com/content/marketregulation/membership/phlx/feesched.pdf.*

[7] *See* CBOE Fees Schedule, at *http://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf.*

[8] *See* Securities Exchange Act Release Nos. 51962 (July 1, 2005), 70 FR 40088 (July 12, 2005) (SR–ISE–2005–29); 53173 (January 24, 2006), 71 FR 5096 (January 31, 2006) (SR–ISE–2006–03); 53914 (June 7, 2006) [sic], 71 FR 33022 (June 7, 2006) (SR–ISE–2006–25); 54697 (November 2, 2006) (71 FR 65857 (November 9, 2006) (SR–ISE–2006–61); 55407 (March 6, 2007), 72 FR 11411 (March 13, 2007) (SR–ISE–2007–13); and 59171 (December 29, 2008), 74 FR 482 (January 6, 2009) (SR–ISE–2008–98).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4).

[11] The Exchange continues to incur costs for maintaining Singly Listed Symbols including marketing expenses. In addition, the Exchange incurs certain additional costs related to singly-listed products as compared to multiply-listed products. For example, in analyzing an obvious error for a singly-listed option, the Exchange does not have the additional data points available in establishing a theoretical price as is the case for a multiply-listed option. For this reason, a singly-listed option requires additional analysis and administrative time to comply with Exchange rules to resolve an obvious error.

19(b)(3)(A)(ii) of the Act.[12] At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. 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–ISE–2012–80 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–ISE–2012–80. 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 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 offices of ISE. 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–ISE–2012–80, and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25081 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67996; File No. SR–Phlx–2012–118]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Inbound Routing From an Affiliated Exchange

October 5, 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 September 28, 2012, NASDAQ OMX PHLX LLC (the ''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 is filing a proposed rule change for the NASDAQ OMX PSX facility of PHLX (''PSX'') to continue to accept inbound orders routed by Nasdaq Execution Services LLC (''NES'') from the NASDAQ OMX BX Equities Market of NASDAQ OMX BX, Inc. (''BX''), as described further below, for an additional six month pilot period. The text of the proposed rule change is available at *http://nasdaqomxphlx.cchwallstreet.com,* at Phlx's principal office, and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

Currently, NES is the approved outbound routing facility of BX, providing outbound routing to other market centers.[3] PHLX and BX have previously adopted rules to permit PSX to receive inbound routes of certain orders by NES in its capacity as an order routing facility of BX.[4] The Exchange specifically has adopted a rule to prevent potential informational advantages resulting from the affiliation between PHLX and NES, as related to NES's authority to route certain orders from BX.[5] NES's authority to route these orders to BX is subject to a pilot period ending October 6, 2012.[6] The Exchange hereby seeks to extend the previously approved pilot period (with the attendant obligations and conditions) for an additional six months, through March 30, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(5) of the Act,[8] 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

[3] BX Rule 4758(b).

[4] *See* Securities Exchange Act Release Nos. 65553 (October 13, 2011), 76 FR 64987 (October 19, 2011) (SR–Phlx–2011–138); and 65470 (October 3, 2011), 76 FR 62489 (October 7, 2011) (SR–BX–2011–048).

[5] *See* PHLX Rule 985(c)(2).

[6] *See* Securities Exchange Act Release No. 65553 (October 13, 2011), 76 FR 64987 (October 19, 2011) (SR–Phlx–2011–138).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

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, because the proposed rule change will allow the Exchange to continue to receive inbound routes of orders from NES, acting in its capacity as a facility of BX, in a manner consistent with prior approvals and established protections. The Exchange believes that extending the previously approved pilot period for six months is a sufficient length of time to permit both the Exchange and the Commission to assess the impact of the Exchange's authority to permit it to receive inbound routes of certain orders via NES (including the attendant obligations and conditions).

B. Self-Regulatory Organization's Statement on Burden on Competition

Phlx 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act [9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the pilot period to be extended without undue delay through March 30, 2013.[11] Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2012–118 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–2012–118. 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–2012–118 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25130 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See* SR–PHLX–2012–118, Item 7.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67977; File No. SR–NASDAQ–2012–110]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer the ACT Reject Scan and Assess a Related Fee

October 4, 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 September 28, 2012, The NASDAQ Stock Market LLC (''Nasdaq'' 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 the Substance of the Proposed Rule Change

Nasdaq proposes to establish a new service, the ACT Reject Scan, and assess a related fee. Nasdaq is proposing to implement the proposed service on October 1, 2012 and implement the proposed fee on November 1, 2012. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Nasdaq 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 III [sic] below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Nasdaq proposes to establish a new add-on service to the Nasdaq Workstation and Weblink ACT 2.0, and establish related fees. Nasdaq's ACT Reject Scan service allows a member firm, at any point during the trading day, to scan the trades it has submitted to the Automated Confirmation Transaction Service (''ACT'') for all trades rejected by ACT. Currently, a member firm must investigate any trade that has been rejected by ACT and for which it has not received a control number.[3] Some member firms have developed their own internal systems that record the data transmitted to ACT in a searchable database, which can aid them in assessing whether a trade was rejected by ACT. Member firms without such systems must contact Nasdaq Subscriber Services to determine the nature of the rejected trade. This manual process can be time-consuming, at a point when a member firm has limited time to report its trades. Nasdaq received feedback from member firms that a reject scan feature would aid in editing and resubmitting rejected trades, a process known as submitting a ''repaired'' trade. In response, Nasdaq developed the ACT Reject Scan service, which automates this process by providing to a subscribing member firm a list of all of its rejected trades together with the trade report forms populated with the original data entered. Subscribing member firms may then correct the rejected trade report forms and resubmit the repaired trade reports.

The ACT Reject Scan service can only be accessed using a Nasdaq Workstation or Weblink ACT 2.0 user account. Member firms subscribing to the ACT Reject Scan service are charged a monthly fee per user, which provides access to the service for each Nasdaq Workstation and Weblink ACT 2.0 user account selected for subscription to the ACT Reject Scan service. Nasdaq proposes to offer the ACT Reject Scan service to each subscriber for a subscription fee of $75 per user, per month. Use of the ACT Reject Scan service is voluntary and the subscription fee will be imposed on all purchasers equally based on the number of users selected. The proposed fee will be applied to offset the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things. To the extent that costs are covered by the proposed fee, the proposed fee may also provide Nasdaq with a profit.

2. Statutory Basis

Nasdaq believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and Section 6(b)(4) of the Act,[5] in particular, because it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that Nasdaq operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. As noted, use of the proposed ACT Reject Scan service is voluntary and the subscription fee will be imposed on all purchasers equally based on the number of users. The proposed fee will be allocated to cover the costs associated with establishing the service, responding to customer requests, configuring Nasdaq's systems, programming to user specifications, and administering the service, among other things, and may provide Nasdaq with a profit to the extent costs are covered.

The Exchange determined that the proposed fee is reasonable based on member firm interest in ACT Reject Scan service, costs associated with developing and supporting the service, and the value that ACT Reject Scan service provides to subscribing member firms. The information provided by ACT Reject Scan service relates to the subscribing member firm's trade submission activity through ACT and the member firm may aggregate and access this information by developing its own system or by contacting Nasdaq Subscriber Services for such information. As such, the Exchange believes that if a member firm determines that the fee is not cost-efficient for its needs, it may decline to subscribe to ACT Reject Scan service and access such information from other sources.

The Exchange also believes the proposed rule change is consistent with Section 6(b)(5) of the Act,[6] which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest. The Exchange believes the proposed rule change is consistent with these requirements because the proposed service provides subscribing members with a useful surveillance tool with which they may access information concerning the acceptance of their trade reports entered into ACT, and quickly repair and resubmit their rejected reports. Accordingly, the Exchange believes that the proposed service will further goals of the Act by providing subscribing members with greater transparency with respect to their trade reports and increasing efficiency with respect to the re-submission of repaired reports.

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.

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 from the date on which it was filed, or such shorter time as the Commission may designate, it has

[3] ACT provides a member firm a control number for all of its trades that are accepted by ACT.

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4).

[6] 15 U.S.C. 78f(b)(5).

become effective pursuant to Section 19(b)(3)(A)[7] of the Act and subparagraph (f)(6) of Rule 19b–4 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, Rule 19b–4(f)(6)(iii)[10] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that Nasdaq may offer the ACT Reject Scan service beginning on October 1, 2012. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will provide members with the option to obtain greater transparency with respect to their trade reports, as well as an enhanced ability to repair rejected trades.[11] In addition, the Commission notes that the service is being offered at no charge for the month of October. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2012–110 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–2012–110. 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 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 offices 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–2012–110, and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25106 Filed 10–11–12; 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)(iii). In addition, 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 the 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 operative delay for this proposal, 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. 34–67990; File No. SR–BX–2012–064]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Exchange Rule 4758(a)(1)(A) To Reflect a Change in Its Routing Functionality To Allow Routable Orders To Simultaneously Execute Against Exchange Available Shares and Route to Other Markets for Execution of the Remainder of the Order

October 5, 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 September 25, 2012, NASDAQ OMX BX, Inc. (''BX'' or ''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 to amend Rule 4758(a)(1)(A) to reflect a change in its routing functionality. The Exchange is proposing to implement the rule change as soon as practicable, but in no case later than thirty calendar days from the filing date of this proposal. 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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

BX is proposing to amend Rule 4758(a)(1)(A) to reflect a change in BX's order routing functionality, which will allow routable orders [3] to simultaneously execute against BX available shares and route to other markets for execution of the remainder of the order. Currently, when a routable order is entered into the BX system, the BX book is first checked for available shares. If such an order is not filled or filled only partially, then the order is routed to away markets with the best bid or best offer pursuant to BX's System routing table.[4] For example, if a BX member submitted an order to buy 5,000 shares of a security, and BX had 500 shares displayed with another 500 shares undisplayed, under the current routing process 1,000 shares would be executed on BX. Thereafter, BX would route the remaining 4,000 shares of the order to other markets for execution.

BX has observed that upon partial execution of a routable order at BX, as in the example above, market participants often react to the order by cancelling their orders on other markets and entering new orders at inferior prices. This occurs because the current process directs the order to BX before attempting to access available liquidity at other markets and thereby allows market participants to react to the execution (an effect known as ''market impact'' or ''information leakage''). As a consequence, the available shares at the away market are no longer available, resulting in a lower likelihood of successfully accessing liquidity on away markets (*i.e.,* the ''fill rate'') and an increased likelihood of ultimately receiving an execution at an inferior price. As such, BX is addressing this problem by changing how the routing process will operate.

BX is proposing to execute routable orders against the BX book for available shares and to simultaneously route any remaining shares to additional markets. Specifically, under the proposed change a routable order would attempt to execute against the available shares at BX and, to the extent the order would not be filled by such available shares, BX would simultaneously route the remainder of the order to other venues, according to BX's System routing table, in a manner consistent with Regulation NMS (*i.e.,* satisfying all displayed protected quotes). For example, using the scenario above, if a member enters a routable order to buy 5,000 shares of a security and BX is displaying 500 shares of that security, with 500 undisplayed, BX would execute against the 500 displayed shares and 500 undisplayed shares, while *simultaneously* routing the remaining 4,000 shares to other venues for execution. In the event that the amount of shares on other markets is insufficient to completely fill the order, or the order fails to completely execute, BX would then post the remaining shares on the BX book or cancel the remaining shares per the routed order's instructions. BX believes that this simultaneous execution against BX available shares and routing to other venues' shares will avoid the deleterious effect of market impact discussed above and result in overall faster and better executions of its members' routable orders.

BX notes that it is not changing the execution and routing sequence of all routable orders. The BTFY, BMOP, and BCRT orders are designed to execute serially as part of their strategies, which is generally to reduce the blended fees associated with transacting on multiple markets. As such, simultaneous routing of such orders would not result in a better execution in terms of the goals of these routable order types.

The proposed change is based on the recently-approved change to the analogous NASDAQ Stock Market LLC (''NASDAQ'') rule.[5] Although the Exchange does not have all of the order types that NASDAQ has, it is making the identical changes applicable to the analogous routable order types shared in common with NASDAQ. The Exchange will implement the proposed change as soon as practicable and in no event later than 30 calendar days from the filing date of this proposal.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[6] which requires the rules of an exchange 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. The Exchange believes that the proposed rule meets these requirements in that it promotes efficiency in the market, and increases the speed of execution and likelihood that a routable order will be filled at the best price possible. In this regard, the Exchange notes that simultaneous execution minimizes the market impact a routable order has on other markets under the current multi-step execution and routing process, thus improving fill rates. Accordingly, the proposed rule change will serve to improve execution quality for investors sending their routable orders to the Exchange.

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.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [7] and Rule 19b–4(f)(6) [8] thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii) [10] permits the Commission to 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 period. The Commission believes

[3] For purposes of this filing, a ''routable order'' is an order entered into the BX System, which is not of an Order Type precluded from routing to other markets.

[4] The ''System routing table'' is the proprietary process for determining the specific trading venues to which the System routes orders and the order in which it routes them. *See* Rule 4758(a)(1)(A).

[5] *See* Securities Exchange Act Release No. 67639 (August 10, 2012), 77 FR 49034 (August 15, 2012) (SR–NASDAQ–2012–071).

[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).

[9] In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6)(iii).

that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest. Specifically, the Commission believes that the proposal should increase the likelihood that a routable order would receive a more complete fill and should improve the Exchange's ability to process such orders. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposed rule change to be 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.[12]

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–2012–064 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–2012–064. 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 available publicly. All submissions should refer to File Number SR–BX–2012–064 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25105 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[11] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(3)(C).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67991; File No. SR–Phlx–2012–116]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Exchange Rule 3315(a)(1)(A) To Reflect a Change in Its Routing Functionality To Allow Routable Orders to Simultaneously Execute Against Exchange Available Shares and Route to Other Markets for Execution of the Remainder of the Order

October 5, 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 September 25, 2012, NASDAQ OMX PHLX LLC (''PHLX'' or ''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

PHLX proposes to amend Rule 3315(a)(1)(A) to reflect a change in its routing functionality. The Exchange is proposing to implement the rule change as soon as practicable, but in no case later than thirty calendar days from the filing date of this proposal. The text of the proposed rule change is available at *http://nasdaqomxphlx.cchwallstreet.com*, 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

PHLX is proposing to amend Rule 3315(a)(1)(A) to reflect a change in PHLX's order routing functionality, which will allow routable orders[3] to simultaneously execute against PHLX available shares and route to other markets for execution of the remainder of the order. Currently, when a routable order is entered into the PHLX system, the PHLX book is first checked for available shares. If such an order is not filled or filled only partially, then the order is routed to away markets with the best bid or best offer pursuant to PHLX's System routing table.[4] For example, if a PHLX member submitted an order to buy 5,000 shares of a security, and PHLX had 500 shares displayed with another 500 shares undisplayed, under the current routing process 1,000 shares

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] For purposes of this filing, a ''routable order'' is an order entered into the PHLX System, which is not of an Order Type precluded from routing to other markets.

[4] The ''System routing table'' is the proprietary process for determining the specific trading venues to which the System routes orders and the order in which it routes them. *See* Rule 3315(a)(1)(A).

would be executed on PHLX. Thereafter, PHLX would route the remaining 4,000 shares of the order to other markets for execution.

PHLX has observed that upon partial execution of a routable order at PHLX, as in the example above, market participants often react to the order by cancelling their orders on other markets and entering new orders at inferior prices. This occurs because the current process directs the order to PHLX before attempting to access available liquidity at other markets and thereby allows market participants to react to the execution (an effect known as ''market impact'' or ''information leakage''). As a consequence, the available shares at the away market are no longer available, resulting in a lower likelihood of successfully accessing liquidity on away markets (*i.e.,* the ''fill rate'') and an increased likelihood of ultimately receiving an execution at an inferior price. As such, PHLX is addressing this problem by changing how the routing process will operate.

PHLX is proposing to execute routable orders against the PHLX book for available shares and to simultaneously route any remaining shares to additional markets. Specifically, under the proposed change a routable order would attempt to execute against the available shares at PHLX and, to the extent the order would not be filled by such available shares, PHLX would simultaneously route the remainder of the order to other venues, according to PHLX's System routing table, in a manner consistent with Regulation NMS (*i.e.,* satisfying all displayed protected quotes). For example, using the scenario above, if a member enters a routable order to buy 5,000 shares of a security and PHLX is displaying 500 shares of that security, with 500 undisplayed, PHLX would execute against the 500 displayed shares and 500 undisplayed shares, while *simultaneously* routing the remaining 4,000 shares to other venues for execution. In the event that the amount of shares on other markets is insufficient to completely fill the order, or the order fails to completely execute, PHLX would then post the remaining shares on the PHLX book or cancel the remaining shares per the routed order's instructions. PHLX believes that this simultaneous execution against PHLX available shares and routing to other venues' shares will avoid the deleterious effect of market impact discussed above and result in overall faster and better executions of its members' routable orders.

PHLX notes that it is not changing the execution and routing sequence of all routable orders. The PTFY, PMOP, and PCRT orders are designed to execute serially as part of their strategies, which is generally to reduce the blended fees associated with transacting on multiple markets. As such, simultaneous routing of such orders would not result in a better execution in terms of the goals of these routable order types.

The proposed change is based on the recently-approved change to the analogous NASDAQ Stock Market LLC (''NASDAQ'') rule.[5] Although PHLX does not have all of the order types that NASDAQ has, it is making the identical changes applicable to the analogous routable order types shared in common with NASDAQ. The Exchange will implement the proposed change as soon as practicable and in no event later than 30 calendar days from the filing date of this proposal.

2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Act,[6] which requires the rules of an exchange 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. The Exchange believes that the proposed rule meets these requirements in that it promotes efficiency in the market, and increases the speed of execution and likelihood that a routable order will be filled at the best price possible. In this regard, the Exchange notes that simultaneous execution minimizes the market impact a routable order has on other markets under the current multi-step execution and routing process, thus improving fill rates. Accordingly, the proposed rule change will serve to improve execution quality for investors sending their routable orders to the Exchange.

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.

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.

[5] *See* Securities Exchange Act Release No. 67639 (August 10, 2012), 77 FR 49034 (August 15, 2012) (SR–NASDAQ–2012–071).

[6] 15 U.S.C. 78f(b)(5).

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) of the Act[7] and Rule 19b–4(f)(6)[8] thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate.[9]

A proposed rule change filed under Rule 19b–4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b–4(f)(6)(iii)[10] permits the Commission to 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 period. The Commission believes that waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest. Specifically, the Commission believes that the proposal should increase the likelihood that a routable order would receive a more complete fill and should improve the Exchange's ability to process such orders. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission designates the proposed rule change to be 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.[12]

[7] 15 U.S.C. 78s(b)(3)(A).

[8] 17 CFR 240.19b–4(f)(6).

[9] In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[10] 17 CFR 240.19b–4(f)(6)(iii).

[11] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(3)(C).

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–2012–116 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–2012–116. 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 available publicly. All submissions should refer to File Number SR–Phlx–2012–116 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25104 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67998; File No. SR–ICEEU–2012–07]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Revise CDS Procedures Related to Clearing Certainty Requirements

October 5, 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 September 25, 2012, ICE Clear Europe Limited (''ICE Clear Europe'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change described in Items I and II below, which items have been prepared primarily by ICE Clear Europe. The Commission is publishing this Notice and Order to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

I. Self-Regulatory Organization's Statement of Terms of Substance of the Proposed Rule Change

ICE Clear Europe is in regular communication with representatives of its Clearing Members, as that term is defined in the CDS Procedures of ICE Clear Europe (the ''CDS Procedures'') in relation to the operation of clearing processes and arrangements. The purpose of the proposed rule changes is to implement in its CDS Procedures new clearing certainty requirements under Commodity Futures Trading Commission (''CFTC'') Rules 39.12(b)(7) and 1.74(b), which become effective on October 1, 2012. All capitalized terms not defined herein are defined in the CDS Procedures.

II. Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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 III below. ICE Clear Europe 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 Purpose of, and Statutory Basis for, the Proposed Rule Change

As noted above, the principal purpose of the proposed procedure amendments is to update the particular characteristics of the CDS Procedures applicable to the clearing of CDS Contracts. Specifically, the proposed rule changes affect Part 4 of the CDS Procedures by addressing the timeframe under which trades must be accepted or rejected for clearing under new CFTC rules and adding certain clarifying language around the weekly CDS clearing cycle. Each of these changes is described in detail as follows.

Paragraph 4.4(b) and 4.5 of the CDS Procedures will be revised to clarify the acceptance timing and procedures for the weekly CDS clearing cycle in light of the new clearing certainty requirements under CFTC rules.

Under paragraph 4.19 of the revised CDS Procedures, ICE Clear Europe will incorporate new CFTC Rule 39.12(b)(7)(ii), which requires, among other things, that ICE Clear Europe accept or reject trades submitted for clearance that are executed competitively on or subject to the rules of a designated contract market or swap execution facility (or similar facility) as soon after execution as would be technologically practicable if fully automated systems were used.

Under paragraph 4.20 of the revised CDS Procedures, ICE Clear Europe will incorporate new CFTC Rule 39.12(b)(7)(iii), which requires, among other things, that ICE Clear Europe accept or reject trades submitted for clearance that are not executed competitively on or subject to the rules of a designated contract market or swap execution facility (or similar facility) as soon after submission for clearing would be technologically practicable if fully automated systems were used.

Finally, under paragraph 4.21 of the revised CDS Procedures, ICE Clear Europe will implement the standards of CFTC Rule 1.74(b) that require Clearing Members to accept or reject each Trade submitted by or for the Clearing Member as quickly as would be technologically practicable if fully automated systems were used. Clearing Members would

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

also be required to submit such Trades to ICE Clear Europe following such acceptance as quickly as would be practicable if fully automated systems were used.

ICE Clear Europe believes that the proposed rule changes are consistent with the purposes and requirements of Section 17A of the Act and the rules and regulations thereunder applicable to it. ICE Clear Europe believes that implementing the CFTC's clearing certainty requirements will comply with the Act and the rules and regulations thereunder.

B. Self-Regulatory Organization's Statement on Burden on Competition

ICE Clear Europe does not believe that the proposed rule change will have any impact or impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

ICE Clear Europe has not solicited and does not intend to solicit comments regarding this proposed rule change. ICE Clear Europe has not received any unsolicited written comments from interested parties.

III. 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 may be submitted by using 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 No. SR–ICEEU–2012–07 on the subject line.
- Paper comments should be sent 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–ICEEU–2012–07. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public 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 ICE Clear Europe and on ICE Clear Europe's Web site at *https://www.theice.com/notices/Notices.shtml*. 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–ICEEU–2012–07 and should be submitted on or before November 2, 2012.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

Section 19(b) of the Act [3] directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. The Commission finds that the proposed rule change is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act, and the rules and regulations thereunder applicable to ICE Clear Europe.[4] Specifically, the Commission finds that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act which requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions because the proposed rule change should allow ICE Clear Europe to incorporate into its CDS Procedures language that articulates the time frame in which trades must be accepted or rejected under new CFTC rules.[5]

In its filing, ICE Clear Europe requested that the Commission approve this proposed rule change on an accelerated basis for good cause shown. ICE Clear Europe cites as the reason for this request ICE Clear Europe's operation as a DCO, which is subject to regulation by the CFTC under the CEA. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice in the **Federal Register** because the proposed rule change allows ICE Clear Europe to implement the regulations of another federal regulatory agency, the CFTC, in accordance with those regulations' effective date.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–ICEEU–2012–07) is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25103 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[3] 15 U.S.C. 78s(b).

[4] 15 U.S.C. 78q–1. In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[5] 15 U.S.C. 78q–1(b)(3)(F).

[6] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67994; File No. SR–NASDAQ–2012–107]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees Assessed Under Rule 7003(a)

October 5, 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 September 27, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to modify fees assessed under Rule 7003(a) relating to the Central Registration Depository (''CRD system''), which are collected by FINRA. NASDAQ is proposing that the implementation date of the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

rule change will be January 2, 2013. 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, NASDAQ 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 III [sic] below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ is amending its fees assessed under Rule 7003(a) to reflect a recent fee change made by FINRA,[3] relating to the CRD system.[4] The fees assessed under Rule 7003(a) are collected and retained by FINRA via the CRD system for the registration of associated persons of NASDAQ members that are not also FINRA members. NASDAQ originally adopted the fees under Rule 7003(a) to mirror the fees assessed by FINRA on its members for use of the CRD system.[5] FINRA recently amended the fees assessed for use of the CRD system, which will become effective January 2, 2013.[6] The CRD system fees are use-based and there is no distinction in the cost incurred by FINRA if the user is a FINRA member or a member of an exchange that is not a FINRA member. Accordingly, NASDAQ is proposing to amend the fees under Rule 7003(a) to mirror those assessed by FINRA, which will be implemented concurrently with the amended FINRA fees on January 2, 2013.[7]

In addition to increasing the existing CRD system fees, FINRA adopted a new fee for the additional processing of each initial or amended Form BD that includes the initial reporting, amendment, or certification of one or more disclosure events or proceedings.[8] Member firms use the Form BD to, among other things, report disclosure matters in which they or a control affiliate have been involved. Prior to the adoption of the new fee, FINRA did not have a fee designed to cover the costs associated with the review of Form BD notwithstanding the review is similar to that performed of member firms' Forms U4 and U5. Such reviews include confirming that the matter is properly reported; reviewing any documentation submitted and determining whether additional documentation is required; conducting any necessary independent research; and, depending on the matter reported, analyzing whether the event or proceeding subjects the individual or member to a statutory disqualification pursuant to Section 3(a)(39) of the Act.[9] FINRA adopted a $110 fee for the review of a Form BD, which mirrors the increased fee adopted for the review of Forms U4 and U5. As such, NASDAQ is adopting the identical fee for FINRA's review of a Form BD submitted by NASDAQ members that are not members of FINRA.

NASDAQ is proposing that the implementation date of the proposed rule change will be January 2, 2013. Specifically, the proposed initial/transfer registration, disclosure filing, and fingerprint fees would become effective for filings or fingerprints submitted on or after January 2, 2013. Lastly, the proposed system processing fee would become effective for the 2013 Renewal Program.[10]

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[11] in general, and with Section 6(b)(4) of the Act[12] and Section 6(b)(5) of the Act,[13] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. All similarly situated members are subject to the same fee structure, and every member firm must use the CRD system for registration and disclosure.

The change is reasonable because the proposed fees are identical to those adopted by FINRA for use of the CRD system for disclosure and the registration of associated persons of FINRA members. As FINRA noted in amending its fees, it believed the fees are reasonable based on the increased costs associated with operating and maintaining the CRD system, and listed a number of enhancements made to the CRD system since the last fee increase, including: (1) Incorporation of various uniform registration form changes; (2) electronic fingerprint processing; (3) Web EFT™, which allows subscribing firms to submit batch filings to the CRD system; (4) increases in the number and types of reports available through the CRD system; and (5) significant changes to BrokerCheck, including making BrokerCheck easier to use and expanding the amount of information made available through the system. These increased costs are similarly borne by FINRA when a member of NASDAQ that is not a member of FINRA uses the CRD system. Accordingly, the fees collected for such use should likewise increase in lockstep with the fees assessed FINRA members, as is proposed by NASDAQ.

The proposed change, like FINRA's proposal, is consistent with an equitable allocation of fees because the fees will apply equally to all individuals and members required to report information to the CRD system. Thus, those members that register more individuals or submit more filings through the CRD system will generally pay more in fees than those members that use the CRD system to a lesser extent.

[3] *See* Securities Exchange Act Release No. 67247 (June 25, 2012), 77 FR 38866 (June 29, 2012) (SR–FINRA–2012–030).

[4] The CRD system is the central licensing and registration system for the U.S. securities industry. The CRD system enables individuals and firms seeking registration with multiple states and self-regulatory organizations to do so by submitting a single form, fingerprint card and a combined payment of fees to FINRA. Through the CRD system, FINRA maintains the qualification, employment and disciplinary histories of registered associated persons of broker-dealers.

[5] *See* Securities Exchange Act Release No. 54264 (August 2, 2006), 71 FR 45590 (August 9, 2006) (SR–NASDAQ–2006–015). *See also,* Section 4(b)(3) of Schedule A to the FINRA By-Laws.

[6] *Supra* note 3.

[7] NASDAQ notes that it is not adopting all of the changes made in the FINRA filing. Certain fees and requirements are specific to FINRA and NASDAQ elected to not adopt them because either such a fee did not apply to NASDAQ-only members or such fees did not directly cover the costs associated with the use of the CRD system. For example, under FINRA Section 4(h) of Schedule A FINRA assesses a fee of $10 per day, up to $300 for each day that a new disclosure event or a change in the status of a previously reported disclosure event is not timely filed on an initial or amended Form U5 or an amended Form U4. This fee provides a financial incentive to a FINRA member to file its Forms U4 and U5 timely. NASDAQ elected to not adopt such a fee applicable to its members that are not also FINRA members.

[8] *Id.*

[9] 15 U.S.C. 78c(a)(39).

[10] As part of FINRA's 2013 Renewal Program, Preliminary Renewal Statements reflecting the proposed $45 system processing fee will be made available to members in the fourth quarter of 2012.

[11] 15 U.S.C. 78f.

[12] 15 U.S.C. 78f(b)(4).

[13] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ 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.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act,[14] NASDAQ has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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–2012–107 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–2012–107. 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 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 offices of NASDAQ. 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–2012–107, and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25082 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67995; File No. SR–BX–2012–066]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Inbound Routing From an Affiliated Exchange

October 5, 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 September 28, 2012, NASDAQ OMX BX, Inc. (the ''Exchange'' or ''BX'') 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 to continue to accept inbound orders routed by Nasdaq Execution Services LLC (''NES'') from the NASDAQ OMX PSX facility (''PSX'') of NASDAQ OMX PHLX LLC (''PHLX'') (with the attendant obligations and conditions), as described further below, for an additional six month pilot period. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, NES is the approved outbound routing facility of PSX, providing outbound routing to other market centers.[3] The Exchange and PSX have previously adopted rules to permit BX to receive inbound routes of certain orders by NES in its capacity as an order routing facility of PSX.[4] The Exchange specifically has adopted a rule to prevent potential informational advantages resulting from the affiliation between BX and NES, as related to NES's authority to route certain orders from PSX to BX.[5] NES's authority to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] PHLX Rule 3315(b).

[4] *See* Securities Exchange Act Release Nos. 65514 (October 7, 2011), 76 FR 63969 (October 14, 2011) (SR–BX–2011–066); and 65469 (October 3, 2011), 76 FR 62486 (October 7, 2011) (SR–Phlx–2011–108).

[5] *See* BX Rule 2140(c).

route these orders to BX is subject to a pilot period ending September 30, 2012.[6] The Exchange hereby seeks to extend the previously approved pilot period (with the attendant obligations and conditions) for an additional six months, through March 30, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(5) of the Act,[8] 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, because the proposed rule change will allow the Exchange to continue to receive inbound routes of orders from NES, acting in its capacity as a facility of PHLX, in a manner consistent with prior approvals and established protections. The Exchange believes that extending the previously approved pilot period for six months is a sufficient length of time to permit both the Exchange and the Commission to assess the impact of the Exchange's authority to permit it to receive inbound routes of certain orders via NES (including the attendant obligations and conditions).

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the pilot period to be extended without undue delay through March 30, 2013.[11] Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2012–066 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–2012–066. 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–BX–2012–066 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25083 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[6] *See* Securities Exchange Act Release No. 65514 (October 7, 2011), 76 FR 63969 (October 14, 2011) (SR–BX–2011–066).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See* SR–BX–2012–066, Item 7.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67997; File No. SR–NASDAQ–2012–112]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Inbound Routing From an Affiliated Exchange

October 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

notice is hereby given that, on September 28, 2012, The NASDAQ Stock Market LLC (the ''NASDAQ'' 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 to continue to accept inbound orders routed by Nasdaq Execution Services LLC (''NES'') from both the NASDAQ OMX PSX facility (''PSX'') of NASDAQ OMX PHLX LLC (''PHLX'') as well as from the NASDAQ OMX BX Equities Market of NASDAQ OMX BX, Inc. (''BX''), as described further below, for an additional six month period. The text of the proposed rule change is available at *http://nasdaq.cchwallstreet.com,* at the Exchange'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

Currently, NES is the approved outbound routing facility of BX and PSX, providing outbound routing to other market centers.[3] The Exchange, BX and PSX have previously adopted rules to permit NASDAQ to receive inbound routes of certain orders by NES in its capacity as an order routing facility of BX and PSX.[4] The Exchange specifically has adopted a rule to prevent potential informational advantages resulting from the affiliation between NASDAQ and NES, as related to NES's authority to route certain orders from BX and PSX to NASDAQ.[5] NES's authority to route these orders to NASDAQ is subject to a pilot period ending October 6, 2012.[6] The Exchange hereby seeks to extend the previously approved pilot period (with the attendant obligations and conditions) for an additional six months, through March 30, 2013.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[7] in general, and with Sections 6(b)(5) of the Act,[8] 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, the proposed rule change will allow NASDAQ to continue to receive inbound routes of equities orders from NES, acting in its capacity as a facility of PHLX or BX, in a manner consistent with prior approvals and established protections. The Exchange believes that extending the previously approved pilot period for six months is a sufficient length of time to permit both the Exchange and the Commission to assess the impact of the Exchange's authority to permit it to receive inbound routes of certain orders via NES (including the attendant obligations and conditions).

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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because such waiver would allow the pilot period to be extended without undue delay through March 30, 2013.[11] Accordingly, the Commission hereby grants the Exchange's request and designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[3] BX Rule 4758(b) and PHLX Rule 3315(b).

[4] *See* Securities Exchange Act Release Nos. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142); 65470 (October 3, 2011), 76 FR 62489 (October 7, 2011) (SR–BX–2011–048); and 65469 (October 3, 2011), 76 FR 62486 (October 7, 2011) (SR–Phlx–2011–108).

[5] *See* NASDAQ Rule 2160(c).

[6] *See* Securities Exchange Act Release No. 65554 (October 13, 2011), 76 FR 65311 (October 20, 2011) (SR–NASDAQ–2011–142).

[7] 15 U.S.C. 78f.

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See* SR–NASDAQ–2012–112, Item 7.

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

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–2012–112 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–2012–112. 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–NASDAQ–2012–112 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25084 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67999; File No. SR–Phlx–2012–122]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Eliminate Position Limits for SPY Options on a Pilot Basis

October 5, 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 October 4, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I 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 to eliminate position limits for options on the SPDR® S&P 500® exchange-traded fund (''SPY ETF''),[3] which list and trade under the symbol SPY.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] ''SPDR®,'' ''Standard & Poor's®,'' ''S&P®,'' ''S&P 500®,'' and ''Standard & Poor's 500'' are registered trademarks of Standard & Poor's Financial Services LLC. The SPY ETF represents ownership in the SPDR S&P 500 Trust, a unit investment trust that generally corresponds to the price and yield performance of the SPDR S&P 500 Index.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Exchange Rule 1001, titled ''Position Limits'' to eliminate position limits for SPY options.

Background

Position limits serve as a regulatory tool designed to address potential manipulative schemes and adverse market impact surrounding the use of options. The Exchange understands that the Commission, when considering the appropriate level at which to set option position and exercise limits, has considered the concern that the limits be sufficient to prevent investors from disrupting the market in the security underlying the option.[4] This consideration has been balanced by the concern that the limits ''not be established at levels that are so low as to discourage participation in the options market by institutions and other investors with substantial hedging needs or to prevent specialists and market-makers from adequately meeting their obligations to maintain a fair and orderly market.'' [5]

SPY options are currently the most actively traded option class in terms of average daily volume (''ADV'').[6] The Exchange believes that, despite the popularity of SPY options as evidenced by their significant volume, the current position limits on SPY options could be a deterrent to the optimal use of this product as a hedging tool. The Exchange further believes that position limits on SPY options may inhibit the ability of certain large market participants, such as mutual funds and other institutional investors with substantial hedging needs, to utilize SPY options and gain meaningful exposure to the hedging function they provide.

The Exchange believes that current experience with the trading of SPY options, as well as the Exchange's surveillance capabilities, has made it appropriate to consider other, less

[4] *See* Securities Exchange Act Release No. 40969 (January 22, 1999), 64 FR 4911, 4912–4913 (February 1, 1999) (SR–CBOE–98–23) (citing H.R. No. IFC–3, 96th Cong., 1st Sess. at 189–91 (Comm. Print 1978)).

[5] *Id.* at 4913.

[6] SPY ADV was 2,156,482 contracts in April 2012. ADV for the same period for the next four most actively traded options was: Apple Inc. (option symbol AAPL)—1,074,351; S&P 500 Index (option symbol SPX)—656,250; PowerShares QQQ Trust℠, Series 1 (option symbol QQQ)—573,790; and iShares® Russell 2000® Index Fund (option symbol IWM)—550,316.

prophylactic alternatives to regulating SPY options, while still seeking to ensure that large positions in SPY options will not unduly disrupt the options or underlying cash markets. Accordingly, the Exchange proposes to eliminate the position limits on SPY options which are currently 900,000 contracts on the same side of the market.[7] In proposing the elimination of position limits on SPY options, the Exchange has considered several factors, including (1) the availability of economically equivalent products and their respective position limits, (2) the liquidity of the option and the underlying security, (3) the market capitalization of the underlying security and the related index, (4) the reporting of large positions and requirements surrounding margin, and (5) the potential for market on close volatility.

Economically Equivalent Products

The Exchange has considered the existence of economically equivalent or similar products, and their respective position limits, if any, in assessing the appropriateness of proposing an elimination of position limits for SPY options.

For example, AM-settled options on the S&P 500 Index, which list and trade exclusively on the Chicago Board Options Exchange, Incorporated (''CBOE'') under the symbol SPX, are currently not subject to position limits.[8] Moreover, SPX options are 10 times the size of SPY options, so that a position of only 90,000 SPX options is the equivalent of a position of 900,000 SPY options, which is the current position limit for SPY options.[9]

Similarly, the C2 Options Exchange (''C2'') has recently introduced a PM-settled S&P 500 cash settled contract (''SPXPM''), which also is not subject to position limits.[10] This contract, unlike the existing SPX contract, is cash-settled based on the closing value of the S&P 500 Index. In this respect, SPXPM is very much like SPY options in that it is settled at the close, albeit into cash as opposed to shares of the underlying like SPY options.

The Exchange believes that, because SPX, SPXPM, and SPY options are ultimately derivative of the same benchmark—the S&P 500 Index—they should be treated equally from a position limit perspective. As a practical matter, investors utilize SPX, SPXPM, and SPY options and their respective underlying instruments and futures to gain exposure to the same benchmark index: the S&P 500. Further, because the creation and redemption process for the underlying SPY ETF allows large investors to transfer positions from a basket of stocks comprising the S&P 500 index to an equivalent number of ETF shares (and the reverse) with relative ease, there is no reason to disadvantage options overlying the one versus the other. The Exchange believes that this view is supported by the recent expansion of various exemptions from position limits, such as the Delta-Based Equity Hedge Exemption [11] for positions of a member, member organization or non-member affiliate that are delta neutral, which allows SPY option positions to be delta-hedged by positions in SPX options. Given that SPX options are not subject to position limits, a member or member organization (or non-member affiliate thereof) could theoretically establish a position in SPY options far in excess of the current 900,000 contract limit, provided that the position is hedged with SPX options. The Exchange believes that this situation accurately reflects the economic equivalence of SPX and SPY options, supporting the Exchange's proposal to further acknowledge this equivalence by eliminating position limits in SPY options.

The Exchange also believes that Commission findings in approving the SPXPM options further support treating SPY options in the same manner as SPX and SPXPM options for purposes of position limits. In particular, the Commission noted in approving SPXPM options that ''C2's proposal will offer investors another investment option through which they could obtain and hedge exposure to the S&P 500 stocks,'' and that ''C2's proposal will provide investors with the ability to trade an option on the S&P 500 index in an all-electronic market, which may better meet the needs of investors who may prefer to trade electronically.'' [12] The Commission also noted that ''C2's proposal will provide investors with added flexibility through an additional product that may be better tailored to meet their particular investment, hedging, and trading needs.'' [13] The Exchange believes that these Commission findings apply equally to SPY options. In this respect, SPY options with no position limit will (1) offer investors another investment option through which they could obtain and hedge significant levels of exposure to the S&P 500 stocks, (2) be available to trade on the Exchange (and presumably all other U.S. options exchanges) electronically, and (3) provide investors with added flexibility through an additional product that may be better tailored to meet their particular investment, hedging, and trading needs, because, among other things, they are PM-settled.

The Exchange notes that, with respect to competition amongst economically equivalent products, a 2005 paper by Hans Dutt and Lawrence Harris that set forth a model to determine appropriate position limits for cash-settled index derivatives observed that ''markets and their regulators should take a closer look at the underlying economic rationale for the levels at which they currently set their position limits to ensure that the limits adequately protect markets from manipulation and that inconsistent position limits do not produce competitive advantages and disadvantages among contracts.'' [14] On this point, the Exchange believes that if no position limits have been found to be warranted on both SPX and SPXPM options, then such treatment should be extended to SPY options so that inconsistent position limits do not produce competitive advantages and disadvantages among contracts.

In addition, the Exchange notes that the Dutt-Harris Paper focuses its attention on the concerns relating to manipulation of cash-settled derivatives, stating that ''[a]lthough several scholars have argued that cash settlement may increase the risk of market manipulation, until recently, the theoretical problems arising from potential cash settlement manipulation has been considered minor, as evidenced by the lack of academic interest in this area.'' [15] The paper further noted that ''[t]he reason for this

[7] *See* Rule 1001. *See also* Securities Exchange Act Release No. 64695 (June 17, 2011), 76 FR 36942 (June 23, 2011) (SR–Phlx–2011–58).

[8] *See* Securities Exchange Act Release No. 44994 (October 26, 2001), 66 FR 55722 (November 2, 2001) (SR–CBOE–2001–22). Position limits were also eliminated for options on the S&P 100 Index (option symbol OEX) and the Dow Jones Industrial Average (option symbol DJX).

[9] The Exchange notes that the reduced-value option on the S&P 500 Index (option symbol XSP) is the equivalent size of SPY options and, similar to SPX options, is not subject to position limits. *See* Securities Exchange Act Release No. 56350 (September 4, 2007), 72 FR 51878 (September 11, 2007) (SR–CBOE–2007–79).

[10] *See* Securities Exchange Act Release No. 65256 (September 2, 2011), 76 FR 55969 (September 9, 2011) (SR–C2–2011–008) (''SPXPM Approval'').

[11] *See* Commentary .09 to Exchange Rule 1001.

[12] *See* SPXPM Approval at 55975.

[13] *Id.*

[14] *The Journal of Futures Markets,* Vol. 25, no. 10, 945–965, 949 (2005) (''Position Limits for Cash-Settled Derivative Contracts,'' by Hans R. Dutt and Lawrence E. Harris) (''Dutt-Harris Paper''). In the paper, the authors examined existing position limits to determine whether they were consistent with the model the authors developed, and found that the results indicated that existing limits were not correlated with the limits suggested by their model.

[15] *Id.* at 946.

may arise from the fact that most exchange-traded derivative index contracts that are cash settled are broad-based, and each of the underlying components typically possesses ample liquidity,'' and that ''manipulation of the underlying components would likely be extremely costly to the would-be manipulator.'' [16] This suggests that whatever manipulation risk does exist in a cash-settled, broad-based product such as SPXPM, the corresponding manipulation risk in a physically-settled, but equally broad-based product such as SPY, is likely to be equally low, if not lower.

Similarly, the Exchange notes that in the Dutt-Harris Paper the authors observed that the lack of scholarly interest in the cash-settlement manipulation problem may have been ''due to the fact that, until recently, most U.S. exchange-traded cash-settled derivative contracts were based on broad indices of very liquid stocks,'' and that ''[m]anipulation of such instruments require very large trades that are costly to make and easy to detect through conventional surveillance.'' [17] This observation applies equally to SPY options, which are based on a broad index of very liquid stocks and can easily be created by submitting a position in the underlying securities. Moreover, it provides additional support for the Exchange's view that the enhanced reporting and surveillance for SPY options discussed below adequately address concerns about manipulation.[18]

Liquidity in the Option and the Underlying Security

The Exchange has also considered the liquidity of SPY options and the underlying SPY ETF in assessing the appropriateness of proposing an elimination of position limits for SPY options.

In approving the elimination of position and exercise limits on SPX options, the Commission noted that the deep, liquid markets for the securities underlying the S&P 500 Index reduced concerns regarding market manipulation or disruption in the underlying markets.[19] The Commission further noted that removing position limits for SPX options could also bring additional depth and liquidity, in terms of both volume and open interest, without increasing concerns regarding intermarket manipulations or disruptions of the options or the underlying securities.[20] The Exchange similarly believes that this would be the case if position limits for SPY [sic].

In this regard, both the SPY ETF and SPY options similarly exhibit deep, liquid markets. However, SPY options are not as active as SPX options when adjusted for the difference in their notional size.[21] As described below, the Exchange believes that this is partly due to the existence of position limits for SPY options. The table below compares the ADV in both SPX and SPY options, and includes an ''implied SPY volume'' figure that reflects theoretical SPY ADV without the constraint of position limits:

Date range	Trade days	SPX options ADV	SPY options ADV	Implied SPY option ADV	Implied SPY option ADV shortfall
Jan 1, 2011 to Dec 31, 2011	252	1,567,535	5,789,511	15,675,353	9,885,842
Jan 1, 2012 to Apr 19, 2012	75	1,343,735	4,525,709	13,437,353	8,911,644

The Exchange believes that certain factors may result in SPX options—adjusted for their larger notional size—currently trading with greater volume than SPY options.[22] In this regard, the Exchange believes that, based on input from various market participants, the existence of position limits in SPY options is reason in itself to instead utilize SPX options. Anecdotally, market participants perceive value in avoiding the regulatory risk of exceeding the SPY option position limit by instead using SPX options for their hedging needs. The Exchange also believes that, while exemptions are available with respect to position limits for SPY options, such exemptions, and the regulatory burden attendant therewith, may dissuade investors from using SPY options when they can instead use an SPX option without the need for such an exemption. Because SPY and SPX options are economically equivalent products, an investor deciding between the two would generally trade the product with the least barriers or requirements to engage in such activity. In this respect, SPX options are currently the easier product to trade.

As a further comparison, the following table sets forth certain data for both the SPY ETF and the combined volume for the component securities upon which the S&P 500 Index is based:

Date range	S&P 500 index underlying component ADV [23]	S&P 500 index underlying component average daily value traded	SPY ETF ADV	SPY ETF average daily value traded
Jan 1, 2011 to Dec 31, 2011	3,289,595,675	$4,149,726,217,456	218,227,747	$27,297,097,993
Jan 1, 2012 to Apr 19, 2012	2,851,457,600	3,860,704,307,080	145,164,527	19,684,577,239

This data shows that there is tremendous liquidity in both SPY ETF shares and the component securities upon which the S&P 500 Index is based. While the ADV for the components underlying the S&P 500 Index is greater than the ADV for the SPY ETF, the Exchange believes that SPY ETF volume has been, is currently and will likely continue to be within a range that the Commission has previously determined to be a deep, liquid market.[24]

[16] *Id.*

[17] *Id.* at 948.

[18] The authors of the Dutt-Harris Paper further posited that ''position limits need only apply during the period when cash settlement takes place.'' *Id* at 964. The Exchange notes that no such period exists with respect to SPY options, which are physically settled.

[19] *See supra* note 2 at 4913.

[20] *Id.*

[21] SPX options have a notional value 10 times greater than SPY options (i.e., one SPX contract equals 10 SPY contracts).

[22] The Exchange notes that the ''Implied SPY Option ADV Shortfall'' has narrowed over time and at an accelerated rate, which the Exchange believes is a direct result of the implementation of the Delta-Based Equity Hedge Exemption that allows SPY options to be hedged via SPX options.

[23] The data considers the aggregate volume for all component stocks of the S&P 500 Index.

[24] *See supra* note 4 at n. 13. The ADV for the components of the indexes underlying the options for which position limits were eliminated were 94.77 million shares (DJX), 244.3 million shares (OEX), and 757.5 million shares (SPX).

Market Capitalization of the Underlying Security and the Related Index

The Exchange has also considered the market capitalization of the SPY ETF and the S&P 500 Index in assessing the appropriateness of proposing an elimination of position limits for SPY options.

The Exchange understands that the Commission similarly considered the market capitalization of the underlying index when it approved the elimination of position limits in SPX options. Accordingly, the Exchange believes that the capitalization of and the deep, liquid markets for the underlying SPY ETF reduces concerns regarding market manipulation or disruption in the underlying market. The table below shows the market capitalization of the SPY ETF and the S&P 500 Index:

Date range average S&P 500 index	Date range average S&P 500 index	Date range average S&P 500 index
Jan. 1, 2011 to Dec. 31	$11,818,270,341,270	$89,533,777,897
Jan. 1, 2012 to Apr.	12,547,946,920,000	99,752,986,022

This data shows the enormous capitalization of both the SPY ETF and the component securities upon which the S&P 500 Index is based. While the capitalization for the components underlying the S&P 500 Index is greater than that for the SPY ETF, the Exchange believes that the SPY ETF capitalization has nonetheless been, is currently and will likely continue to be at a level consistent with that which the Commission has previously determined to be enormously capitalized.[25]

The Exchange notes that the theoretical limit on one's ability to hedge both SPX and SPY options is the full market capitalization of the S&P 500 Index itself. This similarly contributes to the Exchange's determination that it is appropriate for position limits on SPY options to be eliminated.

Large Position Reporting and Margin Requirements

The Exchange has also considered the reporting of large option positions and related margin requirements in assessing the appropriateness of proposing an elimination of position limits for SPY options.

The Exchange notes that the Rule 1003 titled ''Reporting of Options Positions'' would continue to apply. Rule 1003 requires members and member organizations to file a report with the Exchange with respect to each account in which the member or member organization has an interest; each account of a partner, officer, director, trustee or employee of such member organization; and each customer account that has established an aggregate position (whether long or short) that meets certain determined thresholds (e.g., 200 or more option contracts if the underlying security is a stock or Exchange-Traded Fund Share). Rule 1003 also permits the Exchange to impose a higher margin requirement upon the account of a member or member organization when it determines that the account maintains an underhedged position.

Specifically, Rule 1003(b) requires that, ''In addition to the reporting requirements described in paragraph (a) of the Rule, each member (other than an Exchange market-maker) that maintains a position in excess of 10,000 non-FLEX equity option contracts on the same side of the market on behalf of its own account or for the account of a customer, shall report information as to whether such position is hedged, and provide documentation as to how such position is hedged in a manner and form prescribed by the Exchange. In addition, whenever the Exchange determines that a higher margin requirement is necessary in light of the risks associated with an under-hedged non-FLEX equity option position in excess of 10,000 contracts on the same side of the market, the Exchange may consider imposing additional margin upon the account maintaining such under-hedged position, pursuant to its authority under Exchange Rule 722(d). Additionally, it should be noted that the clearing firm carrying the account will be subject to capital charges under Securities Exchange Act Rule 15c3–1 to the extent of any margin deficiency resulting from the higher margin requirements.''

Monitoring accounts maintaining large positions provides the Exchange with the information necessary to determine whether to impose additional margin and/or whether to assess capital charges upon a member organization carrying the account. In addition, the Commission's net capital rule, Rule 15c3–1 under the Securities Exchange Act of 1934 (the ''Act''),[26] imposes a capital charge on members to the extent of any margin deficiency resulting from the higher margin requirement, which should serve as an additional form of protection.

In approving SPXPM, the Commission addressed concerns about the lack of a position limit by noting that CBOE will rely on its enhanced surveillance requirements and procedures for SPX options to monitor trading activity in SPXPM options.[27] Similarly, the Exchange notes that certain option products are currently traded on the Exchange without position limits (e.g., the NASDAQ® 100 Index option (option symbol NDX) and the Russell 2000® Index option (option symbol RUT)), and believes that the reporting, surveillance and monitoring mechanisms in place for these products are effective and could easily accommodate SPY options if position limits thereon are eliminated.

Market on Close Volatility

The Exchange has also considered the potential for resulting or increased market on close volatility in assessing the appropriateness of proposing an elimination of position limits for SPY options.

SPY options are American-style, physically settled options that can be exercised at any time and settle into shares of the underlying SPY ETF. A key characteristic of the SPY ETF is that the number of shares outstanding is limited only by the number of shares available in the component securities of the S&P 500 Index, which can be used to create additional SPY ETF shares as needed. This in-kind creation and redemption mechanism has proven to be quite robust, as evidenced by the SPY ETF's close tracking of its benchmark index and the relatively small premiums or discounts to Net Asset Value (''NAV'') that it has historically exhibited.[28] Additionally, the ability to hedge with SPX options against the stocks underlying the S&P 500 is limited to the shares outstanding for those stocks—the same limit that applies to

[25] *See supra* note 9 at 51879. Specifically, the market capitalization of the component securities of the Russell 2000 Index (''RUT'') of $1.73 trillion was determined to be enormously capitalized.

[26] 17 CFR 240.15c3–1.

[27] *See* SPXPM Approval at 55972.

[28] *See* SPDR® S&P 500® ETF Trust, Annual Report (September 30, 2011), available at *https://www.spdrs.com/librarycontent/public/SPY%20Annual%20Report%2009.30.11.pdf.*

hedging with SPY options. Accordingly, the Exchange believes that the risk of distortions to the market resulting from the elimination of position limits in SPY options is no greater than the risk presented by SPX options not being subject to position limits.

As a physically-settled option, SPY options can be easily hedged via long or short positions in SPY ETF shares, which, as noted above, can be easily created or redeemed as needed. With a physically-settled contract such as SPY options, once a hedge in the form of a long or short position is obtained, that hedge can only be lost if the underlying security becomes hard to borrow and the short position is bought in.[29] The Exchange believes that this ability to hedge with shares of the SPY ETF is very important, and reduces the likelihood of market on close volatility in the component securities underlying the S&P 500 Index (i.e., a market participant can remain fully hedged through expiration via shares of the SPY ETF), which should also be the case if position limits for SPY options are eliminated. At the same time, the Exchange believes that the elimination of position limits for SPY options would not increase market volatility or facilitate the ability to manipulate the market. The Exchange believes that any potential concern regarding volatility at the closing that could result from an elimination in the position limits for SPY options is further alleviated by the current trading environment, including that there are markets for individual securities on more than one exchange, via unlisted trading privileges, that there is wide dispersion of trading across multiple exchanges, and that exchange procedures and systems are designed to facilitate orderly closings, even when there is volatility.[30]

Implementation

In addition to Commission approval, the implementation of this proposed rule change will be contingent on other factors, including the completion of any changes that may be necessary to the Exchange's regulatory and surveillance program. The Exchange will announce the implementation of the elimination of position limits on SPY options through a notice to ATP holders after any Commission approval of this proposed rule change.

Pilot Program

The Exchange proposes that this rule change be adopted pursuant to a pilot program, set to expire December 5, 2013. The Exchange will perform an analysis of the initial pilot program to eliminate position limits in SPY after the first twelve (12) months of the pilot program (the ''Pilot Program''). The Pilot Report will be submitted within thirty (30) days of the end of such twelve (12) month time period. The Pilot Report will detail the size and different types of strategic [sic] employed with respect to positions established as a result of the elimination of position limits in SPY. In addition, the report will note whether any problems resulted due to the no limit approach and any other information that may be useful in evaluating the effectiveness of the pilot program. The Pilot Report will compare the impact of the pilot program, if any, on the volumes of SPY options and the volatility in the price of the underlying SPY shares, particularly at expiration. In preparing the report the Exchange will utilize various data elements such as volume and open interest. In addition the Exchange will make available to Commission staff data elements relating to the effectiveness of the pilot program.

Conditional on the findings in the Pilot Report, the Exchange will file with the Commission a proposal to either extend the pilot program, adopt the pilot program on a permanent basis or terminate the Pilot Program. If the Pilot Program is not extended or adopted on a permanent basis by December 5, 2013, the position limits for SPY would revert to limits in effect at the commencement of the pilot program.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act[31] in general, and furthers the objectives of Section 6(b)(5) of the Act[32] in particular, in that it 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 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. The Exchange believes that the proposed rule change would be beneficial to market participants, including market makers, institutional investors and retail investors, by permitting them to establish greater positions when pursuing their investment goals and needs. The Exchange also believes that economically equivalent products should be treated in an equivalent manner so as to avoid regulatory arbitrage, especially with respect to position limits. Treating SPY and SPX options differently by virtue of imposing different position limits is inconsistent with the notion of promoting just and equitable principles of trade and removing impediments to perfect the mechanisms of a free and open market. At the same time, the Exchange believes that the elimination of position limits for SPY options would not increase market volatility or facilitate the ability to manipulate the market.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[33] and Rule 19b–4(f)(6) thereunder.[34]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[35] normally does not become operative for 30 days after the date of its

[29] As noted, the in-kind creation and redemption process allows for short term imbalances in supply and demand to be resolved readily, which in turn reduces the likelihood of getting ''bought in'' on a short position in SPY. Since the implementation of Regulation SHO, SPY has never been on the threshold security list, which further evidences the efficacy of the in-kind creation and redemption process in resolving imbalances in supply and demand.

[30] *See, e.g.,* Rule 133 titled ''Trading Halts Due to Extraordinary Market Volatility.''

[31] 15 U.S.C. 78f(b).

[32] 15 U.S.C. 78f(b)(5).

[33] 15 U.S.C. 78s(b)(3)(A).

[34] 17 CFR 240.19b–4(f)(6). In addition, 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.

[35] 17 CFR 240.19b–4(f)(6).

filing. However, Rule 19b–4(f)(6) [36] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that doing so will ensure fair competition among options exchanges and immediately benefit market participants who are Exchange members and members of other exchanges, such as NYSE Amex and CBOE, by ensuring consistency and uniformity across options exchanges with respect to the multiply listed SPY options class. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[37] Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative as of October 5, 2012.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2012–122 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–2012–122. 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–2012–122 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[38]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25085 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[36] 17 CFR 240.19b–4(f)(6).

[37] 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).

[38] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68000; File No. SR–ISE–2012–81]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Pilot Program To Eliminate Position and Exercise Limits in SPY Options

October 5, 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 September 27, 2012, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') 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 to amend its rules to eliminate position and exercise limits for physically-settled options on the SPDR S&P ETF Trust (''SPY'') pursuant to a pilot program. The text of the proposed rule change is available on the Exchange's Web site *www.ise.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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

ISE proposes to amend Supplementary Material .01 to ISE Rule 412 and Supplementary Material .01 of ISE Rule 414 to eliminate position and exercise limits, respectively, for physically-settled SPY options pursuant to a pilot program. This filing is based on a filing previously submitted by NYSE MKT LLC (f/k/a NYSE Amex, LLC (''NYSE Amex'')), which the Commission recently approved.[3]

The Exchange began trading SPY options on January 10, 2005. That year, the position limit for these options was increased from 75,000 contracts to 300,000 contracts on the same side of the market.[4] In July 2011, the position limit for these options was again increased from 300,000 contracts to the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67672 (August 15, 2012), 77 FR 50750 (August 22, 2012) (SR–NYSEAmex–2012–29).

[4] *See* Securities Exchange Act Release No. 51042 (January 14, 2005), 70 FR 3412 (January 24, 2005) (SR–ISE–2005–05).

current limit of 900,000 contracts on the same side of the market.[5]

The underlying SPY generally tracks the performance of the S&P 500 Index and the Exchange states that the SPY and SPY options have deep, liquid markets that reduce concerns regarding manipulation and disruption in the underlying markets. In support of this proposed rule change, the Exchange has collected the following trading statistics for SPY and SPY options: (1) The average daily volume (''ADV'') to date (as of August 24, 2012) for SPY is 148 million shares; (2) the ADV to date in 2012 for SPY options is 2.6 million; (3) the total shares outstanding for SPY are 750.3 million; and (4) the fund market cap for SPY is $106 billion. The Exchange represents further that there is tremendous liquidity in the securities that make up the S&P 500 Index. For example, the ADV of the component securities in the S&P 500 Index for the 6-month period of February 28, 2012 through August 28, 2012 was 635,583,189.

Under the Exchange's proposal, the options reporting requirement for SPY options would continue unabated. Thus, the Exchange would still require that each Member that maintains a position in SPY options on the same side of the market, for its own account or for the account of a customer, report certain information to the Exchange. This information would include, but would not be limited to, the option position, whether such position is hedged and, if so, a description of the hedge, and the collateral used to carry the position, if applicable. Exchange market makers would continue to be exempt from this reporting requirement, as market maker information can be accessed through the Exchange's market surveillance systems. In addition, the general reporting requirement for customer accounts that maintain an aggregate position of 200 or more option contracts would remain at this level for SPY options.[6]

In addition, ISE Rule 4.15(b) [sic] provides:

> Electronic Access Members that maintain an end of day position in excess of 10,000 non-FLEX equity options contracts on the same side of the market on behalf of its own account or for the account of a customer, shall report whether such position is hedged and provide documentation as to how such position is hedged. This report is required at the time the subject account exceeds the 10,000 contract threshold and thereafter, for customer accounts, when the position increases by 2,500 contracts and for proprietary accounts when the position increases by 5,000 contracts.

As the anniversary of listed options trading approaches its fortieth year, the Exchange believes that the existing surveillance procedures and reporting requirements at ISE, other options exchanges, and at the several clearing firms are capable of properly identifying unusual and/or illegal trading activity. In addition, routine oversight inspections of the Exchange's regulatory programs by the Commission have not uncovered any material inconsistencies or shortcomings in the manner in which the Exchange's market surveillance is conducted. These procedures utilize daily monitoring of market movements via automated surveillance techniques to identify unusual activity in both options and underlying stocks.[7]

Furthermore, large stock holdings must be disclosed to the Commission by way of Schedules 13D or 13G.[8] Options positions are part of any reportable positions and, thus, cannot be legally hidden. Moreover, the Exchange's requirement that Members file reports with the Exchange for any customer who held aggregate large long or short positions of any single class for the previous day will continue to serve as an important part of the Exchange's surveillance efforts.

The Exchange believes that the current financial requirements imposed by the Exchange and by the Commission adequately address concerns that a Member or its customer may try to maintain an inordinately large un-hedged position in an option, particularly on SPY. Current margin and risk-based haircut methodologies serve to limit the size of positions maintained by any one account by increasing the margin and/or capital that a Member must maintain for a large position held by itself or by its customer. In addition, the Commission's net capital rule, Rule 15c3–1[9] under the Securities Exchange Act of 1934 (the ''Act''),[10] imposes a capital charge on members to the extent of any margin deficiency resulting from the higher margin requirement.

Pilot Program

The Exchange proposes that this rule change be adopted pursuant to a pilot program, set to expire December 5, 2013.[11] The Exchange will perform an analysis of the initial pilot program to eliminate position limits in SPY after the first twelve (12) months of the pilot program (the ''Pilot Report''). The Pilot Report will be submitted within thirty (30) days of the end of such twelve (12) month time period. The Pilot Report will detail the size and different types of strategies employed with respect to positions established as a result of the elimination of position limits in SPY. In addition, the report will note whether any problems resulted due to the no limit approach and any other information that may be useful in evaluating the effectiveness of the pilot program. The Pilot Report will compare the impact of the pilot program, if any, on the volumes of SPY options and the volatility in the price of the underlying SPY shares, particularly at expiration. In preparing the report the Exchange will utilize various data elements such as volume and open interest. In addition the Exchange will make available to Commission staff data elements relating to the effectiveness of the pilot program.

Conditional on the findings in the Pilot Report, ISE will file with the Commission a proposal to either extend the pilot program, adopt the pilot program on a permanent basis, or terminate the pilot program. If the pilot program is not extended or adopted on a permanent basis by December 5, 2013, the position limits for SPY would revert to limits in effect at the commencement of the pilot program.

The Exchange believes that the elimination of position and exercise limits on SPY options on a pilot basis is required for competitive purposes as well as for purposes of consistency and uniformity among the competing options exchanges. This supports the Exchange's current proposal to eliminate the position and exercise limits applicable to physically-settled SPY options on a pilot basis.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the Securities Exchange Act of 1934[12] (the ''Act'') in general, and furthers the objectives of Section 6(b)(5) of the Act[13] in particular, in that it 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 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

[5] *See* Securities Exchange Act Release No. 64760 (June 28, 2011), 76 FR 39143 (July 5, 2011) (SR–ISE–2011–34).

[6] *See* ISE Rule 415(a).

[7] These procedures have been effective for the surveillance of SPY options trading and will continue to be employed.

[8] 17 CFR 240.13d–1.

[9] 17 CFR 240.15c3–1.

[10] 15 U.S.C. 78s(b)(1).

[11] The Exchange will notify ISE Members of the establishment of the pilot program and the running dates of the pilot program via regulatory circular.

[12] 15 U.S.C. 78f(b).

[13] 15 U.S.C. 78f(b)(5).

general to protect investors and the public interest.

Specifically, the proposed rule change will benefit large market makers (which generally have the greatest potential and actual liability [sic] to provide liquidity and depth I [sic] the product), as well as retail traders, investors, and public customers, by providing them with a more effective trading and hedging vehicle. In addition, the Exchange believes that the structure of SPY options and the considerable liquidity of the market for SPY options diminish the opportunity to manipulate this product and disrupt the underlying market that a lower position limit may protect against. The Exchange also believes that the proposed rule change will benefit a greater number of market participants who are ISE Members and members of other exchanges. This is because SPY is a multiply listed options class and currently there is not a uniform and consistent position and exercise limits regime across all of the exchanges that list SPY options. The proposed filing will benefit market participants because it will ensure consistency and uniformity among the competing options exchanges as to the position and exercise limits for a multiply listed options class.

B. Self-Regulatory Organization's Statement on Burden on Competition

ISE does not believe that this proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. In this regard and as indicated above, the Exchange notes that the rule change is being proposed as a competitive response to a NYSE Amex filing. ISE believes this proposed rule change is necessary to permit fair competition among the options exchanges and to establish uniform positions for a multiply listed options class.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [14] and Rule 19b–4(f)(6) thereunder.[15]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act [16] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6) [17] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that doing so will ensure fair competition among options exchanges and immediately benefit market participants who are ISE members and members of other exchanges by ensuring consistency and uniformity across options exchanges with respect to the multiply listed SPY options class. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest.[18] Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative as of October 5, 2012.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–ISE–2012–81 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–ISE–2012–81. 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–ISE–2012–81 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25086 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[14] 15 U.S.C. 78s(b)(3)(A).

[15] 17 CFR 240.19b–4(f)(6). In addition, 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.

[16] 17 CFR 240.19b–4(f)(6).

[17] 17 CFR 240.19b–4(f)(6).

[18] 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).

[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68001; File No. SR–NYSEArca–2012–112]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Commentary .06 to NYSE Arca Rule 6.8 Adopting a Pilot Program Eliminating Position Limits for Options on the SPDR® S&P 500® Exchange-Traded Fund,[1] Which List and Trade Under the Symbol SPY October 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on October 1, 2012, NYSE Arca, Inc. (the ''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Commentary .06 to NYSE Arca Rule 6.8 to adopt a pilot program eliminating position limits for options on the SPDR® S&P 500® exchange-traded fund (''SPY ETF''),[4] which list and trade under the symbol SPY. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposal is to amend Commentary .06 to NYSE Arca Rule 6.8 to adopt a pilot program eliminating position limits for SPY options. The Exchange is basing this proposal on a recently approved rule change by NYSE MKT LLC, on behalf of NYSE Amex Options LLC (''NYSE Amex Options''), to adopt a pilot program to eliminate position limits for SPY options.[5]

Background

Position limits serve as a regulatory tool designed to address potential manipulative schemes and adverse market impact surrounding the use of options. The Exchange understands that the Commission, when considering the appropriate level at which to set option position and exercise limits, has considered the concern that the limits be sufficient to prevent investors from disrupting the market in the security underlying the option.[6] This consideration has been balanced by the concern that the limits ''not be established at levels that are so low as to discourage participation in the options market by institutions and other investors with substantial hedging needs or to prevent specialists and market-makers from adequately meeting their obligations to maintain a fair and orderly market.'' [7]

SPY options are currently the most actively traded option class in terms of average daily volume (''ADV'').[8] The Exchange believes that, despite the popularity of SPY options as evidenced by their significant volume, the current position limits on SPY options could be a deterrent to the optimal use of this product as a hedging tool. The Exchange further believes that position limits on SPY options may inhibit the ability of certain large market participants, such as mutual funds and other institutional investors with substantial hedging needs, to utilize SPY options and gain meaningful exposure to the hedging function they provide.

The Exchange believes that current experience with the trading of SPY options, as well as the Exchange's surveillance capabilities, has made it appropriate to consider other, less prophylactic alternatives to regulating SPY options, while still seeking to ensure that large positions in SPY options will not unduly disrupt the options or underlying cash markets. Accordingly, the Exchange proposes to eliminate the position limits on SPY options—currently 900,000 contracts on the same side of the market.[9] In proposing the elimination of position limits on SPY options, the Exchange has considered several factors, including (1) the availability of economically equivalent products and their respective position limits, (2) the liquidity of the option and the underlying security, (3) the market capitalization of the underlying security and the related index, (4) the reporting of large positions and requirements surrounding margin, and (5) the potential for market on close volatility.

Economically Equivalent Products

The Exchange has considered the existence of economically equivalent or similar products, and their respective position limits, if any, in assessing the appropriateness of proposing an elimination of position limits for SPY options.

For example, AM-settled options on the S&P 500 Index, which list and trade exclusively on the Chicago Board Options Exchange (''CBOE'') under the symbol SPX, are currently not subject to position limits.[10] Moreover, SPX options are 10 times the size of SPY options, so that a position of only

[1] ''SPDR®,'' ''Standard & Poor's®,'' ''S&P®,'' ''S&P 500®,'' and ''Standard & Poor's 500'' are registered trademarks of Standard & Poor's Financial Services LLC. The SPY ETF represents ownership in the SPDR S&P 500 Trust, a unit investment trust that generally corresponds to the price and yield performance of the SPDR S&P 500 Index.

[2] 15 U.S.C. 78s(b)(1).

[3] 17 CFR 240.19b–4.

[4] ''SPDR®,'' ''Standard & Poor's®,'' ''S&P®,'' ''S&P 500®,'' and ''Standard & Poor's 500'' are registered trademarks of Standard & Poor's Financial Services LLC. The SPY ETF represents ownership in the SPDR S&P 500 Trust, a unit investment trust that generally corresponds to the price and yield performance of the SPDR S&P 500 Index.

[5] *See* Securities Exchange Act Release No. 67672 (August 15, 2012), 77 FR 50750 (August 22, 2012) (Order approving NYSEAmex–2012–29). NYSE Amex Options is the options trading facility of NYSE MKT, LLC, f/n/a NYSE Amex LLC.

[6] *See* Securities Exchange Act Release No. 40969 (January 22, 1999), 64 FR 4911, 4912–4913 (February 1, 1999) (SR–CBOE–98–23) (citing H.R. No. IFC–3, 96th Cong., 1st Sess. at 189–91 (Comm. Print 1978)).

[7] *Id.* at 4913.

[8] SPY ADV was 2,156,482 contracts in April 2012. ADV for the same period for the next four most actively traded options was: Apple Inc. (option symbol AAPL)—1,074,351; S&P 500 Index (option symbol SPX)—656,250; PowerShares QQQ Trust^{SM}, Series 1 (option symbol QQQ)—573,790; and iShares® Russell 2000® Index Fund (option symbol IWM)—550,316.

[9] *See* Commentary .06 to NYSE Arca Rule 6.8. *See also* Securities Exchange Act Release No. 64945 (July 21, 2011), 76 FR 44969 (July 27, 2011) (SR–NYSEArca-2011–47).

[10] *See* Securities Exchange Act Release No. 44994 (October 26, 2001), 66 FR 55722 (November 2, 2001) (SR–CBOE–2001–22). Position limits were also eliminated for options on the S&P 100 Index (option symbol OEX) and the Dow Jones Industrial Average (option symbol DJX).

90,000 SPX options is the equivalent of a position of 900,000 SPY options, which is the current position limit for SPY options.[11]

Similarly, the C2 Options Exchange (''C2'') has recently introduced a PM-settled S&P 500 cash settled contract (''SPXPM''), which also is not subject to position limits.[12] This contract, unlike the existing SPX contract, is cash-settled based on the closing value of the S&P 500 Index. In this respect, SPXPM is very much like SPY options in that it is settled at the close, albeit into cash as opposed to shares of the underlying like SPY options.

The Exchange believes that, because SPX, SPXPM, and SPY options are ultimately derivative of the same benchmark—the S&P 500 Index—they should be treated equally from a position limit perspective. As a practical matter, investors utilize SPX, SPXPM, and SPY options and their respective underlying instruments and futures to gain exposure to the same benchmark index: The S&P 500. Further, because the creation and redemption process for the underlying SPY ETF allows large investors to transfer positions from a basket of stocks comprising the S&P 500 index to an equivalent number of ETF shares (and the reverse) with relative ease, there is no reason to disadvantage options overlying the one versus the other. The Exchange believes that this view is supported by the recent expansion of various exemptions from position limits, such as the Delta-Based Equity Hedge Exemption [13] for positions of a member, member organization or non-member affiliate that are delta neutral, which allows SPY option positions to be delta-hedged by positions in SPX options. Given that SPX options are not subject to position limits, a member or member organization (or non-member affiliate thereof) could theoretically establish a position in SPY options far in excess of the current 900,000 contract limit, provided that the position is hedged with SPX options. The Exchange believes that this situation accurately reflects the economic equivalence of SPX and SPY options, supporting the Exchange's proposal to further acknowledge this equivalence by eliminating position limits in SPY options.

The Exchange also believes that Commission findings in approving the SPXPM options further support treating SPY options in the same manner as SPX and SPXPM options for purposes of position limits. In particular, the Commission noted in approving SPXPM options that ''C2's proposal will offer investors another investment option through which they could obtain and hedge exposure to the S&P 500 stocks,'' and that ''C2's proposal will provide investors with the ability to trade an option on the S&P 500 index in an all-electronic market, which may better meet the needs of investors who may prefer to trade electronically.'' [14] The Commission also noted that ''C2's proposal will provide investors with added flexibility through an additional product that may be better tailored to meet their particular investment, hedging, and trading needs.'' [15] The Exchange believes that these Commission findings apply equally to SPY options. In this respect, SPY options with no position limit will (1) offer investors another investment option through which they could obtain and hedge significant levels of exposure to the S&P 500 stocks, (2) be available to trade on the Exchange (and presumably all other U.S. options exchanges) electronically, and (3) provide investors with added flexibility through an additional product that may be better tailored to meet their particular investment, hedging, and trading needs, because, among other things, they are PM-settled.

The Exchange notes that, with respect to competition amongst economically equivalent products, a 2005 paper by Hans Dutt and Lawrence Harris that set forth a model to determine appropriate position limits for cash-settled index derivatives observed that ''markets and their regulators should take a closer look at the underlying economic rationale for the levels at which they currently set their position limits to ensure that the limits adequately protect markets from manipulation and that inconsistent position limits do not produce competitive advantages and disadvantages among contracts.'' [16] On this point, the Exchange believes that if no position limits have been found to be warranted on both SPX and SPXPM options, then such treatment should be extended to SPY options so that inconsistent position limits do not produce competitive advantages and disadvantages among contracts.

In addition, the Exchange notes that the Dutt-Harris Paper focuses its attention on the concerns relating to manipulation of cash-settled derivatives, stating that ''[a]lthough several scholars have argued that cash settlement may increase the risk of market manipulation, until recently, the theoretical problems arising from potential cash settlement manipulation has been considered minor, as evidenced by the lack of academic interest in this area.'' [17] The paper further noted that ''[t]he reason for this may arise from the fact that most exchange-traded derivative index contracts that are cash settled are broad-based, and each of the underlying components typically possesses ample liquidity,'' and that ''manipulation of the underlying components would likely be extremely costly to the would-be manipulator.'' [18] This suggests that whatever manipulation risk does exist in a cash-settled, broad-based product such as SPXPM, the corresponding manipulation risk in a physically-settled, but equally broad-based product such as SPY, is likely to be equally low, if not lower.

Similarly, the Exchange notes that in the Dutt-Harris Paper the authors observed that the lack of scholarly interest in the cash-settlement manipulation problem may have been ''due to the fact that, until recently, most U.S. exchange-traded cash-settled derivative contracts were based on broad indices of very liquid stocks,'' and that ''[m]anipulation of such instruments require very large trades that are costly to make and easy to detect through conventional surveillance.'' [19] This observation applies equally to SPY options, which are based on a broad index of very liquid stocks and can easily be created by submitting a position in the underlying securities. Moreover, it provides additional support for the Exchange's view that the enhanced reporting and surveillance for SPY options discussed below adequately address concerns about manipulation.[20]

[11] The Exchange notes that the reduced-value option on the S&P 500 Index (option symbol XSP) is the equivalent size of SPY options and, similar to SPX options, is not subject to position limits. *See* Securities Exchange Act Release No. 56350 (September 4, 2007), 72 FR 51878 (September 11, 2007) (SR–CBOE–2007–79).

[12] *See* Securities Exchange Act Release No. 65256 (September 2, 2011), 76 FR 55969 (September 9, 2011) (SR–C2–2011–008) (''SPXPM Approval'').

[13] *See* Commentary .07(iii) to NYSE Arca Rule 6.8.

[14] *See* SPXPM Approval at 55975.

[15] *Id.*

[16] *The Journal of Futures Markets,* Vol. 25, no. 10, 945–965, 949 (2005) (''Position Limits for Cash-Settled Derivative Contracts,'' by Hans R. Dutt and Lawrence E. Harris) (''Dutt-Harris Paper''). In the paper, the authors examined existing position limits to determine whether they were consistent with the model the authors developed, and found that the results indicated that existing limits were not correlated with the limits suggested by their model.

[17] *Id.* at 946.

[18] *Id.*

[19] *Id.* at 948.

[20] The authors of the Dutt-Harris Paper further posited that ''position limits need only apply during the period when cash settlement takes place.'' *Id.* at 964. The Exchange notes that no such

Liquidity in the Option and the Underlying Security

The Exchange has also considered the liquidity of SPY options and the underlying SPY ETF in assessing the appropriateness of proposing an elimination of position limits for SPY options.

In approving the elimination of position and exercise limits on SPX options, the Commission noted that the deep, liquid markets for the securities underlying the S&P 500 Index reduced concerns regarding market manipulation or disruption in the underlying markets.[21] The Commission further noted that removing position limits for SPX options could also bring additional depth and liquidity, in terms of both volume and open interest, without increasing concerns regarding intermarket manipulations or disruptions of the options or the underlying securities.[22] The Exchange similarly believes that this would be the case if position limits for SPY options were eliminated.

In this regard, both the SPY ETF and SPY options similarly exhibit deep, liquid markets. However, SPY options are not as active as SPX options when adjusted for the difference in their notional size.[23] As described below, the Exchange believes that this is partly due to the existence of position limits for SPY options. The table below compares the ADV in both SPX and SPY options, and includes an ''implied SPY volume'' figure that reflects theoretical SPY ADV without the constraint of position limits:

Date range	Trade days	SPX option ADV	SPY option ADV	Implied SPY option ADV	Implied SPY option ADV shortfall
Jan 1, 2011 to Dec 31, 2011	252	1,567,535	5,789,511	15,675,353	9,885,842
Jan 1, 2012 to Apr 19, 2012	75	1,343,735	4,525,709	13,437,353	8,911,644

The Exchange believes that certain factors may result in SPX options—adjusted for their larger notional size—currently trading with greater volume than SPY options.[24] In this regard, the Exchange believes that, based on input from various market participants, the existence of position limits in SPY options is reason in itself to instead utilize SPX options. Anecdotally, market participants perceive value in avoiding the regulatory risk of exceeding the SPY option position limit by instead using SPX options for their hedging needs. The Exchange also believes that, while exemptions are available with respect to position limits for SPY options, such exemptions, and the regulatory burden attendant therewith, may dissuade investors from using SPY options when they can instead use an SPX option without the need for such an exemption. Because SPY and SPX options are economically equivalent products, an investor deciding between the two would generally trade the product with the least barriers or requirements to engage in such activity. In this respect, SPX options are currently the easier product to trade.

As a further comparison, the following table sets forth certain data for both the SPY ETF and the combined volume for the component securities upon which the S&P 500 Index is based:

Date range	S&P 500 Index underlying component ADV[25]	S&P 500 Index underlying component average daily value traded	SPY ETF ADV	SPY ETF average daily value traded
Jan. 1, 2011 to Dec. 31, 2011	3,289,595,675	$4,149,726,217,456	218,227,747	$27,297,097,993
Jan. 1, 2012 to Apr. 19, 2012	2,851,457,600	3,860,704,307,080	145,164,527	19,684,577,239

This data shows that there is tremendous liquidity in both SPY ETF shares and the component securities upon which the S&P 500 Index is based. While the ADV for the components underlying the S&P 500 Index is greater than the ADV for the SPY ETF, the Exchange believes that SPY ETF volume has been, is currently and will likely continue to be within a range that the Commission has previously determined to be a deep, liquid market.[26]

Market Capitalization of the Underlying Security and the Related Index

The Exchange has also considered the market capitalization of the SPY ETF and the S&P 500 Index in assessing the appropriateness of proposing an elimination of position limits for SPY options.

The Exchange understands that the Commission similarly considered the market capitalization of the underlying index when it approved the elimination of position limits in SPX options. Accordingly, the Exchange believes that the capitalization of and the deep, liquid markets for the underlying SPY ETF reduces concerns regarding market manipulation or disruption in the underlying market. The table below shows the market capitalization of the SPY ETF and the S&P 500 Index:

Date range	Average S&P 500 Index market cap	Average SPY ETF market cap
Jan. 1, 2011 to Dec. 31, 2011	$11,818,270,341,270	$89,533,777,897
Jan. 1, 2012 to Apr. 19, 2012	12,547,946,920,000	99,752,986,022

period exists with respect to SPY options, which are physically settled.

[21] *See supra* note 6 at 4913.

[22] *Id.*

[23] SPX options have a notional value 10 times greater than SPY options (i.e., one SPX contract equals 10 SPY contracts).

[24] The Exchange notes that the ''Implied SPY Option ADV Shortfall'' has narrowed over time and at an accelerated rate, which the Exchange believes is a direct result of the implementation of the Delta-Based Equity Hedge Exemption that allows SPY options to be hedged via SPX options.

[25] The data considers the aggregate volume for all component stocks of the S&P 500 Index.

[26] *See supra* note 6 at n. 13. The ADV for the components of the indexes underlying the options for which position limits were eliminated were 94.77 million shares (DJX), 244.3 million shares (OEX), and 757.5 million shares (SPX).

This data shows the enormous capitalization of both the SPY ETF and the component securities upon which the S&P 500 Index is based. While the capitalization for the components underlying the S&P 500 Index is greater than that for the SPY ETF, the Exchange believes that the SPY ETF capitalization has nonetheless been, is currently and will likely continue to be at a level consistent with that which the Commission has previously determined to be enormously capitalized.[27]

The Exchange notes that the theoretical limit on one's ability to hedge both SPX and SPY options is the full market capitalization of the S&P 500 Index itself. This similarly contributes to the Exchange's determination that it is appropriate for position limits on SPY options to be eliminated.

Large Position Reporting and Margin Requirements

The Exchange has also considered the reporting of large option positions and related margin requirements in assessing the appropriateness of proposing an elimination of position limits for SPY options.

The Exchange notes that the Large Option Position Reporting (''LOPR'') requirement in NYSE Arca Rule 6.6 would continue to apply. Rule 6.6 requires members and member organizations to file a report with the Exchange with respect to each account in which the member or member organization has an interest; each account of a partner, officer, director, trustee or employee of such member organization; and each customer account that has established an aggregate position (whether long or short) that meets certain determined thresholds (e.g., 200 or more option contracts if the underlying security is a stock or Exchange-Traded Fund Share). Rule 6.6 also permits the Exchange to impose a higher margin requirement upon the account of a member or member organization when it determines that the account maintains an under-hedged position.

Additionally, Rule 6.6 provides:

In addition to the requirements under Rule 6.6(a), each OTP Holder or OTP Firm (other than an Exchange Market Maker), that maintains a position in excess of 10,000 Non-FLEX equity option contracts on the same side of the market on behalf of its own account or for the account of a customer, must report information, in a manner and form prescribed by the Exchange, as to whether such positions are hedged and provide documentation as to how such contracts are hedged. In addition, whenever the Exchange determines, based on a report to the Exchange or otherwise, that a higher margin requirement is necessary in light of the risks associated with an under-hedged Non-FLEX equity option position in excess of 10,000 contracts on the same side of the market, the Exchange may, pursuant to its authority under Exchange Rule 4.16, consider imposing additional margin upon the account maintaining such under-hedged position. It should be noted that the clearing firm carrying the account will be subject to capital charges under SEC Rule 15c3–1 to the extent of any margin deficiency from the higher margin requirements.

Monitoring accounts maintaining large positions provides the Exchange with the information necessary to determine whether to impose additional margin and/or whether to assess capital charges upon a member organization carrying the account. In addition, the Commission's net capital rule, Rule 15c3–1 under the Securities Exchange Act of 1934 (the ''Act''),[28] imposes a capital charge on members to the extent of any margin deficiency resulting from the higher margin requirement, which should serve as an additional form of protection.

In approving SPXPM, the Commission addressed concerns about the lack of a position limit by noting that CBOE will rely on its enhanced surveillance requirements and procedures for SPX options to monitor trading activity in SPXPM options.[29] Similarly, the Exchange notes that certain option products are currently traded on the Exchange without position limits (e.g., the NASDAQ® 100 Index option (option symbol NDX) and the Russell 2000® Index option (option symbol RUT)), and believes that the reporting, surveillance and monitoring mechanisms in place for these products are effective and could easily accommodate SPY options if position limits thereon are eliminated.

Market on Close Volatility

The Exchange has also considered the potential for resulting or increased market on close volatility in assessing the appropriateness of proposing an elimination of position limits for SPY options.

SPY options are American-style, physically settled options that can be exercised at any time and settle into shares of the underlying SPY ETF. A key characteristic of the SPY ETF is that the number of shares outstanding is limited only by the number of shares available in the component securities of the S&P 500 Index, which can be used to create additional SPY ETF shares as needed. This in-kind creation and redemption mechanism has proven to be quite robust, as evidenced by the SPY ETF's close tracking of its benchmark index and the relatively small premiums or discounts to Net Asset Value (''NAV'') that it has historically exhibited.[30] Additionally, the ability to hedge with SPX options against the stocks underlying the S&P 500 is limited to the shares outstanding for those stocks—the same limit that applies to hedging with SPY options. Accordingly, the Exchange believes that the risk of distortions to the market resulting from the elimination of position limits in SPY options is no greater than the risk presented by SPX options not being subject to position limits.

As a physically-settled option, SPY options can be easily hedged via long or short positions in SPY ETF shares, which, as noted above, can be easily created or redeemed as needed. With a physically-settled contract such as SPY options, once a hedge in the form of a long or short position is obtained, that hedge can only be lost if the underlying security becomes hard to borrow and the short position is bought in.[31] The Exchange believes that this ability to hedge with shares of the SPY ETF is very important, and reduces the likelihood of market on close volatility in the component securities underlying the S&P 500 Index (i.e., a market participant can remain fully hedged through expiration via shares of the SPY ETF), which should also be the case if position limits for SPY options are eliminated. At the same time, the Exchange believes that the elimination of position limits for SPY options would not increase market volatility or facilitate the ability to manipulate the market. The Exchange believes that any potential concern regarding volatility at the closing that could result from an elimination in the position limits for

[27] *See supra* note 11 at 51879. Specifically, the market capitalization of the component securities of the Russell 2000 Index (''RUT'') of $1.73 trillion was determined to be enormously capitalized.

[28] 17 CFR 240.15c3–1.

[29] *See* SPXPM Approval at 55972.

[30] *See* SPDR® S&P 500® ETF Trust, Annual Report (September 30, 2011), available at *https://www.spdrs.com/library-content/public/SPY%20Annual%20Report%2009.30.11.pdf.*

[31] As noted, the in-kind creation and redemption process allows for short term imbalances in supply and demand to be resolved readily, which in turn reduces the likelihood of getting ''bought in'' on a short position in SPY. Since the implementation of Regulation SHO, SPY has never been on the threshold security list, which further evidences the efficacy of the in-kind creation and redemption process in resolving imbalances in supply and demand.

SPY options is further alleviated by the current trading environment, including that there are markets for individual securities on more than one exchange, via unlisted trading privileges, that there is wide dispersion of trading across multiple exchanges, and that exchange procedures and systems are designed to facilitate orderly closings, even when there is volatility.[32]

Implementation

The implementation of this proposed rule change will be contingent on other factors, including the completion of any changes that may be necessary to the Exchange's regulatory and surveillance program. Once this rule filing is effective, the Exchange will announce the implementation of the elimination of position limits on SPY options through a notice to OTP Holders.

Pilot Program

NYSE Arca proposes that this rule change be adopted pursuant to a pilot program, set to expire December 5, 2013. The Exchange will perform an analysis of the initial pilot program to eliminate position limits in SPY after the first twelve (12) months of the pilot program (the ''Pilot Report''). NYSE Arca represents that the Pilot Report will be submitted within thirty (30) days of the end of such twelve (12) month time period. The Pilot Report will detail the size and different types of strategies employed with respect to positions established as a result of the elimination of position limits in SPY. In addition, the Pilot Report will note whether any problems resulted due to the no limit approach and any other information that may be useful in evaluating the effectiveness of the pilot program. The Pilot Report will compare the impact of the pilot program, if any, on the volumes of SPY options and the volatility in the price of the underlying SPY shares, particularly at expiration. In preparing the report the Exchange will utilize various data elements such as volume and open interest. In addition, the Exchange has represented that it will make available to Commission staff data elements relating to the effectiveness of the pilot.

Depending on the findings in the Pilot Report, NYSE Arca will file with the Commission a proposal to either extend the pilot program, adopt the pilot program on a permanent basis, or terminate the pilot program. If the pilot program is not extended or adopted on a permanent basis by December 5, 2013, the position limits for SPY would revert to limits in effect at the commencement of the pilot program.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)[33] of the Act, in general, and furthers the objectives of Section 6(b)(5),[34] in particular, in that it 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 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. The Exchange believes that the proposed rule change would be beneficial to market participants, including market makers, institutional investors and retail investors, by permitting them to establish greater positions when pursuing their investment goals and needs. The Exchange also believes that economically equivalent products should be treated in an equivalent manner so as to avoid regulatory arbitrage, especially with respect to position limits. Treating SPY and SPX options differently by virtue of imposing different position limits is inconsistent with the notion of promoting just and equitable principles of trade and removing impediments to perfect the mechanisms of a free and open market. At the same time, the Exchange believes that the elimination of position limits for SPY options would not increase market volatility or facilitate the ability to manipulate the market.

The Exchange further notes that the rule proposal will remove impediments to and perfect the mechanism of a free and open market because it will harmonize how position limits are treated for SPY options across options markets. As noted above, the Commission has already approved the elimination of position limits for SPY options for NYSE Amex Options, and the Exchange believes that harmonizing the standard across options markets will enable market participants to handle trading in SPY options similarly regardless of which options market in which they are trading.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[35] and Rule 19b–4(f)(6) thereunder.[36] Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[37] and Rule 19b–4(f)(6) thereunder.[38]

A proposed rule change filed pursuant to Rule 19b–4(f)(6) under the Act[39] normally does not become operative for 30 days after the date of its filing. However, Rule 19b–4(f)(6)[40] permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that doing so will allow participants on the Exchange to benefit from the opportunity to establish greater positions when pursuing their investment goals and needs without undue delay and will allow dual members of NYSE Amex Options and the Exchange to harmonize how they establish position limits for SPY options when trading at both markets. The Commission believes that waiving the 30-day operative delay is consistent with the protection of

[32] *See, e.g.,* Rule 123C—NYSE Amex Equities (The Closing Procedures).

[33] 15 U.S.C. 78f(b).

[34] 15 U.S.C. 78f(b)(5).

[35] 15 U.S.C. 78s(b)(3)(A)(iii).

[36] 17 CFR 240.19b–4(f)(6).

[37] 15 U.S.C. 78s(b)(3)(A).

[38] 17 CFR 240.19b–4(f)(6). In addition, 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.

[39] 17 CFR 240.19b–4(f)(6).

[40] 17 CFR 240.19b–4(f)(6).

investors and the public interest.[41] Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative as of October 5, 2012.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NYSEArca–2012–112 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–NYSEArca–2012–112. 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–NYSEArca–2012–112 and should be submitted on or before November 2, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Kevin M. O'Neill,

Deputy Secretary.

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[41] 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).

[42] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68002; File No. AN–OCC–2012–03]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Advance Notice and Notice of No Objection To Replace The Options Clearing Corporation's Credit Facility

October 5, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4(n)(1)(i),[2] notice is hereby given that on September 26, 2012, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') an advance notice 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 change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance for the Advance Notice

In connection with a change to its operations (the ''Change''), OCC proposes to replace its credit facility designed to be used to meet obligations of OCC arising out of the default or suspension of a clearing member of OCC or the insolvency of any bank or clearing organization doing business with OCC.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4(n)(i).

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Advance Notice

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed change and discussed any comments it received on the proposed change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared a summary, set forth in section (A) below, of the most significant aspects of such statements.[3]

Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'')

Description of Change

The Change involves the replacement of a credit facility that OCC maintains for the purposes of meeting obligations arising out of the default or suspension of a clearing member or the failure of a bank or securities or commodities clearing organization to perform its obligations due to its bankruptcy, insolvency, receivership or suspension of operations. OCC's existing credit facility (the ''Existing Facility'') was implemented on October 13, 2011 through the execution of a Credit Agreement among OCC, JPMorgan Chase Bank, N.A. (''JPMorgan''), as administrative agent, and the lenders that are parties to the agreement from time to time, which provides short-term secured borrowings in an aggregate principal amount of up to $2 billion.

The Existing Facility is set to expire on October 11, 2012, and OCC is therefore currently negotiating the terms of a new credit facility (the ''New Facility'') on substantially similar terms as the Existing Facility. On September 4, 2012, OCC received a commitment letter with regard to the New Facility from: JPMorgan, the administrative agent, euro administrative agent and collateral agent, and a lender, for the New Facility; JPMorgan Securities LLC (''JPMorgan Securities''), the joint lead arranger for the New Facility; Merrill Lynch, Pierce, Fenner & Smith Incorporated (''MLPF&S''), the joint lead arranger for the New Facility; and Bank of America, N.A. (''BANA''), the syndication agent and a lender for the New Facility. The terms and conditions applicable to the New Facility are set forth in the commitment letter and a Summary of Terms and Conditions attached as an exhibit to the commitment letter. One of the

[3] The Commission has modified the text of the summaries prepared by OCC.

conditions to the availability of the New Facility is the execution and delivery of a credit agreement and pledge agreement between OCC, JPMorgan, JPMorgan Securities, MLPF&S, BANA and the various lenders under the New Facility, which OCC anticipates will occur on or before October 11, 2012. Another condition is the successful syndication of the facility to a group of lenders who will in the aggregate provide commitments of at least $2 billion.

Under the New Facility, a syndicate of banks, financial institutions and other entities will make loans to OCC on request. The New Facility includes a tranche that may be drawn in dollars or euros and a dollar-only tranche. The aggregate amount of loans available under the facility, subject to the value of eligible collateral, is up to $2 billion. The dollar equivalent of the total loans denominated in euros under the euro/dollar tranche of the New Facility may not exceed $100 million. During the term of the New Facility, the amount of the New Facility may be increased to up to $3 billion if OCC so requests and if sufficient commitments from lenders are received and accepted.

The New Facility is available on a revolving basis for a 364-day term. OCC may request a loan under the New Facility on any business day by providing a notice to JPMorgan, as administrative agent, which will then notify the lenders, who will be required to fund their *pro rata* share of any requested loan within a specified period of time after receiving notice from JPMorgan. The funding deadline is designed to permit OCC to obtain funds on the date of the request, subject to a cutoff time after which funding will occur on the next business day. Each loan issued pursuant to the New Facility matures and is payable 30 days after the borrowing date. Proceeds of these loans must be used to meet the obligations of OCC arising out of the default or suspension of a clearing member or the failure of a bank or securities or commodities clearing organization to perform its obligations to OCC. In order to obtain a loan under the facility, OCC must pledge as collateral cash or government securities that are margin deposits of suspended members or that are held in OCC's clearing fund, and that in either case are not otherwise subject to liens, security interests or other encumbrances. OCC has the authority to pledge these assets in connection with borrowings under Section 5(e) of Article VIII of its By-Laws and Rule 1104(b).

The amount available under the New Facility at any given point in time is equal to the lesser of (i) $2 billion, or the increased size of the facility, if applicable, and (ii) the sum of (A) 90% of the value of OCC's clearing fund that is not subject to liens or encumbrances granted by OCC other than in connection with the New Facility and (B) 90% of the value of unencumbered margin deposits of suspended clearing members that are not subject to liens or encumbrances granted by OCC other than in connection with the New Facility. If the aggregate principal amount of loans under the New Facility exceeds the amount available under this formula, OCC must prepay loans, obtain the release of liens and/or require additional margin and/or clearing fund deposits to cure the deficiency. A condition to the making of any loan under the New Facility is that, after giving effect to the loan, the sum of 100% of the dollar-denominated loans and 105% of the euro-denominated loans under the New Facility may not exceed the ''borrowing base.'' The borrowing base is determined by adding the value of all collateral pledged in connection with all loans under the New Facility, after applying ''haircuts'' to government securities based on their remaining maturity. If the borrowing base is less than the sum of 100% of the dollar-denominated loans and 105% of the euro-denominated loans under the New Facility, OCC must repay loans or pledge additional collateral to cure the deficiency. There are additional customary conditions to the making of any loan under the New Facility, including that OCC is not in default. Importantly, however, the absence of a material adverse change affecting OCC is not a condition to the making of a loan. Loans may be prepaid at any time without penalty.

Events of default by OCC under the New Facility include, but are not limited to, non-payment of principal, interest, fees or other amounts when due; non-compliance with a daily borrowing base when loans are outstanding; material inaccuracy of representations and warranties; bankruptcy events; fundamental changes; and failure to maintain a first priority perfected security interest in collateral. In the event of a default, the interest rate applicable to outstanding loans would increase by 2.00%. The New Facility also includes customary defaulting lender provisions, including provisions that restrict the defaulting lender's voting rights, permit set-offs of payments against the defaulting lender and suspend the defaulting lender's right to receive commitment fees.

The New Facility involves a variety of customary fees payable by OCC, including: (1) A one-time arrangement fee payable to JPMorgan Securities and MLPF&S; (2) a one-time administrative and collateral agent fee payable to JPMorgan if the New Facility closes; (3) a one-time euro administrative fee payable to JPMorgan if the New Facility closes; (4) upfront commitment fees payable to the lenders based on the amount of their commitments; and (5) an ongoing quarterly commitment fee based on the unused amount of the New Facility.

Anticipated Effect on and Management of Risk

Overall, the New Facility reduces the risks to OCC, its clearing members and the options market in general because it will allow OCC to obtain short-term funds to address liquidity demands arising in connection with the default or suspension of clearing members or the insolvency of a bank or another securities or commodities clearing organization. The existence of the New Facility could enable OCC to minimize losses in the event such a default, suspension or insolvency, by allowing it to obtain funds on extremely short notice to ensure that the clearance of transactions in options and other contracts occurs without interruption. By drawing on the facility OCC would be able to avoid liquidating margin or clearing fund assets in what would likely be volatile market conditions, which would preserve funds available to cover any losses resulting from the failure of a clearing member, bank or another clearing organization. OCC's entering into the New Facility will not increase the risks associated with its clearing function because it is entered into on substantially the same terms as the Existing Facility.

While the New Facility will, in general, reduce the risks associated with OCC's clearing function, like any lending arrangement the New Facility involves risks. One of the primary risks to OCC and its clearing function associated with the New Facility is the risk that a lender fails to fund when OCC requests a loan, because of the lender's insolvency or otherwise. This risk is mitigated through the use of a syndicated facility, which does not depend on the creditworthiness of a small number of lenders. In addition, the New Facility has lender default provisions designed to discourage lenders from failing to fund loans. Moreover, OCC has the ability under the New Facility to replace a defaulting lender. Finally, in the event a particular lender fails to fund its portion of the requested loan, the New Facility includes provisions pursuant to which

OCC may request ''covering'' loans from non-defaulting lenders to make up the shortfall, or OCC may simply make a second borrowing request for the shortfall amount that lenders are committed to make, subject to OCC's satisfying the borrowing conditions for the second loan, although in either case the total amount available for borrowing under the New Facility would be reduced by the unfunded commitment of the defaulting lender. The failure by one or more lenders to fund the first loan does not relieve the lenders of their commitment to fund the second loan.

A second risk associated with the New Facility is the risk that OCC is unable to repay a loan within 30 days, which would allow the lenders to seize the pledged collateral and liquidate it, potentially at depressed prices that would result in losses to OCC. OCC believes that this risk is at a manageable level, because 30 days should be an adequate period of time to allow OCC to generate funds to repay the loans under the New Facility, such as by liquidating clearing fund assets other than those pledged to secure the loans. As provided in Section 5(e) of Article VIII of its By-Laws, if the loans have not been repaid within 30 days, the amount of clearing fund assets used to secure the loans will be considered to be an actual loss to the clearing fund, which will be allocated in accordance with Section 5 of Article VIII, and the proceeds of such allocation can be used to repay the loans.

III. Date of Effectiveness of the Advance Notice and Timing for Commission Action

The proposed change may be implemented if the Commission does not object to the proposed change within 60 days of the later of (i) the date that the proposed change was filed with the Commission or (ii) the date that any additional information requested by the Commission is received. The clearing agency shall not implement the proposed change if the Commission has any objection to the proposed change.

The Commission may extend period for review by an additional 60 days if the proposed change raises novel or complex issues, subject to the Commission or the Board of Governors of the Federal Reserve System providing the clearing agency with prompt written notice of the extension. A proposed change may be implemented in less than 60 days from the date the advance notice is filed, or the date further information requested by the Commission is received, if the Commission notifies the clearing agency in writing that it does not object to the proposed change and authorizes the clearing agency to implement the proposed change on an earlier date, subject to any conditions imposed by the Commission.

The clearing agency shall post notice on its Web site of proposed changes that are implemented.

The proposal shall not take effect until all regulatory actions required with respect to the proposal are completed.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed change is consistent with the Exchange 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 AN–OCC–2012–03 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number AN–OCC–2012–03. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed change that are filed with the Commission, and all written communications relating to the proposed change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filings will also be available for inspection and copying at the principal office of OCC and on OCC's Web site: (*http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/an_occ_12_03.pdf*).

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number AN–OCC–2012–03 and should be submitted on or before November 2, 2012.

V. Commission's Findings and Notice of No Objection

Section 806(e)(1)(G) of the Clearing Supervision Act provides that a designated financial market utility may implement a change if it has not received an objection by the Commission within 60 days of an advanced notice.[4] Section 806(e) of the Clearing Supervision Act allows the Commission to act prior to the 60th day.[5] If the Commission chooses to not object prior to the 60th day, it must notify the designated financial market utility in writing that it does not object and authorize implementation of the change on an earlier date.[6] If the Commission chooses to object prior to the 60th day, it must similarly notify the designated financial market utility.[7]

In its filing with the Commission, OCC requested that the Commission notify OCC that it has no objection to the Change no later than October 9, 2012, which is two days prior to the October 11, 2012 effective date of the New Facility. OCC requested Commission action two days in advance of the effective date to ensure that there is no period of time that OCC operates without a credit facility, given the importance of the borrowing capacity in connection with OCC's risk management.

For the reasons set forth above, the Commission does not object to the proposed change.

VI. Conclusion

Pursuant to Section 806(e)(1)(I) of the Clearing Supervision Act, the Commission does not object to the proposed change and authorizes OCC to implement the change (AN–OCC–2012–03) as of the date of this notice.[8]

By the Commission.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25088 Filed 10–11–12; 8:45 am]

BILLING CODE 8011–01–P

[4] 12 U.S.C. 5465(e)(1)(G).

[5] 12 U.S.C. 5465(e).

[6] 12. U.S.C. 5465(e)(1)(I).

[7] 12. U.S.C. 5465(e)(1)(E).

[8] 12 U.S.C. 5465(e)(1)(I).

DEPARTMENT OF STATE

[Public Notice 8061]

Culturally Significant Objects Imported for Exhibition Determinations: ''Royal Treasures From the Louvre: Louis XIV to Marie-Antoinette''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Royal Treasures from the Louvre: Louis XIV to Marie-Antoinette'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to a loan agreement with the foreign owner or custodian. I also determine that the exhibition or display of the exhibit objects at the Fine Arts Museums of San Francisco, San Francisco, CA, from on or about November 17, 2012, until on or about March 17, 2013, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: October 3, 2012.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2012–25167 Filed 10–11–12; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35506]

Western Coal Traffic League—Petition for Declaratory Order

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of request for comments.

SUMMARY: The Surface Transportation Board seeks comments from the public addressing the recent discovery that Berkshire Hathaway Inc. (Berkshire), owned or controlled CBEC Railway (CBEC) and White City Terminal Union Railway (WCTU) when it acquired BNSF Railway Company (BNSF) in February 2010, thus subjecting Berkshire's acquisition of BNSF to the Board's jurisdiction pursuant to 49 U.S.C. 11323. Specifically, the Board seeks comments addressing the effect, if any, of this discovery on the post-February 2010 valuation of BNSF's asset base.

DATES: Comments are due by November 8, 2012. Replies are due by November 28, 2012.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's Web site at *http://www.stb.dot.gov*. Any person submitting a filing in the traditional paper format should send an original and 10 copies referring to Docket No. FD 35506 to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn, (202) 245–0382. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: By a letter dated September 13, 2012, in response to an inquiry from the Board, Berkshire stated that it owned or controlled CBEC and WCTU at the time of Berkshire's acquisition of BNSF in February 2010,[1] thus subjecting this transaction to the Board's jurisdiction pursuant to 49 U.S.C. 11323. Berkshire also acknowledged that the 2008 purchase of its initial 60% ownership stake in the Marmon Group, which holds WCTU through one of its subsidiaries, was likely subject to Board jurisdiction. In its letter, Berkshire stated that it intends to fully comply with the requirements of § 11323 by divesting itself of CBEC and WCTU.

The Board responded to Berkshire in a letter dated September 18, 2012, stating that Berkshire is not permitted to own or control multiple carriers without Board authorization, and that according to the facts it disclosed, Berkshire failed to comply with the requirements of § 11323 when it acquired BNSF, and when it first obtained control over both the CBEC and WCTU.[2] The Board directed Berkshire to submit within 10 days a letter specifying the method and timing by which it proposed to remedy its failure to comply with § 11323, and further stated that the Board would, at that time, consider whether further action is warranted.

By letter dated September 25, 2012,[3] Berkshire responded to the Board, stating that it fully intends to complete the divestiture of both WCTU and CBEC to persons that are neither rail carriers, as defined by 49 U.S.C. 10102(5), nor owners of other rail carriers, so that neither divestiture would be subject to Board jurisdiction, pursuant to § 11323, no later than December 31, 2012. Berkshire stated that it and its subsidiaries are currently in the process of valuing both rail carriers and contacting potential transferees. Berkshire proposed to update the Board on the progress of these divestitures on November 1, 2012 and December 1, 2012. The Board replied to Berkshire by letter on October 9, 2012, stating that prompt divestiture is an appropriate remedy under Board precedent, and directing Berkshire to submit written progress reports on November 1, 2012

[1] On February 12, 2010, Berkshire purchased the common stock of BNSF's parent company that Berkshire did not already own in a transaction valued at $34.5 million in cash and Berkshire stock (the Purchase Price). *See* Burlington Northern Santa Fe Corporation, Schedule 13D (Amendment No. 4 to Schedule 13D), at 6 (Feb. 16, 2010), *available at http://www.sec.gov/Archives/edgar/data/934612/000119312510032484/dsc13da.htm*. The Purchase Price reflected a premium of approximately $22 billion over the net book value of the pre-acquisition BNSF, which was approximately $13 billion. Out of the $22 billion, BNSF stated in its 2010 STB Form R–1 annual report that it increased the cost of its tangible assets by approximately $8.1 billion to reflect their fair market value, and allocated $14 billion to goodwill.

[2] An entity that is not a rail carrier must obtain prior Board approval to acquire a railroad line through an asset purchase. *See* 49 U.S.C. 10901(a)(4). But the acquisition by a non-railroad of a controlling stock interest in a company that owns a railroad line does not trigger § 10901(a)(4). Prior Board approval of the acquisition of a controlling interest in the stock of a rail carrier is only required where the purchaser already controls a rail carrier. *See* 49 U.S.C. 11323.

[3] The September 13, 2012 and September 25, 2012 Berkshire letters, as well as the Board's September 18, 2012 and October 9, 2012 responses, have been added to this docket.

and December 1, 2012, detailing the status of the divestitures. In the same letter, the Board also stated that should any developments or change in circumstances at any other time that affect the course of divestiture arise, Berkshire should bring them to the Board's attention immediately.

On September 28, 2011, the Board opened this proceeding to address the May 2, 2011 petition of the Western Coal Traffic League (WCTL), where WCTL asked the Board to issue an order declaring that the Board will adjust the Uniform Railroad Costing System (URCS) costs of BNSF for calendar year 2010 and subsequent years. In particular, WCTL asked the Board to declare that it will exclude the write-up in BNSF's net investment base attributable to the difference between the BNSF's book value and the price that Berkshire paid to acquire BNSF in 2010, and to make corresponding changes in BNSF's annual URCS depreciation calculations. WCTL argued that the inclusion of the write-up could have an impact in rate cases, the determination of BNSF's revenue adequacy, and other matters. On March 22, 2012, the Board held a public hearing to explore the arguments raised by WCTL, BNSF, and other parties to the proceeding.

The Board now seeks comments from the public on the effect, if any, of Berkshire's non-compliance with § 11323 upon this proceeding. Berkshire's 2010 acquisition of BNSF was and remains subject to the Board's jurisdiction pursuant to § 11323, but Berkshire will not come into compliance until December 31, 2012 (by its estimates). The Board seeks comments on the effect, if any, of Berkshire's non-compliance with § 11323 on the legal and accounting principles that govern acquisition premiums within rail mergers, here the post-February 2010 valuation of BNSF's asset base.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Comments are due by November 8, 2012.

2. Replies are due by November 28, 2012.

3. This decision is effective on its service date.

Decided: October 9, 2012.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–25118 Filed 10–11–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Debt Management Advisory Committee; Meeting

Notice is hereby given, pursuant to 5 U.S.C. App. 2, 10(a)(2), that a meeting will be held at the Hay-Adams Hotel, 16th Street and Pennsylvania Avenue NW.,Washington, DC, on October 30, 2012 at 11:30 a.m. of the following debt management advisory committee:

Treasury Borrowing Advisory Committee of The Securities Industry and Financial Markets Association.

The agenda for the meeting provides for a charge by the Secretary of the Treasury or his designate that the Committee discuss particular issues and conduct a working session. Following the working session, the Committee will present a written report of its recommendations. The meeting will be closed to the public, pursuant to 5 U.S.C. App. 2, 10(d) and Public Law 103–202, § 202(c)(1)(B)(31 U.S.C. 3121 note).

This notice shall constitute my determination, pursuant to the authority placed in heads of agencies by 5 U.S.C. App. 2, 10(d) and vested in me by Treasury Department Order No. 101–05, that the meeting will consist of discussions and debates of the issues presented to the Committee by the Secretary of the Treasury and the making of recommendations of the Committee to the Secretary, pursuant to Public Law 103–202, 202(c)(1)(B). Thus, this information is exempt from disclosure under that provision and 5 U.S.C. 552b(c)(3)(B). In addition, the meeting is concerned with information that is exempt from disclosure under 5 U.S.C. 552b(c)(9)(A). The public interest requires that such meetings be closed to the public because the Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decisions on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an advisory committee under 5 U.S.C. App. 2, 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

Treasury staff will provide a technical briefing to the press on the day before the Committee meeting, following the release of a statement of economic conditions and financing estimates. This briefing will give the press an opportunity to ask questions about financing projections. The day after the Committee meeting, Treasury will release the minutes of the meeting, any charts that were discussed at the meeting, and the Committee's report to the Secretary.

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Fred Pietrangeli, Deputy Director for Office of Debt Management (202) 622–1876.

Dated: October 3, 2012.

Matthew S. Rutherford,

Assistant Secretary, Financial Markets.

[FR Doc. 2012–24947 Filed 10–11–12; 8:45 am]

BILLING CODE 4810–25–M

INSTITUTE OF PEACE

Notice of Meeting

Date/Time: Wednesday, October 24, 2012 (9:00 a.m.–4:00 p.m.).

Location: 2301 Constitution Avenue NW., Washington, DC 20037.

Status: Open Session—Portions may be closed pursuant to Subsection (c) of Section 552(b) of Title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law 98–525.

Agenda: October 24, 2012 Board Meeting; Approval of Minutes of the One Hundred Forty-Fourth Meeting (July 19, 2012) of the Board of Directors; Chairman's Report; President's Report; Update on Management, Budget and Congress; Update on USIP Work in Syria, Afghanistan, Pakistan, Libya, Tunisia, Egypt and Iraq; Board Executive Session; Other General Issues.

Contact: Tessie F. Higgs, Executive Office, Telephone: (202) 429–3836.

Dated: October 4, 2012.

Michael Graham,

Senior Vice President for Management, United States Institute of Peace.

[FR Doc. 2012–25019 Filed 10–11–12; 8:45 am]

BILLING CODE 6820–AR–M

FEDERAL REGISTER

Vol. 77 Friday,

No. 198 October 12, 2012

Part II

Department of Justice

Drug Enforcement Administration

Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195; Decision and Order and Denial of Request for Redactions; Notices

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket Nos. 12–37 and 12–38]

Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195; Decision and Order

On June 8, 2012, Chief Administrative Law Judge (ALJ) John J. Mulrooney II, issued the attached Recommended Decision. Both parties filed Exceptions to the ALJ's decision.

Having considered the record in its entirety, including the parties' Exceptions, I have decided to adopt the ALJ's recommended rulings, findings of fact (except as discussed below), conclusions of law, and proposed sanction. A discussion of Respondents' Exceptions follows.[1]

Respondents' Exceptions

Respondents raise numerous exceptions to the ALJ's Recommended Decision. Of their contentions, the most substantial, but ultimately still unpersuasive, are the following:

(1) That their conduct in dispensing controlled substance prescriptions issued by two physicians, whose DEA Registrations were ''expired'' and therefore invalid, ''cannot serve as a basis for revocation,'' Resp. Exceptions at 2–9;

(2) that the ALJ's findings that Respondents dispensed controlled substances pursuant to prescriptions, which raised red flags that a pharmacist could not resolve, and thus violated their corresponding responsibility under federal law, are not supported by substantial evidence, *id.* at 9–22; and

(3) that the ALJ failed to consider evidence of their acceptance of responsibility, *id.* at 22–25.

Exception One—Respondents' Dispensings of Controlled Substance Prescriptions Issued by Physicians Whose Registrations Were ''Expired'' Does Not Support the Revocation of Their Registrations

The evidence showed that both Respondents dispensed numerous prescriptions which were issued by two physicians, Dr. Anthony Wicks and Dr. Ronald Lynch, who no longer held their DEA registrations and thus could not lawfully prescribe controlled substances under federal law. *See* 21 CFR 1306.03(a) (''A prescription for a controlled substance may be issued only by an individual practitioner who is * * * [e]ither registered or exempted from registration pursuant to §§ 1301.22(c) and 1301.23 of this chapter.''). More specifically, with respect to Dr. Wicks, the evidence showed that his registration expired on May 31, 2011. Yet, between June 6 and July 15, 2011, Respondent CVS #219 dispensed thirty-eight prescriptions issued by Dr. Wicks for oxycodone 30 mg. Likewise, between June 7 and July 14, 2011, Respondent CVS #5195 dispensed seventeen prescriptions issued by Wicks for oxycodone 30 mg.

While Respondent also characterizes Dr. Lynch's registration as ''expired,'' the record shows that Lynch's registration had, in fact, been revoked following a hearing under 21 U.S.C. 824(a). More specifically, on December 3, 2010, the Agency issued a Decision and Final Order, which revoked Dr. Lynch's registration with an effective date of January 18, 2011, based, *inter alia,* on findings that he violated 21 CFR 1306.04(a) by issuing controlled substance prescriptions outside of the usual course of professional practice and which lacked a legitimate medical purpose; this decision was published in the **Federal Register** on December 16, 2010. GX 31; *see also Ronald Lynch, M.D.; Revocation of Registration,* 75 FR 78,745, 78,752–54 (2010). Pursuant to Agency practice, the decision was also published on the DEA Office of Diversion Control's public Web site.

Nonetheless, Respondent CVS #219 dispensed forty controlled substance prescriptions and Respondent CVS #5195 dispensed five controlled substance prescriptions, which Lynch issued after his registration had been revoked.[2] GX 32. The evidence further shows that CVS #219 dispensed fifteen controlled substance prescriptions issued by Lynch during or later than June 2011, and that it did so as late as September 2011. *Id.*

Respondents argue that their dispensings of the prescriptions issued by Drs. Wick and Lynch cannot support the revocation of their registration because there is ''no evidence that the allegedly expired status of any prescriber's DEA registration was *known or should have been known* to Respondents or their pharmacists prior to dispensing.'' Resp. Exceptions, at 2. In support of their contention, Respondents maintain that the evidence shows ''that every CVS pharmacist relies on the company-wide pharmacy information management system to notify the pharmacist of the status of a physician's DEA registration.'' *Id.* Respondents also argue that the database they used may have contained inaccuracies, because at the time of the dispensings, the stores were allowed to input prescriber information into the dispensing software and this information may have been inaccurate; alternatively, they argue that there was a time lag between the date on which a practitioner's registration expired and the date this information, which is collected by a third-party data aggregator, was downloaded into the company-wide pharmacy information management system.

As the ALJ noted, the argument only takes Respondents so far because the evidence shows that the third-party vendor from whom CVS receives registration data obtains its data from the Government on a weekly basis and then transmits the data to CVS on a weekly basis.[3] ALJ at 60–61. Thus, while this delay might justify Respondents' having filled some of Dr. Wicks' prescriptions, it does not justify Respondents' having filled a substantial portion of them.[4]

Even if I accepted Respondents' contention that the time lag in their obtaining of updated information regarding the expiration of Dr. Wicks' registration explains why they continued to dispense his prescriptions,

[1] All citations to the ALJ's Recommended Decision are to the slip opinion as issued by him.

[2] Having reviewed the spreadsheet, I arrive at a different number of prescriptions for each pharmacy than the ALJ did.

[3] The evidence also showed that a number would appear in the Government's database as expired on the day its registration expires.

[4] As for the contention that the data may have been inaccurate because of information inputted at the local stores, it is not clear why personnel at local stores would be entering into the database information as to the expiration date of a practitioner's registration. While a DEA registrant is required to include his/her registration number on a controlled substance prescription, he/she is not required to include the expiration date of his/her registration on a prescription, and in the Agency's experience, it is not a customary practice among physicians to include the expiration date of their registrations on a prescription. As Respondents' witness, who serves as Vice President of Pharmacy Operations of CVS Caremark, the holding company which owns Respondents, testified, CVS has a contract with a company (HMS) which aggregates prescriber information and that it is important to aggregate prescriber data ''for consistency purposes'' because ''[i]t allows us to have one record for each prescriber and prevents to the greatest degree possible having incorrect information tied together.'' Tr. 1241–42.

While this official testified that prior to April 2012, the pharmacy teams would also enter prescriber information, his testimony was to the effect that ''when a pharmacy team would look up a prescriber as they were entering a prescription, it would display both the HMS records, as well as some of the historical store-entered records from the past.'' *Id.* at 1246. Moreover, the official testified that on doing a prescriber search prior to April 2012, the information management system ''would display both the HMS records as well as any historical store-entered records that were still in the system.'' *Id.* at 1250–51. Unexplained is why the prescriptions could nonetheless be filled if the HMS records displayed that a physician's DEA number was invalid.

the argument is totally unpersuasive when applied to the prescriptions of Dr. Lynch.[5] As explained above, the Agency published its Decision and Order revoking Dr. Lynch's registration on December 3, 2010, and the Order was effective on January 18, 2011. Yet, Respondents dispensed Dr. Lynch's controlled substance prescriptions after the effective date of the Order and did so for months thereafter. Indeed, Respondents were still dispensing his prescriptions more than six months after the date of the Order's publication.

In enacting the Controlled Substances Act, Congress created a comprehensive and closed system for regulating the distribution of those controlled substances, which have legitimate medical uses, to prevent the diversion of these substances to those who would either abuse them or sell them to those who do. *See Gonzales* v. *Oregon,* 546 U.S. 243, 250 (2006). One of the fundamental features of this scheme is the requirement that all persons who seek to engage in the legitimate manufacture, distribution, or dispensing of a controlled substance must first obtain a registration from the Attorney General authorizing them to do so. *See* 21 U.S.C. 822(a). And to protect the public from those practitioners who engage in the diversion of controlled substances, Congress authorized the Attorney General to revoke the registration of a practitioner upon finding, *inter alia,* that the practitioner ''has committed such acts as would render his registration * * * inconsistent with the public interest.'' *Id.* sec. 824(a)(4).

It is manifest that Respondents' conduct in filling prescriptions issued by a practitioner whose registration had been revoked undermines the Congressional scheme. Nor, given that the Order revoking Dr. Lynch's registration was published in the **Federal Register** (as well as on the Agency's Web site), can Respondents reasonably claim ignorance of it. *Cf. Fed. Crop Ins. Corp.* v. *Merrill,* 332 U.S. 380, 384–85 (1947) (''Just as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the **Federal Register** gives legal notice of their contents.'') (citations omitted); *see also California* v. *FERC,* 329 F.3d 700, 707 (9th Cir. 2003) (''Publication in the **Federal Register** is legally sufficient notice to all interested or affected persons regardless of actual knowledge or hardship resulting from ignorance, except those who are legally entitled to personal notice.'').[6]

So too, those who engage in a highly regulated industry are expected to keep informed of regulatory developments which affect their industry. *See United States* v. *Southern Union Co.,* 630 F.3d 17, 31 (1st Cir. 2010) (''[T]hose who manage companies in highly regulated industries are not unsophisticated * * *. It is part of [a company's] business to keep abreast of government regulation.''). Here, the Agency's publication of the revocation order in Lynch's case thus provided Respondents with reason to know that, effective January 18, 2011, Lynch would no longer be authorized to issue controlled substance prescriptions. *See Ralph J. Bertolino, d/b/a Ralph J. Bertolino Pharmacy,* 55 FR 4729, 4730 (1990).

Accordingly, Respondents' contention that the evidence does not establish that they (or their pharmacists) had actual knowledge of the revocation of Dr. Lynch's registration is wholly unavailing. Given that Respondents continued filling Lynch's unlawful prescriptions for more than six months after the Order became effective, and in the case of CVS #219 did so repeatedly, this conduct is sufficiently egregious to support the conclusion that Respondents committed acts which render their continued registrations ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4); *cf. United Prescription Services, Inc.,* 72 FR 50397, 50408–09 (2007) (''While filling a prescription issued by a practitioner whose registration had recently expired might be excusable, [pharmacy's] repeated filling of numerous prescriptions long after the expiration of [physician's] registration clearly was not appropriate and was unlawful.'').[7] By itself, this conduct is sufficient to conclude that the Government has made out a *prima facie* case for revocation. I therefore reject this exception.

Exception Two—The ALJ's Findings That Respondents Dispensed Controlled Substances Pursuant to Prescriptions Which Raised Red Flags That Could Not Be Resolved and Thus Violated Their Corresponding Responsibility Under Federal Law Are Not Supported by Substantial Evidence

Respondents also contend that the record does not support the ALJ's findings that they violated their corresponding responsibility under federal law to dispense only those prescriptions, which have been ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). Respondents take exception to the ALJ findings because they ''are based solely on the testimony of the Government's Expert * * * who stated that he found certain red flags on approximately fifty of the more than 25,000 prescriptions filled by Respondents to be 'unresolvable.' '' Resp. Exceptions, at 9. Respondents contend that ''[n]o other witness, no case law, no Administrator decision, and no published DEA guidance supports [the Government Expert's] claims that certain red flags are 'unresolvable' on their face.'' *Id.* at 9–10. Respondents further argue that the testimony of the Government's Expert

[5] Respondents contend that the Agency did not rely on their filling of the prescriptions issued by Drs. Wicks and Lynch in the Immediate Suspension Orders, stating that ''this conduct did not figure prominently in the Government's Prehearing Statement,'' and that even then the Government ''only raised this issue with respect to prescriptions allegedly filled for one prescriber, Dr. Wicks, and then only tangentially.'' Resp. Exceptions, at 9 n.5.

As for the allegations pertaining to the filling of Dr. Wicks' prescriptions, the Government's disclosure of its intent to litigate the issue can hardly be described as tangential. *See* Gov. Pre-Hearing Statement at 18 (ALJ Ex. 14). In addition, in its Pre-Hearing Statement, the Government provided notice that it intended to elicit testimony as to the actions that DEA had taken against various practitioners including Dr. Lynch, *id.* at 15–16, and provided further notice that it intended to introduce a spreadsheet showing Dr. Lynch's prescriptions. *Id.* at 27. Moreover, in its Supplemental Pre-Hearing Statement, the Government provided notice that it would be introducing into evidence the Agency's Final Order revoking Dr. Lynch's registration; it also again provided notice that it would introduce a spreadsheet showing the prescriptions of Lynch, which were filled at Respondents. Gov. Supplemental Pre-Hearing Statement, at 5. Pursuant to the ALJ's Pre-Hearing Ruling, each party was required to serve opposing counsel with copies of their respective exhibits in advance of the hearing and Respondents make no claim that the Government failed to do so. Thus, Respondents had adequate notice of the Government's intent to litigate the issue of Respondents' filling prescriptions, which Dr. Lynch issued after his registration had been revoked, and raised no such objection when the Government elicited testimony and introduced various documents regarding this allegation. *See CBS Wholesale Distributors,* 74 FR 36746, 36749–50 (2009).

[6] In response to the testimony of an Agency's Investigator that at a December 2010 meeting with various CVS representatives regarding the diversion problem, she discussed how the pharmacies could check the status of DEA registrations through the Agency's Web site, Respondents elicited testimony from the Investigator that CVS's representatives told her that its pharmacies do not have internet access. *See* Tr. 73. However, surely someone in the CVS corporate hierarchy has internet access and the ability to check either the Agency's Web site (or that of the **Federal Register**) to determine whether the Agency has issued any recent Decisions and Orders revoking a practitioner's registration. That Respondents continued to fill Dr. Lynch's prescriptions for months after the revocation order became final also begs the question of what information the CVS Pharmacy Management Information System displayed regarding his registration.

[7] That Dr. Lynch's registration had been revoked and had not simply expired, renders Respondents' conduct in filling the prescriptions even more egregious.

''is unreliable and biased and cannot by itself provide sufficient evidence to satisfy the Government's burden of proof.'' *Id.* at 10. Finally, Respondents contend that ''the Government's 'unresolvable' red flag argument—adopted in full in the ALJ recommendation—improperly shifts the burden of proof to Respondents.'' *Id.*

At the hearing, the Government presented extensive evidence showing that numerous persons, including persons who were not Florida residents, obtained prescriptions for both oxycodone 30 mg and alprazolam 2 mg from various South Florida physicians, whose offices were typically located 200 miles or more from Respondents (s*ee* GX 62), which they then presented to Respondents' pharmacists and which Respondents filled, notwithstanding that there are numerous pharmacies between South Florida and Sanford (where Respondents are located). The evidence included multiple spreadsheets showing each Respondent's dispensings of the oxycodone (and in some cases alprazolam) prescriptions issued by various physicians.

A principal component of the Government's evidence was the testimony of its expert witness, Professor Paul Doering, who reviewed various dispensings made by the Respondents and opined as to whether the Respondents had complied with their corresponding responsibility to dispense only lawful prescriptions. Professor Doering, who has been a registered pharmacist in the State of Florida since 1973, currently holds the title of Distinguished Service Professor of Pharmacy Practice, Emeritus, of the College of Pharmacy at the University of Florida, and has been on its faculty since 1976. GX 6, at 1–2. He has also published extensively and presented numerous papers at professional meetings. *See id.* at 4–29.

The ALJ found credible Professor Doering's testimony that controlled substances are ''high alert drugs'' and that among controlled substances, drugs such as ''opioids, benzodiazepines, [and] other central nervous system depressant drugs'' require ''the highest level scrutiny'' on the part of a pharmacist who is presented with prescriptions for these drugs. Tr. 692; ALJ at 28. Professor Doering testified that in pharmacy practice, there are various red flags, which create ''a level of concern that might cause a pharmacist to either choose not to fill a prescription or take some other kind of actions,'' and that ''the more red flags there are, the stronger that suspicion is.'' Tr. 694. Professor Doering testified that while some red flags might be resolvable by checking a patient's identification or calling the prescriber, there are also circumstances in which calling the prescriber will not resolve the red flags because the red flags indicate that the prescriber is collaborating with the patient to divert drugs. *Id.* at 697–700.

Professor Doering specifically identified such red flags as including that the patient is paying for controlled substance prescriptions with cash, *id.* at 703; the respective locations of the patient and the prescriber, *id.* at 701–02; that a prescriber writes for certain combinations or patterns of drugs, *id.* at 708; and multiple patients presenting ''prescriptions for the same drugs, the same quantities * * * from the same doctor without any kind of variability or change considering the different patients that come into the pharmacy,'' thus suggesting that the physician prescribes in a ''factory like manner.'' *Id.*

Professor Doering reviewed the various spreadsheets of the prescriptions dispensed by Respondents and testified regarding whether Respondents could have lawfully dispensed various prescriptions given the red flags they presented. For example, when questioned about Respondent CVS #219's dispensing of oxycodone 30 mg prescriptions,[8] which were issued by a Fort Lauderdale-based physician (P.G.) for persons whose addresses were in Kentucky and Tennessee and who paid cash, Professor Doering opined that the multiple red flags these prescriptions presented could not be resolved so that a reasonable pharmacist could dispense them consistent with his corresponding responsibility under federal law.[9] Tr. 722–23.

As the ALJ found, the Government elicited additional testimony from its Expert regarding the prescriptions issued by other doctors which was to similar effect. For example, the Government noted that on August 29 and 30, 2010, Respondent CVS #219 filled prescriptions for either 210 or 240 tablets of oxycodone 30 mg for four Kentucky residents, all of whom paid cash, which were issued by a physician (L.A.) whose office address was listed as either in Miami or Fort Lauderdale. GX 57, at 15. Two of these individuals were from Clay City; the other two were from Stanton. *Id.*

Regarding these prescriptions, Professor Doering testified that he could not ''foresee any explanation for this set of red flags that would satisfy my professional obligation not to fill the scripts.'' Tr. 754. When further questioned as to whether anything ''could have been done to resolve the[] red flags'' presented by these prescriptions, Professor Doering explained that ''it's a conflagration or a combination of things that suggests to me that these prescriptions were not issued in the usual course of medical practice'' and that nothing on the hard copy of the prescriptions ''would change [his] opinion.'' *Id.* at 757–58. And when asked by the ALJ if he was imposing a more stringent standard than the standard of a Florida pharmacist, Professor Doering testified that the standard he applied was ''what they're taught in school,'' and that in his ''many conversations with similar pharmacies operating under similar circumstances * * * the feedback I get is universally consistent with my point of view.'' *Id.* at 758.

The Government also noted that on August 19, 2010, Respondent CVS #219 filled four prescriptions for 180 tablets of oxycodone 30 mg for four Kentucky residents, which were issued by a physician (C.N.) whose address was listed as either being in Delray Beach or Deerfield Beach, two cities located in Palm Beach County. Tr. 759–64; GX 57, at 38. Here again, Professor Doering testified that the red flags could not be resolved and that no information on the hard copy of the prescriptions would lead him to change his opinion. Tr. 764.

Professor Doering likewise testified regarding dispensings that occurred at Respondent CVS #5195. More specifically, he addressed Respondent's dispensings on August 26, 2010, of several prescriptions for 180 tablets of oxycodone 30 mg written by a Dr. Jack

[8] Professor Doering acknowledged that ''the doses of these medications (oxycodone 30 mg) are within therapeutic guidelines or limits, but, number one, it's just extremely suspicious to me that these are always 30 milligram tablets, always in large quantities. * * * [P]eople come in all shapes, sizes and degrees of infirmity, and it just is an attention getter when I see the same drugs from the same doctors from similar places coming through in a nonstop sort of way.'' Tr. 776.

[9] The specific prescriptions were either for 180 or 210 tablets of oxycodone 30 mg. The evidence showed that on August 13, 2010, Respondent CVS #219 dispensed such prescriptions to a resident of Harrogate, Tennessee and a resident of Ingram, Kentucky; that on August 16, 2010, Respondent CVS #219 dispensed such prescriptions to another resident of Harrogate, Tennessee, as well as three residents of Middlesboro, Kentucky (one of whom received 56 tablets of OxyContin 80 mg), and a resident of Dayhoit, Kentucky; and that on September 24, 2010, it dispensed more oxycodone 30 mg prescriptions to three Kentucky residents, including two who had the same last name and town of residence (Middlesboro), as well as three residents of Tennessee. *See* GX 57, at 33. Each of these persons paid cash. *Id.*

Danton [10] of Pompano Beach for three residents of Tennessee, two of whom shared the same last name and address in Knoxville, with the other being from the town of Mascot. GX 57, at 29. Professor Doering testified that the red flags associated with these prescriptions included that they were paid for with cash, the prescriptions were for ''a high alert drug,'' that the patients were ''from out-of-state who apparently traveled a great distance to be seen in Pompano Beach,'' and that the assigned prescription numbers were very close sequentially, suggesting that it was ''most likely they were presented to the pharmacy within a very short time span.'' Tr. 751.[11] While Professor Doering was not specifically asked whether the combination of red flags presented by the Danton prescriptions was resolvable, based on his earlier testimony that other prescriptions, which were issued for the same drug and in similar quantities to persons who had travelled from out-of-state to South Florida to obtain the prescriptions and then on to Sanford to fill them presented red flags which were not resolvable, I conclude that the red flags presented by these prescriptions were also not resolvable.

Professor Doering further testified regarding Respondent CVS #5195's dispensings on August 11, 2010 of six oxycodone 30 mg prescriptions (all but one of which were for 180 tablets [12]), issued by a Dr. Carlos Gonzales of West Palm Beach to six Kentucky residents, all of whom paid cash.[13] GX 57, at 35. The evidence further showed that three of these persons lived in the same town (Stanton) and that two of them had the same last name and street address; another two were also from the same town (Danville). *Id.* When asked whether a reasonable and prudent pharmacist in Sanford would want to resolve the red flags presented by these prescriptions before dispensing them, Professor Doering answered: ''If it's resolvable. I think I've testified already that there's no explanation that's going to resolve that in my mind.'' Tr. 916.[14]

The Government also introduced an eighty-one page spreadsheet of the controlled substance prescriptions which were written by a Longwood, Florida physician and filled by both Respondents.[15] The spreadsheet documents numerous instances in which both Respondents filled two or more controlled substance prescriptions that the physician typically wrote for 168 tablets of oxycodone 30 mg and 56 tablets of alprazolam 2 mg; moreover, in many instances, the patients received a third prescription for 56 tablets of oxycodone 15 mg. *See* GX 55.

The Government then asked Professor Doering for his opinion regarding the red flags that were presented by this doctor's prescriptions and directed his attention to several prescriptions that each Respondent filled on December 23, 2010. More specifically, the Government noted the prescriptions that Respondent CVS #219 filled for patients T.F. and A.T., each of whom received 168 tablets of oxycodone 30 mg, 56 tablets of oxycodone 15 mg, and 56 tablets of alprazolam 2 mg; s*ee* GX 55, at 15, 47; as well as the prescriptions that Respondent CVS #5195 filled for patients C.H. and J.R., each of whom also received 168 tablets of oxycodone 30 mg, 56 tablets of oxycodone 15 mg, and 56 tablets of alprazolam 2 mg. *See id.* at 62, 74.[16]

Regarding these prescriptions, Professor Doering Expert testified that from the perspective of ''a clinical pharmacist * * * that combination of drugs is * * * a red flag because [a]lprazolam and oxycodone are commonly diverted to nonmedical use.'' Tr. 784. As for the two oxycodone prescriptions each person obtained, Professor Doering explained that while ''one might speculate that the reason for that is that pain can vary throughout the day and it may be that the individual is suggested to take the 15 [mg tablets] when the pain is not so great and 30 [mg tablets] when it is so great,'' the ''30 milligram tablets are scored right down the middle, and it's quite easy to break them in half.'' *Id.* Professor Doering thus explained that prescribing both fifteen and thirty milligram strengths of the drug ''just doesn't make any sense.'' *Id.* He also testified that pill cutters are widely available in pharmacies and that it is common for doctors to prescribe a stronger strength of a drug to save money and instruct their patients to cut the drug in half. *Id.* at 786.

Professor Doering further testified that the prescribing patterns of this physician ''would suggest that the one size fits all concept was in the'' physician's mind, and that this was ''highly suspicious'' because ''you see the same drugs, the same quantities, the same patterns over and over again.'' *Id.* at 784–85. Indeed, while the Government questioned Professor Doering about only a few of the prescriptions, the eighty-plus page spreadsheet manifests that this physician repeatedly engaged in the pattern prescribing of oxycodone with alprazolam and frequently provided these persons with prescriptions for both oxycodone 30 mg and 15 mg.[17] Moreover, this was not the only physician who engaged in the pattern prescribing of oxycodone and alprazolam and whose prescriptions

[10] Dr. Danton's registration was subsequently revoked by the Agency following a hearing. *See Jack A. Danton,* 76 FR 60,900, 60,922 (2011).

[11] While the spreadsheet indicates that the prescriptions were subject to a ''cash discount,'' which apparently means that the patients were entitled to some type of group discount, I adopt the ALJ's finding that even if this red flag is eliminated from the factors which a pharmacist must consider, ''the remaining red flags [we]re still unresolvable.'' ALJ at 30–31n.54. So too, I adopt the ALJ's findings that while Professor Doering conceded that he did not know at what point the prescription numbers were assigned, the prescriptions at issue ''were presented in proximity to one another.'' *See id* at 31 n.55 (quoting Tr. 926–27).

[12] The other prescription was for 150 tablets. GX 57, at 35.

[13] Respondents argue that the ALJ improperly relied on three of the six controlled substance prescriptions that were issued by Dr. Gonzales and dispensed by Respondent CVS #5195 on August 11, 2010, because Professor Doering did not specifically address all six of them in his testimony. Resp. Exceptions, at 27. However, having identified those circumstances presenting red flags, which according Professor Doering could not be resolved, the ALJ could reasonably apply this testimony in assessing the lawfulness of Respondents' dispensings of other prescriptions that presented similar unresolvable red flags.

[14] Professor Doering further testified that ''Interstate 95 has been renamed the Oxycodone Express because of the brisk travel of people from Kentucky, Tennessee, [and] Ohio to South Florida to obtain medications.'' Tr. 775. He also testified with respect to these dispensings that:

Well, once again this is a clinic that's at a distant site from someone living in Kentucky, and I don't think it's any secret that—I haven't used the term yet, I won't use the term—I'll call them pain management clinics that are known to be—what should I say—fairly easy to get controlled substance prescriptions from.

Id.

[15] The spreadsheet was provided by CVS to a DEA Group Supervisor, who then provided it to an Agency Investigator. Tr. 485. While the Investigator subsequently removed the title of the original document, she did not change the substantive information. *Id.*

[16] Nor were these the only patients who, on the same date, filled at Respondents, prescriptions for the same combination of drugs which they obtained from this physician. *See* Tr. 787–91 (discussing patients B.D., A.H., R.M., J.W., each of whom, on January 6, 2011, filled prescriptions at CVS #219 for 168 tablets of oxycodone 30 mg, 56 tablets of oxycodone 15 mg, and 56 tablets of alprazolam 2 mg).

[17] To counter the testimony of the Government's Expert, Respondent called one of their own, Professor Brushwood, who is also a member of the faculty at the University of Florida College of Pharmacy. The ALJ carefully reviewed Professor Brushwood's testimony and thoroughly explained why he did not find his testimony to be more persuasive than that of Professor Doering on the material issues of whether certain red flags presented by the prescriptions were unresolvable and whether Respondents' pharmacists dispensed controlled substance prescriptions when they had reason to know that the prescriptions lacked a legitimate medical purpose and were not issued in the usual course of professional practice. *See* ALJ at 42. Having reviewed the record and the ALJ's reasoning, I agree with the ALJ's discussion of the weight he gave the testimony of each party's expert.

were filled by Respondents. *See, e.g.,* GX 35.

Respondents take exception to the ALJ's reliance on Professor Doering's testimony. Resp. Exceptions, at 18–22. More specifically, they assert that Professor Doering's testimony is unreliable because he did not use a reliable methodology in formulating his opinions. *Id.* at 18–21. They also assert that Professor Doering's testimony is biased because he acknowledged having testified for the Government in ''virtually all'' of the cases in which he has testified as an expert. *Id.* at 21–22.

As for the claim of bias, Respondents' argument provides no reason to reject the ALJ's credibility determination. The mere fact that Professor Doering has consistently testified for the Government is not sufficient to prove bias.

As for the claim that Professor Doering's testimony was unreliable, Respondents contend this is so because he ''spent insufficient time reviewing the dispensing data,'' ''failed to review (or to request) any hard-copy prescriptions,'' ''relied on data pre-selected by the Government instead of conducting an independent evaluation of all of the data available,'' and that he ''fundamentally misunderstood the data he reviewed.'' Resp. Exceptions, at 20. Respondents' contentions are not persuasive.

As for the first assertion, Respondents note that ''Professor Doering spent fewer than ten hours reviewing'' the dispensing data. *Id.* at n.9. However, Respondents offer no explanation as to why this was insufficient to review the data.

With respect to the second assertion, given that much of Professor Doering's testimony centered on certain prescriptions that presented a collection of red flags that no reasonable and prudent pharmacist could resolve so as to lawfully fill the prescriptions, his failure to review the hard-copy prescriptions is of no consequence. As Professor Doering testified with respect to several of the prescriptions, the fact that he was not provided with the hard copy prescriptions did not affect his opinion because ''[t]here's nothing that I could gain from that review that would change my opinion.'' Tr. 758.

As for Respondents' claim that Professor Doering relied on data which was pre-selected by the Government rather than conduct an independent evaluation of all of the available data, Respondents cite to his testimony that the Government provided him with a spreadsheet that listed the cash-only transactions. Resp. Exceptions, at 20 n.11 (citing Tr. 849:8–852:18). Respondents' counsel then asked Professor Doering whether ''when the Government provided that information to [him] they also consider[ed] cash discount to be the same thing as cash?'' Tr. 851. Professor Doering answered that he could not ''remember'' and added that he did not do anything to look at the individual prescriptions and determine which ones were actually paid for with cash.[18] *Id.*

Respondents' argument gains no traction because Professor Doering subsequently explained that even if a patient presented a card entitling him to a cash discount, this would not address the other red flags which may have been present. Tr. 924. As Professor Doering further testified, ''you have to look at it in totality of the issues that give you reason for concern.'' *Id.* at 924–25. And with respect to the prescriptions that he discussed during his direct examination, Professor Doering explained that even after eliminating the red flag of cash payments, there were still other red flags present which could not have been resolved so as to lawfully dispense the prescriptions.[19] *Id.* at 925.

Thus, contrary to Respondents' contention, Professor Doering's testimony, coupled with the evidence he reviewed, is more than enough to satisfy the Government's burden of proof. Moreover, the Government elicited additional testimony that, while it did not address any specific prescriptions, provides further support for the conclusion that Respondents' pharmacists repeatedly dispensed prescriptions when they had reason to know that the prescriptions lacked a legitimate medical purpose and were issued outside of the usual course of professional practice. 21 CFR 1306.04(a).

More specifically, on October 18, 2011, DEA Investigators served Administrative Inspection Warrants at both Respondents and interviewed various employees of each store's pharmacy departments including their pharmacists-in-charge. At CVS #5195, a DEA Investigator (DI) interviewed Ms. Jessica Merrill, its pharmacist-in-charge. Tr. 227. Ms. Merrill stated that ''she could fill oxycodone * * * prescriptions all day long, but rather than doing that, she had decided to set a limit * * * each morning'' on the number of prescriptions the store would fill for oxycodone (as well as alprazolam), which was based on the available inventory of oxycodone and the amount of staff on hand. *Id.* at 229–30. Ms. Merrill stated that ''once the limit [wa]s reached,'' customers who then presented oxycodone prescriptions were told the store was out-of-stock even when it still had stock on hand.[20] *Id.* at 230. Ms. Merrill further stated that ''the limit [was] basically based upon a first-come, first-served system'' and that as a result, ''customers would start staggering in at 8:02 a.m. to present their prescriptions.'' *Id.* at 230–31.

When asked by the DI why she was limiting the number of prescriptions the store would fill as the store still had oxycodone in inventory, Ms. Merrill replied that ''she had to keep a certain amount of oxycodone on hand to fill prescriptions * * * for her real pain patients.'' *Id.* at 231–32. According to the DI, she then asked Ms. Merrill why she would fill prescriptions ''from these not-real pain patients.'' *Id.* at 233–34. Ms. Merrill replied that ''as a pharmacist she was stuck between a rock and a hard place, and that basically * * * she had not been trained to diagnose,'' and that if she or her staff were ''able to confirm that a prescription had been issued by a physician who was licensed by the state, and had a DEA license, then . . . [the pharmacy] should be able to trust that that prescription—or that physician is legitimate, and that the doctor * * * ha[d] given the correct diagnosis.'' *Id.* at 234.

Ms. Merrill further acknowledged that patients were presenting patterns of prescriptions that included oxycodone, an anti-anxiety medication, and a muscle relaxant; she also admitted that ''a lot of these customers were paying for their prescriptions in cash.'' *Id.* at 238. When questioned by the DI as to why the patients were using cash

[18] The evidence showed that the term ''Cash Discount'' referred to those transactions in which a patient presented a discount card such as from the AARP. It is not clear why a person's presentation of such a card would make the transaction any less suspicious if other red flags were present.

[19] Respondents also note that Professor Doering acknowledged on cross-examination that he did not know how CVS assigns prescription numbers. Resp. Exceptions, at 20 & n.12. However, this does not provide reason to reject his testimony, because there were ample other red flags presented by the prescriptions, especially by those which were presented by persons who gave out-of-state addresses as their residences and yet had obtained their prescriptions from a doctor located in South Florida.

[20] At approximately 10:30 a.m. on the day the IAW was served, the DI encountered a person in a massage chair, who related that he had come to the store to fill an oxycodone prescription only to be told by a pharmacy technician that the pharmacy was out of stock. Tr. 221. However, because the Investigators had counted the stock of oxycodone, the DI knew this was not true. *Id.* at 222–23. Upon asking the pharmacy technician why she had told the person this, the technician explained that the store placed a limit each morning on the number of oxycodone prescriptions it would fill that day. *Id.* at 223–24.

instead of insurance, Ms. Merrill stated ''most of them are unemployed.'' *Id.* When the DI then asked how the patients could afford to pay for hundreds of dollars-worth of prescriptions if they were unemployed, Ms. Merrill stated that she did not know. *Id.* However, when the DI suggested that the patients might be selling their pills, Ms. Merrill said: ''I know.'' *Id.*

The DI further testified that she had obtained the prescriptions that the pharmacy had accepted for filling that day, *id.* at 226, and that upon reviewing them, observed that ''[t]he prescriptions from one particular physician's office basically appeared to be all for the same quantity and the same combination of drugs.'' *Id.* at 239. However, when she discussed this with Ms. Merrill, the latter ''basically stated that * * * as a pharmacist, she is not trained to diagnose, and it's up to the doctor to determine whether or not they need a prescription.'' *Id.*

The DI also observed that some of the prescriptions were issued by a physician located near or in Orlando for a patient from Daytona Beach. *Id.* at 240. The DI then asked Ms. Merrill whether she found it ''a little odd'' that the patients had presented their prescriptions in Sanford,[21] given that there are CVSs all over central Florida and that the patients ''obviously passed multiple CVSs coming from the doctor.'' *Id.* Ms. Merrill, however, did not ''know why they did that.'' *Id.*

On October 28, 2011, the DI also participated in an interview of other employees of the Respondents at the local DEA field office, including Mr. Paras Priyadarshi, the pharmacist-in-charge at Respondent CVS #219. *Id.* at 244–45. According to the DI, the prescription records for CVS #219 showed that it was ''basically filling prescriptions for the same type of cocktail prescribing pattern that CVS #5195 had been dispensing,'' namely combinations of oxycodone, alprazolam, and carisoprodol.[22] *Id.* at 247. When asked whether he found it ''odd that all of these practitioners in the area'' that the pharmacy was ''filling for,'' were writing prescriptions for the same combination of drugs ''to all these different patients,'' Mr. Priyadarshi answered that he did not find it odd and that this was the combination of drugs these doctors prescribed. *Id.* at 248. Nor did Mr. Priyadarshi find it odd that when ''prescriptions came from a specific doctor, every single patient had the same ailment.'' [23] *Id.* at 250. And when asked whether the patients asked for a certain brand of drugs, Mr. Priyadarshi stated that the patients ''would come in and ask for the 'Ms' or the 'blues','' which are street slang references to the thirty milligram oxycodone tablets manufactured by Mallinckrodt. *Id.; see also id.* at 254 (testimony regarding statements of Susan Masso, another pharmacist who worked at Store #219). However, Mr. Priyadarshi did not find it suspicious that patients would use street slang to ask for thirty milligram oxycodone.[24] *Id.* at 256, 264.

The statements of Respondents' employees thus manifest a complete abdication of their responsibility ''to exercise professional judgment'' before dispensing prescriptions for highly abused controlled substances. *Ralph J. Bertolino, d/b/a/Ralph J. Bertolino Pharmacy,* 55 FR 4,729, 4,730 (1990). This evidence provides further support for the conclusions that each Respondent dispensed numerous prescriptions when their pharmacists either knew or had reason to know that the prescriptions lacked a legitimate medical purpose and were issued outside of the usual course of professional practice and thus violated the CSA. *See* 21 CFR 1306.04(a).

Respondents nonetheless contend that the ALJ improperly shifted the burden of proof from the Government to them. Resp. Exceptions, 15–18. More specifically, Respondents note that in a pre-hearing order, the ALJ held that to prove a violation of 21 CFR 1306.04(a), the Government was required to prove the following elements: (1) That ''the Respondent dispensed a controlled substance''; (2) that ''a red flag was or should have been recognized at or before the time the controlled substances was dispensed''; and (3) that ''the red flag was not resolved conclusively prior to the dispensing of the controlled substance.'' ALJ Ex. 28, at 11–12; *see also* Resp. Exceptions, at 15–16.

Respondents argue that the ALJ improperly required them ''to present evidence that the red flags discussed by the Government *were,* in fact, resolved, in lieu of holding the Government to its obligation to prove that these red flags *were not* resolved.'' Resp. Exceptions, at 16 (emphasis in original). According to Respondents, the Government ''did not identify any of these prescriptions, which it selected for Professor Doering from a pool of 25,000, until Professor Doering testified at the hearing.'' *Id.* Respondents note that the Government did not introduce the hard-copy prescriptions and that its case ''relied on an analysis of spreadsheets of Respondents' dispensing data and its expert's conclusory assertion that all the red flags on the prescriptions [which] he identified from the spreadsheets were simply 'unresolvable.'" *Id.* at 17. Respondents thus contend that the Government ''failed to meet the burden of proof to demonstrate that the identified red flags were or were not resolved'' and that the ALJ improperly shifted the burden of production to them. *Id.*

As discussed above, with respect to multiple prescriptions, particularly those which were presented by non-Florida residents, who had obtained the prescriptions from doctors in South Florida located more than 200 miles from Respondents, and yet filled them at Respondents, the ALJ found credible Professor Doering's testimony that the red flags were not resolvable and that nothing on the particular prescription (such as a notation by the pharmacist of having verified the prescription or the

[21] The DI testified that the distance between Orlando and Sanford was ''a little less'' than 30 miles. She further testified that in her experience patients fill their prescription at pharmacies located either near their doctor's office or near their residence.

[22] At the time of the interview carisoprodol was not a controlled substance under federal law. On December 12, 2011, DEA issued a final rule placing carisoprodol in schedule IV of the Controlled Substances Act, effective January 11, 2012. *See Schedules of Controlled Substances: Placement of Carisoprodol Into Schedule IV,* 76 FR 77,330 (2011). However, during the relevant period, carisoprodol was a controlled substance under Florida law. *See* Fla. Stat. § 893.03(4)(jjj) (2010). Moreover, several Agency decisions had discussed the abuse of carisoprodol when taken as part of a drug cocktail which includes oxycodone and alprazolam. *See East Main Street Pharmacy,* 75 FR 66,149, 66,158 (2010) (noting expert's testimony that ''[i]t is well known in the pharmacy profession [that] the combination of a benzodiazepine, narcotic pain killer, and Soma [the branded version of carisoprodol] [is] being used by patients abusing prescriptions drugs''); *Paul J. Volkman,* 73 FR 30,630, 30,637–38 (2008)(discussing expert's testimony regarding abuse of drug cocktails of oxycodone, alprazolam, and carisoprodol).

[23] On direct examination, the DI did not identify the specific doctor she was referring to. However, on cross-examination, the DI identified by name a Longwood, Florida physician who ''writes the same prescriptions, the same combinations of drugs, to all of his patients.'' Tr. 274. This is the same physician whose prescriptions are listed in the eighty-one page spreadsheet which is GX 55.

The DI further noted that while this physician ''may vary the quantity'' of oxycodone from patient to patient, ''the majority of the prescriptions are for the combination of oxycodone, alprazolam, and carisoprodol or Soma.'' *Id.* The record also contains a number of oxycodone prescriptions which were written by this physician, most of which contain the same DX Code. *See* GX 67 (of nine prescriptions issued by physician on April 26, 2011, eight list DX code of 724.2); GX 68 (of eighteen prescriptions issued by physician on May 19, 2011, sixteen list DX Code of 724.2).

[24] Here too, the ALJ found the testimony of the Agency's Investigators regarding the statements made by these employees to be credible. *See* ALJ at 24, 66–68. And while the statements are hearsay, they are inherently reliable as statements against interest. *Cf.* Fed. R. Evid. R. 804(b)(3).

diagnosis) would lead him to change his conclusion. While the ALJ's pre-hearing order did not explicitly contemplate the scenario that certain red flags could not be resolved conclusively so as to permit a lawful dispensing, it is clear that if the red flags presented by a prescription could not be revolved, then the Government satisfied the third element of its *prima facie* burden. The ALJ thus did not improperly shift the burden of proof to Respondents.[25] Accordingly, I reject the contention.[26]

While not discussed in their brief under this exception, Respondents raise several other arguments, which are closely related to their main contention that the Government has not shown that they violated 21 CFR 1306.04(a). First, with respect to the dispensings that occurred in 2010, they argue that ''the Government failed to establish that the red flag would have been known to a reasonable pharmacist *at the time the prescription was presented.''* Resp. Exceptions, at 27. Respondents further argue that ''pharmacists and pharmacies in Florida were just beginning to see significant increases in prescriptions for oxycodone and to experience the effects of Florida's pill mill legislation.'' *Id.* Respondents thus contend that there is no evidence ''that any of the alleged red flags of diversion about which Professor Doering testified would or should have been recognized as red flags during the early stage of the oxycodone epidemic.'' *Id.*

As discussed by an Agency Investigator, the Florida pill mill crisis was ''no secret,'' Tr. 43, and was the subject of ''a lot of publicity in the press.'' *Id.* at 52. Thus, in response to the societal harms[27] caused by the diversion and abuse of prescription drugs including oxycodone and alprazolam, in 2010, the Florida legislature enacted legislation which, *inter alia,* restricted the amount of schedule II narcotics, such as oxycodone, which a prescriber could dispense directly to a patient who paid for the medication with cash, check, or credit card, to no more than a 72-hour supply. Tr. 44–45; *see* Fla. Stat. Ann. § 465.0276(1)(b)(2011). As a consequence of the law, for those patients who lacked a third-party payer, prescribers were required to write paper prescriptions, which a patient was required to fill at a pharmacy. *Id.*

Respondents and their supervisory management cannot reasonably claim ignorance of the Florida pill mill problem or the legislation enacted by the State. Likewise, Respondents' protestation of ignorance begs the question of what they expected would occur upon the enactment of the State's pill mill legislation.

In any event, even before many of the dispensings which are at issue here, this Agency had published several decisions which discussed the diversion and abuse of oxycodone, as well as drug cocktails which included oxycodone, alprazolam, and carisoprodol. *See Paul J. Volkman,* 73 FR 30,630 (2008) (discussing drug cocktails issued by physician for oxycodone, benzodiazepines and carisoprodol, expert testimony of abuse potential of these drugs, and red flag of patient travelling long distance to fill prescriptions); *see also East Main Street Pharmacy,* 75 FR 66,149 (Oct. 27, 2010) (discussing abuse of oxycodone, alprazolam, and carisoprodol and red flag of patients traveling long distances to fill prescriptions); *Your Druggist Pharmacy,* 73 FR 75,774, 75,775 n.1. (2008) (noting that ''[w]hile carisoprodol [was] not controlled under Federal law, it is controlled under various state laws and is highly popular with drug abusers, especially when taken as part of a drug cocktail that includes an opiate and a benzodiazepine''). Beyond this, the red flags presented by the circumstances of patients travelling from Kentucky or Tennessee to South Florida to obtain prescriptions, including for a schedule II narcotic, which by definition has the highest potential for abuse of any drug that may be prescribed lawfully, *see* 21 U.S.C. 812(b)(2), and then travelling to Respondents to fill them, are so obvious that only those who are deliberately ignorant would fill these prescriptions. I thus reject this contention as well.

I therefore conclude that the ALJ's finding that both Respondents repeatedly dispensed controlled substances in violation of 21 CFR 1306.04(a) is supported by substantial evidence.[28] ALJ at 69–70. I further adopt the ALJ's finding that ''the Government has established that the Respondents have committed acts that are inconsistent with the public interest'' and that ''the record evidence under the Fourth and Second Factors weighs in favor of revocation.'' *Id.*

Exception Three—The ALJ Failed To Consider Evidence of Respondents' Acceptance of Responsibility

Respondents also argue that the ALJ erred in holding that ''they 'have not accepted responsibility for the actions

[25] As discussed above, the Government did introduce the prescriptions issued by the Longwood, Florida physician which were filled on two separate dates. While these prescriptions contained a diagnosis code, and nearly all of the prescriptions on each date contained the same code, it is not clear who wrote the code on the prescription. However, even if Respondents' pharmacists or pharmacy technicians had called the physician, the dispensing pharmacists clearly were aware that this prescriber was prescribing the same combination of controlled substances to nearly all of his patients and nearly all of the patients had the same diagnosis. The pharmacists thus clearly had reason to know that these prescriptions were unlawful and chose to ignore that information.

[26] Respondents also contend that there is no legal authority to support the Expert's testimony ''that certain red flags are unresolvable on their face.'' Resp. Exceptions, at 9–10. Contrary to Respondents' contention, for more than thirty years (if not longer), it has been settled law that a pharmacist can be held liable for violating 21 CFR 1306.04(a) even if he calls the prescriber and verifies the prescription. *See, e.g., East Main St. Pharmacy,* 75 FR 66,149, 66,164 (2010) (quoting *United States* v. *Hayes,* 595 F.2d 258, 261 (5th Cir. 1979)). As the Fifth Circuit explained in *Hayes,* ''[v]erification by the issuing practitioner on request of the pharmacist is evidence that the pharmacist lacks knowledge that the prescription was issued outside the scope of professional practice. But it is not an insurance policy against a fact finder's concluding that the pharmacist had the requisite knowledge despite a purported but false verification.'' 595 F.2d at 261. *See also United States* v. *Seelig,* 622 F.2d 207, 213 (6th Cir. 1980) (upholding jury instruction that knowledge may be inferred from evidence that pharmacists ''deliberately closed their eyes to what would otherwise be obvious to them''); *see also Bertolino,* 55 FR at 4,730.

[27] Among the harms identified by the DI identified were an increase of 345 percent in oxycodone overdose deaths between 2005 and 2010, and an increase, during the same time period, in the number of babies born who were addicted to oxycodone from 258 to 1,374 per year. Tr. 44.

[28] Respondents also take exception to the ALJ's exclusion of testimony of their proposed pain management experts. Resp. Exceptions, at 36–37. Respondents assert that they have been prejudiced by the ALJ's ruling, and that their experts would have provided testimony to the effect ''that certain quantities and combinations [of controlled substances] would *not* be considered 'large' or 'unusual' for the treatment of pain'' and that ''[i]t is difficult to see how such practices could-or should-'raise a suspicion regarding the validity of a prescription,' when qualified experts on the 'usual course of professional practice in the relevant field would testify that there is nothing suspicious about what was prescribed.''' Resp. Mot. for Reconsideration, at 4 (ALJ Ex. 30) (quoting Order on Hearing Scope and Government Motion Regarding the Respondents' Experts at 11) (ALJ Ex. 28).

In support of their motion, Respondents proffered the reports of two pain management physicians. *See* Resp. Mot. to File Expert Reports (ALJ Ex. 25). Yet in their reports, neither physician specifically addressed whether the prescriptions for the combination of controlled substances (*i.e.,* oxycodone and alprazolam) filled by Respondents were issued for a legitimate medical purpose. Moreover, even Professor Brushwood acknowledged that while prescriptions for this combination of controlled substances could be prescribed for legitimate medical purposes, ''it is also sought after by people who would divert and abuse drugs.'' Tr. 1082. He also testified that both drugs present a high risk for abuse or diversion and also agreed that a pharmacist must be ''particularly conscious of potential diversion issues'' when dispensing these drugs. *Id.* at 1086.

Accordingly, even assuming that there are patients to whom a physician can legitimately prescribe these controlled substances simultaneously, as the Government's Expert testified, it is the totality of the red flags which renders them unresolvable and thus made the dispensings unlawful.

that form the basis of the Government's *prima facie* case.''' Resp. Exceptions, at 22 (quoting ALJ at 72). According to Respondents, the ALJ failed to ''credit the unequivocal statements of CVS's Vice President of Pharmacy Operations explaining that CVS accepted responsibility on behalf of Respondents and fails entirely to consider the significant evidence of the swift and targeted actions taken by CVS in the wake of the [Administrative Inspection] Warrants to address and resolve the precise concerns identified by DEA at Stores 219 and 5195.'' *Id.* at 23. They further contend that ''CVS's actions speak volumes to its acceptance of responsibility for Respondents' dispensing practices and for assuring that its pharmacies and employees meet their legal obligations.'' *Id.* However, having reviewed the record, I agree with the ALJ's conclusion that ''Respondents have not accepted responsibility for the actions that form the basis of the Government's *prima facie* case.'' ALJ at 72.

This Agency has repeatedly held that where 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 [it] can be entrusted with the responsibility carried by such a registration.''''' *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008) (quoting *Samuel S. Jackson,* 72 FR 23,848, 23,853 (2007) (quoting *Leo R. Miller,* 53 FR 21,931, 21,932 (1988))). Moreover, because ''past performance is the best predictor of future performance,'' *ALRA Labs., Inc.,* v. *DEA,* 54 F.3d 450, 452 (7th Cir. 1995), this Agency has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must both accept responsibility for its actions and demonstrate that it will not engage in future misconduct. *Medicine Shoppe-Jonesborough,* 73 FR at 387; *see also Jackson,* 72 FR at 23,853; *John H. Kennedy,* 71 FR 35,705, 35,709 (2006); *Prince George Daniels,* 60 FR 62,884, 62,887 (1995).

DEA cases make clear that admitting fault for past misconduct is an important factor in determining whether a registrant has rebutted the Government's *prima facie* showing that its continued registration would be ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4). As the Tenth Circuit recently held in rejecting a physician's contention that the Agency exceeded its statutory authority in considering whether he had admitted fault for his prescribing violations:

> The DEA may properly consider whether a physician admits fault in determining if the physician's registration should be revoked. When faced with evidence that a doctor has a history of distributing controlled substances unlawfully, it is reasonable for the . . . Administrator to consider whether that doctor will change his or her behavior in the future. And that consideration is vital to whether the continued registration is in the public interest. . . . [T]he . . . Administrator had no evidence that Dr. Mackay recognized the extent of his misconduct and was prepared to remedy his prescribing practices.

MacKay v. *DEA,* 664 F.3d 808, 820 (2011) (citing *Hoxie* v. *DEA,* 419 F.3d 477, 483 (6th Cir. 2005)). *See also Chein* v. *DEA,* 533 F.3d 828, 837 (D.C. Cir. 2007) (upholding revocation order, noting in part that physician had not ''accepted responsibility for his misconduct''); *Hoxie,* 419 F.3d at 483 (DEA properly considers admission of fault in determining whether a registration should be revoked).

As noted above, Respondents contend that the ALJ failed to give proper weight to what they characterize as ''the unequivocal statements of CVS's Vice President of Pharmacy Operations explaining that CVS accepted responsibility on behalf of Respondents.'' Resp. Exceptions, at 23. However, at the hearing, the evidence offered to rebut the Government's *prima facie* case focused entirely on various measures CVS implemented following the execution of the Administrative Inspection Warrants in October 2011. Contrary to Respondents' assertion, the only testimony of the company's official that even mentioned the word ''responsibility,'' occurred in response to the question posed by their counsel as to why CVS had taken various actions since October 2011. Tr. 1296. In response, the official testified:

> CVS takes its responsibility seriously, and given the drug abuse, the elevated level of drug abuse, that's being observed broadly in Florida, we don't want to contribute to that, and to the extent that any of our stores could contribute to that, we wanted to take these steps to help ensure that no stores do in the future. We understand that it's our responsibility to provide our stores the tools and information that they need to do their jobs on a day-to-day basis and in compliance with state, federal and local legislation and requirements, and we felt these actions helped us do so.

Id. at 1296–97.

As the ALJ found, at no point did this official acknowledge that Respondents had engaged in any misconduct. Indeed, in their post-hearing brief, Respondents all but concede as much, arguing that the Agency ''cannot point to another instance where a revocation of a chain pharmacy's license has occurred in similar circumstances.'' Resp. Proposed Findings of Fact and Conclusions of Law (Post-Hearing Br.), at 123. Respondents further contend that ''other DEA revocation cases bear a crucial distinction from this case: in virtually all of those cases, the individual doctor or independent pharmacy owner/pharmacist was both the one accused of wrongdoing and the registrant. As such, these individuals were in a position to apologize for their own misconduct or that of the retail pharmacy they owned or operated.'' *Id.*

Be that as it may, the Agency's rule is clear and the fact that CVS is a large corporation provides no reason to excuse it from explicitly acknowledging the misconduct of Respondents and their pharmacists. Therefore, I decline to create one rule for chain pharmacies and another rule for closely held or sole-proprietor owned pharmacies. Because Respondents have failed to satisfy this requirement, the ALJ properly held that they have not accepted responsibility for their misconduct.

Nor, even with respect to whether CVS has successfully demonstrated that it will not engage in future misconduct, is its evidence convincing. It is acknowledged that CVS made changes to its pharmacy software, issued new dispensing guidelines, and is requiring its pharmacy personnel to undergo additional training. However, other evidence still raises serious questions as to how seriously CVS takes its responsibility to comply with federal law.

For example, Respondents point to the fact that *at the time* of the Administrative Inspection Warrants, they became aware of the Government's concerns that they were dispensing oxycodone prescriptions issued by certain ''high-volume prescribers'' and ceased dispensing schedule II narcotic prescriptions issued by these physicians. *Id.* at 23–24; *see also* GX 29 (November 15, 2011 email from Respondent's counsel to DI noting that CVS would be suspending various physicians). Yet, among these physicians was the same Longwood, Florida physician, who repeatedly prescribed combinations of oxycodone and alprazolam based on nearly uniform diagnoses, which both Respondents repeatedly filled (and had been doing so for at least six months), notwithstanding that it was clear that he was engaged in pattern prescribing. *See* GX 55 (eighty-one page spreadsheet of each Respondent's dispensings of physician's prescriptions); GXs 67 & 68. Respondents offer no explanation for why they could not figure out on their

own that this physician was issuing unlawful prescriptions.[29]

Respondents also argue that CVS has appointed new pharmacists-in-charge at each store. Resp. Post-Hearing Br. 126. According to Respondents, ''[t]his employment decision was made 'in the best interest of the stores' and was designed to provide new leadership for the pharmacies.'' *Id.; see also* Tr. 1294 (testimony of CVS Vice President; decision ''was based on the additional scrutiny within the stores related to these hearings, the company felt it was in the best interest of those pharmacies to bring in new leadership that would not be distracted by these events'').[30] However, CVS's Vice President did not know what further personnel actions were being taken with respect to these individuals. Tr. 1295. Given the egregiousness of their misconduct, it is stunning that CVS offered no assurance that these individuals had been discharged from employment. *See* 21 CFR 1301.92. Accordingly, I agree with the ALJ that Respondents have not rebutted the Governments' *prima facie* case.[31]

Respondents further argue that the ALJ's recommended sanction is overly broad and that any sanction should be limited to oxycodone or schedule II controlled substances. Resp. Exceptions, at 25–26. According to Respondents, this is so because ''the Government's evidence focused almost exclusively on Respondents' dispensing of oxycodone'' and ''the only evidence regarding other controlled substances related to substances commonly dispensed in conjunction with oxycodone.'' *Id.* at 25.

I acknowledge that DEA possesses the discretion to limit an order of revocation to a particular controlled substance. *See* 21 U.S.C. 824(b). However, I conclude that to exercise that discretion here would be particularly inappropriate and ill-serve the public interest.

The Agency has previously held that ''[t]he Government is not required to prove that multiple categories of [controlled substances] were diverted in order to sustain the revocation of [a registrant's] entire registration.'' *Southwood Pharmaceuticals, Inc.,* 72 FR 36,487, 36,503 (2007). Rather, proof that a registrant has diverted any category of a controlled substance is sufficiently egregious misconduct to warrant the revocation of a registrant's entire registration. *See id.* (rejecting ALJ's recommendation to limit revocation to a single drug and revoking distributor's registration based solely on evidence registrant diverted hydrocodone, a schedule III drug).

In any event, Respondents diverted not only schedule II drugs, which have been placed in this schedule because they have the highest potential for abuse and the abuse of them ''may lead to severe psychological or physical dependence,'' *see* 21 U.S.C. 812(b)(2), but also schedule IV benzodiazepines.[32] Moreover, Respondents' misconduct was both egregious and of extensive duration and undoubtedly caused extensive harm to the public interest, notwithstanding the assertion of CVS's Vice President that CVS does not want to contribute to the prescription drug abuse problem. This is more than enough to conclude that the revocation of the entirety of each Respondents' controlled substance dispensing authority is necessary to protect the public interest. I therefore reject Respondents' contention that the ALJ's recommendation is overly broad and adopt the ALJ's recommended sanction.[33]

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a)(4), as well as 28 CFR 0.100(b), I order that DEA Certificate of Registration Number BC5289055, issued to Holiday C.V.S., L.L.C., d/b/a CVS Pharmacy #00219, and DEA Certificate of Registration Number BC6988298, issued to Holiday C.V.S., L.L.C., d/b/a CVS Pharmacy #5195, be, and they hereby are, revoked. I further order that any pending applications of Holiday C.V.S., L.L.C., d/b/a CVS Pharmacy #00219 or #5195, be, and they hereby are, denied. This Order is effective November 13, 2012.

Dated: August 31, 2012.

Michele M. Leonhart,

Administrator.

Paul Soeffing, Esq., Jason Hadges, Esq., Christine Menendez, Esq., for the Government

[29] Indeed, in a December 2010 meeting, DEA Investigators explained to CVS officials various red flags to look for including the prescribing of the combination of oxycodone and alprazolam. Tr. 52. The DI further testified that ''We brought up examples again of people coming in from the same doctors with the same prescriptions for Oxycodone, 15 milligrams, 30 milligrams[,] [a]lprazolam, two milligrams, a lot of people wanting to pay cash, a lot of people wanting to drive distances to the pharmacy or to the doctor.'' *Id.* at 55. In addition, the Investigators told CVS's representatives that it was a red flag when ''individuals * * * come in with the same prescriptions, also the same diagnosis.'' *Id.* at 56. The Investigators also explained that calling a doctor to verify whether he wrote a prescription would not be sufficient to determine whether a prescription complied with federal law, and CVS's representatives agreed. *Id.* at 57.

[30] The Vice President did not know when CVS had replaced the two pharmacists-in-charge and did not even know generally when it had occurred. Tr. 1294.

[31] I have also considered Respondents' various arguments regarding a proposed settlement of allegations based on CVS's pharmacies having filled prescriptions issued by various prescribers who did not have current or valid DEA registrations. Suffice it to say, the settlement has not been agreed to by the Department of Justice. Moreover, even were I to consider the settlement as evidence of CVS's acceptance of responsibility for filling the prescriptions issued by Dr. Lynch, the settlement does not address Respondents' misconduct in dispensing numerous prescriptions in violation of 21 CFR 1306.04(a).

I have also considered the rest of Respondents' exceptions and conclude that they are either without merit or fail to establish prejudicial error. *Cf.* 5 U.S.C. 706 (''due account shall be taken of the rule of prejudicial error''). For example, Respondents argue that the ALJ made a factual finding that at Store 5195, an Agency Investigator had observed a person who had dilated pupils and that this evidence was not admissible pursuant to the ALJ's Scope Order. Resp. Exceptions, at 26. Be that as it may, the ALJ did not cite this testimony as support for his legal conclusions and thus Respondents cannot show prejudice. *See also* Resp. Exceptions, at 29 (arguing that ALJ inserted ''irrelevant and prejudicial facts into his findings of fact'' but not showing any prejudice).

[32] Moreover, with respect to Dr. Lynch's unlawful prescriptions, the evidence shows that Respondents' dispensed controlled substances in schedules II, III, and IV. *See* GX 32, at 2 (alprazolam, schedule IV), 5 (zolpidem, schedule IV), 6 (OxyContin, schedule II), 9 (Endocet (oxycodone)), 10 (oxycodone).

[33] The Government takes exception to the ALJ's exclusion of evidence showing the oxycodone purchases of each Respondent. Gov. Exceptions, at 1. The Government contends that ''[s]urely these figures would have (and, in fact, should have) caused someone at CVS #219 and CVS #5195 to inquire as to why their stores . . . were purchasing increasingly large quantities of oxycodone in order to fill the huge volume of oxycodone prescriptions being presented by their customers.'' *Id.* at 2–3. The Government further asserts that ''the volume of oxycodone purchased by CVS #219 and CVS #5195 eclipsed the amount of oxycodone purchased by other stores located in more densely populated cities within the State of Florida.'' *Id.* at 3.

The rejected exhibits are, however, simply a compilation of the purchases of the Respondents. The Government made no proffer that it had performed a statistically valid study of the oxycodone purchases by CVS pharmacies (as well as other pharmacies) in the State of Florida, or even within the central Florida area, and that even after controlling for the relevant variables which might legitimately affect purchasing patterns, the Respondents' increased purchases could not be explained by an increase in legitimate prescriptions. Nor is it clear what the evidence adds as the testimony establishes that following the enactment of the 2010 Florida pill mill bill, CVS's officials requested a meeting with DEA because ''they had seen an increase in the numbers of prescriptions for oxycodone,'' and at the meeting, the purchases of both Respondents were specifically discussed. Tr. 52, 58, 80–81. Thus, there is ample evidence that CVS officials were on notice that something was amiss at both pharmacies.

Finally, as the ALJ properly held, Respondents' purchases do not establish a violation of 21 CFR 1306.04(a). Rather, such a violation must be established by reference to a specific prescription and evidence indicating that Respondents' pharmacists dispensed the prescription notwithstanding that they either knew or had reason to know that the prescription lacked a legitimate medical and was issued outside of the usual course of professional practice. *See* Order on Hearing Scope, at 7–12 (ALJ Ex. 28). I thus reject the Government's contention.

Catherine O'Neil, Esq., John A. Gilbert, Esq., Colleen P. Schoch, Esq., Karla L. Palmer, Esq., Barbara Rowland, Esq., for the Respondents

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

John J. Mulrooney, II, Chief Administrative Law Judge. On February 2, 2012, the Administrator of the Drug Enforcement Administration (DEA or Government), issued an Order to Show Cause and Immediate Suspension of Registration (OSC/ISO) immediately suspending and proposing to revoke the DEA Certificate of Registration (COR), Number BC5289055, of Holiday C.V.S. L.L.C., d/b/a CVS/Pharmacy #00219 (''Respondent 219'') pursuant to 21 U.S.C. 824(a), and to deny any pending applications for registration, renewal or modification pursuant to 21 U.S.C. 823(f) and 824(a). The same day, a similar OSC/ISO was issued against the DEA COR, Number BC6988298, of Holiday C.V.S. L.L.C., d/b/a CVS/Pharmacy #05195 (''Respondent 5195'').

On March 2, 2012, the Respondents, through counsel, timely filed requests for hearing. On March 7, 2012, the two cases were consolidated. A consolidated hearing was held from April 25, 2012, through April 30, 212, in Arlington, Virginia.

The issue ultimately to be adjudicated by the Administrator, with the assistance of this recommended decision, is whether the record as a whole establishes, by substantial evidence, that either (or both) of the Respondents' CORs should be revoked as inconsistent with the public interest, as that term is used in 21 U.S.C. 823(f) and 824(a).

After carefully considering the testimony elicited at the hearing, the admitted exhibits, the arguments of counsel, and the record as a whole, I have set forth my recommended findings of fact and conclusions of law below.

The Allegations

The OSC/ISOs issued by the Government against the Respondents contend that revocation of the Respondents' CORs is appropriate because ''[s]ince at least 2010, [the Respondents] ha[ve] dispensed controlled substances to customers under circumstances indicating that the drugs are diverted from legitimate channels, misused or abused.'' ALJ Ex. 1, at 2; ALJ Ex. 2, at 2. The respective OSC/ISOs cite aggregate controlled substance purchase amounts and proffer that these numbers have been subject to increases, and allege that the Respondents ''failed to exercise [their] corresponding responsibility regarding the proper prescribing and dispensing of controlled substances in violation of 21 C.F.R. § 1306.04(a) * * * failed to maintain effective controls against diversion of controlled substances in violation of 21 C.F.R. § 1301.76.'' [1] ALJ Ex. 1, at 2; ALJ Ex. 2, at 2.

The Stipulations of Fact

1) Respondents 219 and 5195, are retail pharmacies located in Sanford, Florida. Respondents 219 and 5195 are operated by CVS Pharmacy, Inc., (''CVS''), the division of CVS Caremark Corporation which operates the retail pharmacy business.

2) Respondent 219, is registered with DEA as a chain pharmacy in Schedules II–V under DEA registration number BC5289055 at 3798 Orlando Drive, Sanford, Florida 32773. Respondent 219's registration expires by its terms on December 31, 2013.

3) Respondent 5195, is registered with DEA as a chain pharmacy in Schedules II–V under DEA registration number BC6988298 at 4639 W 1st Street, Sanford, Florida 32771. Respondent 5195's registration expires by its terms on December 31, 2013.

4) DEA served Administrative Inspection Warrants (AIWs) at Respondents 219 and 5195 on October 18, 2011.

5) An evaluation by DEA of aggregate controlled substance dispensing data from the Respondents' pharmacies resulted in DEA's decision to initiate the investigations that culminated in these proceedings. Tr. 130.

The Evidence

The Government's Evidence

The Government elicited factual testimony from six DEA Diversion Investigators (DI) and expert testimony from a retired professor from the College of Pharmacy at the University of Florida.

The Government's Fact Witnesses

DI Susan Langston, the Acting Diversion Program Manager for the Miami Field Division, testified that she has been a DI since 1996, and has held various supervisory positions prior to her current assignment as the Diversion Program Manager in Miami where she oversees the supervisors who manage six diversion investigator offices. Tr. 40–42.

Langston testified that ''it's no secret that we have an incredible pill problem in the State of Florida. It's a national problem, but Florida is the epicenter.'' Tr. 43. According to DI Langston, the ''pill problem is fueled by unscrupulous doctors and pill mill pain clinics * * * [that were] originally situated primarily in Broward County, and now [have] spread all over the state.'' Tr. 43. In Florida, ''[t]he two most commonly abused drugs and the drugs that are a part of this pill mill problem * * * are oxycodone [2] and alprazolam.[3] '' Tr. 44.

Langston's testimony also included some background information related to recent changes in Florida law, and certain effects that those changes have had on the diversion enforcement landscape. In 2010, the State of Florida passed a law prohibiting doctors from dispensing Schedule II controlled substances from their offices to patients who paid with cash, check or credit card. Tr. 44–45. In July of 2011, the law was changed again to ''virtually eliminate[] all dispensing of Schedule II and III controlled substances from doctors' offices.'' Tr. 45. DI Langston explained that in 2010, ''98 of the top 100 doctors who dispensed oxycodone in the United States were in Florida [and that] there is more oxycodone that goes to the State of Florida than all of the other states combined.'' Tr. 45. DI Langston further testified that ''as a result of the law change we've seen an incredible increase in the amount of pharmacies that are opening in the State of Florida and the amount of pharmacies that are now involved in the pill mill problem. All the [prescriptions for] drugs that the pill mill doctors write now in Florida have to be filled at a pharmacy.'' Tr. 46. This change is reflected in that fact that ''[s]ome pharmacies that purchased hardly any oxycodone * * * now purchase three, four, five times the national average.'' Tr. 46.

In response to the increase in oxycodone sales, DIs in Florida have ''visited hundreds of pharmacies over the past * * * two years [and have] talked to thousands of pharmacists.'' Tr. 47–47. The DEA has also sponsored a Pharmacy Awareness Conference in West Palm Beach, Florida. Tr. 47. Langston explained that, when interacting with pharmacists, DEA representatives go over the rules and regulations that pharmacies must follow * * *. We talk about what we're seeing in Florida * * * We talk about trends. We talk about what we're seeing doctors doing, what we're seeing happening at the patient level.[4] We talk about the red flags of diversion, types of things to look out for whenever they're filling prescriptions.

Tr. 47–48. As an example of a red flag of diversion which would have been discussed during these DEA outreach programs, DI Langston identified ''a lot of prescriptions coming in for oxycodone, 30 milligrams (mg), oxycodone, 15 [mg]; Xanax [5] [alprazolam] two [mg].'' Tr. 48.

As a part of its outreach activities, the DEA, at the request of CVS counsel John

[1] On April 13, 2012, based on the factual proffers set forth in the respective prehearing statements, this tribunal issued an order (''Scope Order'') which, *inter alia,* precluded the Government from introducing evidence of aggregate amounts of purchased controlled substances to establish that the Respondents continued registrations would be inconsistent with the public interest. ALJ Ex. 23. The Scope Order precluded the Government from introducing any evidence for a violation of 21 CFR § 1301.76 based on its failure to allege any factual basis in its OSC/ISO or initial or supplemental prehearing statements. *Id.;* ALJ Exs. 9, 16. The Scope Order also limited evidence the Respondents had noticed to meet the aggregate amount evidence and granted the Government's motion to limit expert testimony that related to the practice of medicine. ALJ Ex. 23.

[2] ''A medicinal substance used as a narcotic and analgesic.'' 4–O Attorneys' Dictionary of Medicine O–85581. Oxycodone is a Schedule II controlled substance. 21 CFR § 1308.12(b)(1).

[3] ''A drug used in the treatment of anxiety and panic disorders usually associated with depression.'' 1–A Attorneys' Dictionary of Medicine A–5091.'' Alprazolam is a Schedule IV controlled substance. 21 CFR § 1308.14(c).

[4] When conducting these outreach activities, Ms. Langston has observed that ''virtually every pharmacist'' knows about the pill mill problem. Tr. 47.

[5] Xanax is ''[t]he brand name of a preparation containing alprazolam, used in the treatment of anxiety.'' 6–X Attorneys' Dictionary of Medicine X–125138.

Gilbert, Esq.,[6] conducted a meeting with CVS representatives on December 8, 2010 (''December 2010 CVS Meeting). Tr. 48–49. DI Langston explained that prior to the meeting Mr. Gilbert contacted her by telephone ''and said that CVS was aware of the pill mill problem in South Florida, and he would like to meet with us and bring a couple of the supervisors along that worked for local CVS stores and talk about the pill mill problem, oxycodone diversion problem, and what types of things we're seeing.'' Tr. 49. In preparation for the meeting, DI Langston ran an ARCOS[7] report for the oxycodone purchases of Respondent 219 from 2006 through 2010. Tr. 58.

The December 2010 meeting was attended by: Mr. Gilbert; Jennifer Lalani, a supervisor for CVS stores 219 and 5195; Ms. Tankut, an official from CVS's corporate headquarters in Rhode Island; DI Langston; DEA Diversion Group Supervisor (GS) Gayle Lane; DI Phyllis Garret; Robert Difiore, a pharmacist from the Florida Department of Health; and Michele Miller, a supervisor from the West Palm Beach Department of Health. Tr. 49–51, 69.

At the meeting, the parties discussed a pharmacist's corresponding responsibility ''at length.'' Tr. 54. The discussion topics included the pill mill problem in Florida; some recent arrests and other DEA enforcement activity; increased publicity; the oxycodone crisis; and the combination of prescriptions for oxycodone 30 mg, oxycodone 15 mg, Alprazolam 2 mg, and a fourth ''filler''[8] drug, which DEA identified as an indicator of diversion.[9] Tr. 51–52.

The DEA representatives identified some indicators of possible diversion to be aware of, such as ''patients driving distances to see their doctors, patients driving distances to go to particular pharmacies, some people going from out of state * * *.'' and monitoring for ''suspicious behavior.'' Tr. 52. ''Suspicious behavior'' was defined as ''[p]eople coming and appearing like they may not need the medication, appearing like they may be high, things like that.'' Tr. 53. Other red flags discussed were: (1) large quantities of people paying cash; (2) large quantities of people traveling distances to see the prescribing physician; (3) people coming in with the same prescriptions and same diagnoses (particularly lower lumbar pain); and (4) an ''influx'' of prescriptions from board certified pediatricians or gynecologists.[10] Tr. 54–57.[11]

In addition to red flags, the meeting participants discussed methods to verify a prescription. Tr. 57. Specifically, the DEA representatives stated that ''[s]imply calling a doctor's office to verify that he or she wrote a prescription does not meet the requirement [of verification].'' Tr. 57. The representatives for CVS agreed with this assessment. Tr. 57. After the CVS representatives were shown the oxycodone ordering of Respondent 219, they appeared ''a little bit surprised at quite how high it was, and they said they didn't know why it was so high.'' Tr. 59. Ms. Lalani speculated that the high numbers could have been caused by the fact that Respondent 219 was a 24-hour store and assured those present that she would look into Respondent 219 to ensure that everything was being done legitimately.[12] Tr. 59.

DI Langston testified that over the past year, ''at least'' thirty doctors and three pharmacists had been arrested ''for their part in oxycodone diversion.'' Tr. 59–60. Simultaneously, ''[t]he State of Florida * * * picked up their efforts [by] issu[ing] emergency suspensions on several doctors' medical licenses over the past year.'' Tr. 60. When a Florida State license is subject to an immediate suspension order, a notification of the suspension is placed on the Florida Department of Health's Web site ''within ten minutes.'' Tr. 61. Similarly, the DEA Web site for DEA registrants updates a registrant's profile the same day a DEA immediate suspension order is served on the effected registrant.[13] Tr. 62.

The Government elicited information from DI Langston about the prescription privileges of a physician named Dr. Ronald Lynch. Tr. 66. Langston testified that Dr. Lynch's DEA COR was revoked, effective January 18, 2011, and that as of the effective date of that revocation order, he no longer enjoyed the authority to prescribe, administer or dispense any controlled substances. Tr. 66; *see also,* Gov't Ex. 32 at 3–12. Although Dr. Lynch's COR was revoked, DI Langston explained that the DEA Web site would reflect that his registration was ''expired.'' Tr. 74–75.

On cross-examination DI Langston testified that, unlike the case of a revocation, in situations where a COR expires by its own terms, there is a thirty-day window between the expiration date and the date the number associated with the COR is retired. Tr. 78–79. This grace period is designed to address inadvertent lapses or other unintentional delays. If a registrant submits an application for renewal after the expiration date, but during the grace period, then the registrant will maintain his or her dispensing privileges. Tr. 78–79. A pharmacist who encounters an ''expired'' signal may resolve the red flag by calling the DEA and inquiring about the status of the application or registration. Tr. 102–03.

The testimony presented by DI Langston was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government also presented the testimony of DI Stephanie Orr. DI Orr testified that she has been employed by the DEA since July of 2009, and that she currently is stationed in the DEA's Boston Office. Tr. 335–36.

DI Orr testified that she participated in the execution of an administrative inspection warrant on Respondent 219 on October 18, 2011, and that her role in that evolution was ''to gather the records of inventories and prescription records and dispensing records.'' Tr. 337–38. Upon entering the store, DI Orr enlisted the assistance of CVS lead technician Keyla Perry in gathering records at the pharmacy Tr. 337–40. Through Ms. Perry, DI Orr collected an inventory taken in September of 2011, and another taken in October of 2010.[14] Tr. 339. Orr also requested and received hard copy ''prescriptions for the controlled substances for Schedule 2s * * * for that time period.'' Tr. 339–40. The prescription records, which were produced in small boxes, were photocopied by the DEA, and then returned Respondent 219. Tr. 340–41. DI Orr also obtained the dispensing binders[15] for oxycodone 30 mg for the relevant time period. Tr. 341–42. As with the hard copies of the prescriptions, the dispensing labels were taken into DEA evidence, scanned, and returned. Tr. 342.

While Ms. Perry assisted with the collection of records, she and DI Orr discussed Perry's employment at CVS. Tr. 343. Orr described Perry's demeanor during this conversation as ''normal'' and ''relaxed.'' Tr. 343. Ms. Perry stated that she had worked for CVS for seven years, and Respondent 219 for the past three years. Tr. 343. Ms. Perry also told DI Orr that Respondent 219 filled approximately a thousand prescriptions per day, the majority of which were for controlled substances. Tr. 344.

As to the filling of oxycodone 30 mg prescriptions, Ms. Perry indicated that Drs. Pyko, Namone, Moyer, Pizza, Scolaro, Namone, Moyer and Zelkowitz ''were some of the top prescribing doctors'' for oxycodone 30 mg at Respondent 219. Tr. 344. Ms. Perry also set forth Respondent 219's procedure for verifying Schedule II controlled substances presented to the pharmacy. Tr. 345. Specifically, Ms. Perry ''stated that when a prescription was presented she'll get an ID from the patient, write down their driver's license number on the prescription, and then call the doctor to verify and write down who they spoke to, the date, along with * * * the diagnosis code.'' Tr. 345.

[6] An attorney of record for the Respondents in this matter.

[7] The Automation of Reports and Consolidated Orders System (ARCOS) is a DEA database which monitors the flow of controlled substances.

[8] Soma, ibuprofen, Flexeril and blood pressure medication were identified by DI Langston as possible ''filler' drugs. Tr. 51–52. Langston explained that ''filler drugs [are] medication[s] that doctors will prescribe so it won't look like they're prescribing too many controlled substances.'' Tr. 51–52.

[9] Also during the meeting, Ms. Lalani stated that CVS ''had seen an increase in the numbers of prescriptions for oxycodone * * * and that's why they wanted the meeting.'' Tr. 52.

[10] Ms. Langston estimated that ''90 percent of the pill mill doctors use lower lumbar pain'' as a diagnosis code. Tr. 56.

[11] On cross-examination Ms. Langston agreed that, standing alone, none of the red flags she listed were dispositive on the issue of the legitimacy of a prescription. Tr. 90–94.

[12] On cross-examination Ms. Langston testified that she addressed the oxycodone ordering at Respondent 5195 at the December 2010 CVS Meeting, but did not provide the underlying data. Tr. 81–82. However, in a January 25, 2012, summary of the December 2010 CVS Meeting sent to DEA's Chief Counsel Office, Ms. Langston did not state that she addressed Respondent 5195's oxycodone ordering. Tr. 82.

[13] The DEA registrant Web site referenced by Ms. Langston is a system which a DEA registrant can log in to verify that another registrant has a valid DEA registration. Tr. 63–64.

[14] DI Orr explained that she ''gathered two sets of inventories because [she] wanted to make sure that it went over at least a year.'' Tr. 339.

[15] DI Orr explained that ''when a prescription is printed out [Respondent 219] put a sticker on the back of the prescription and then that [sticker] has like a label and they put that in a binder.'' Tr. 341.

After the AIW inspection, DI Orr received a CD that contained a Microsoft Excel spreadsheet (CVS Dispensing Data)[16] that was provided by CVS and contained the dispensing records for the Respondent pharmacies from January 1, 2010, up until October 16, 2010.[17] Tr. 347. DI Orr also received ''one scrip that was labeled 10/17/11.'' Tr. 348. Orr narrated her understanding of the information provided in the spreadsheet provided by CVS. In addition to the drug type and strength, the CVS Dispensing Data set forth culled information regarding individual controlled substance dispensing events. The document included the method of payment (listed under ''agency type''), the National Drug Code and schedule classification for each drug, the pharmacy number (219 or 5195), the prescription number assigned by the Respondents to specific dispesnsings, the dispensing date and quantity, as well as the name and address of each patient and prescriber. Tr. 353–56; Gov't Ex. 30. DI Orr invested considerable testimony into detailed explanations of her efforts to process the data provided by CVS into multiple spreadsheets to facilitate an analysis of the Respondents' dispensing.

Sometime after receiving the CVS Dispensing Data, DI Orr ''was sent an email from [Group Supervisor] Carter [containing] about 22 different spreadsheets for different doctors that [were] provided to her from CVS.'' Tr. 365. These individual spreadsheets showed the controlled substances dispensed pursuant to prescriptions of certain practitioners. *Id.* DI Orr was asked ''to analyze [all the spreadsheets], look through [them], and create several spreadsheets for different physicians and addresses, and then sort it by drugs.'' Tr. 350. In this regard, Orr explained that she utilized specialized training she had received at DEA regarding the handling and preparing of spreadsheets. Tr. 535.

Though the spreadsheets purport to reflect the dispensing records of the Respondents, DI Orr conceded that the ''actual''[18] dispensing records are the hard copies of the prescriptions, and that the overall reliability of the spreadsheets provided was dependent on the reliability of the pharmacy technicians entering the dispensing data. Tr. 542–43. To ensure the accuracy of the data provided, DI Orr compared the hard copies of ''more than one-hundred'' prescriptions to the corresponding data reflected in the CVS Dispensing Data. Tr. 537–38. Of the hard copy prescriptions she checked against the CVS Dispensing Data, DI Orr identified ''several'' errors. Tr. 544. When queried why she would check only one-hundred prescriptions in a document with approximately 25,000 records of dispensing, DI Orr testified that she did not have time to perform a more thorough analysis. Tr. 555.

A spreadsheet of common addresses (Common Address Spreadsheet) was created by DI Orr by culling address information from the CVS Dispensing Data Tr. 358–60; Gov't Ex. 22. Orr explained that the filtering process utilized to create the Common Address Spreadsheet involved a manual survey of only approximately one-fourth of the CVS Dispensing Data. Tr. 360–61. From this manual view, DI Orr identified dispensing events for ''multiple people living at the [same] address, the same household * * *.'' Tr. 362. The dispensing events for common addresses were then populated into the Common Address Spreadsheet, which was received into evidence. Gov't Ex. 22.

DI Orr also created a spreadsheet from the CVS Dispensing Data wherein she culled out oxycodone 30 mg dispensing events grouped by thirteen individual Florida prescribers. Tr. 367–68. From the prescriber-culled data, DI Orr created ''pivot tables''[19] for each practitioner, showing the sum of oxycodone 30 mg prescribing, and in some cases the sum of Roxicodone 30 mg prescribing. *See* Tr. 368. The combined by-prescriber data and pivot tables (By-Prescriber Chart A) were received into evidence. Gov't Ex. 57.

The By-Prescriber Spreadsheet was, in turn, used by DI Orr to create a pivot table setting forth the total oxycodone 30 mg dispensed by the Respondent pharmacies pursuant to prescriptions written by the thirteen South Florida doctors organized by patients residing in specific cities and states (Prescriber & Patient Address Chart). Tr. 381; Gov't Ex. 58. When creating the categories for the locations, DI Orr aggregated addresses she believed to be the same, explaining that ''[a]n example might be Altamonte Springs and they might put ALT Springs but you know it was Altamonte Springs.'' Tr. 383. As with the By-Prescriber Spreadsheet,[20] the source of the data used in Prescriber & Patient Address Chart was the individual prescriber spreadsheets provided to the DEA by CVS. Tr. 384.

Orr also created a document which combined spreadsheets and pivot tables to demonstrate the dispensing of oxycodone 30 mgs by Respondent pharmacies pursuant to prescriptions written by four specific South Florida practitioners (By-Prescriber Chart B). Tr. 439–40; Gov't Ex. 59. To create By-Prescriber Chart B, DI Orr extracted from the CVS Dispensing Data, dispensing events for oxycodone 30 mg, Roxycodone 30 mg, and Oxycontin 30 dispensed pursuant to prescriptions written by the four South Florida doctors. Tr. 440, 445. The extracted data was then separated into four spreadsheets, with each spreadsheet representing the oxycodone 30 mg, Roxycodone 30 mg, and Oxycontin 30 mg dispensing for a particular doctor. Tr. 440–41. DI Orr then created pivot tables for each spreadsheet representing the total amount of oxycodone 30 mg dispensed, and the total amount of oxycodone 30 mg dispensed to specific United States cities. Tr. 439–444.

In response to a request from DEA, CVS generated and provided to the DEA a spreadsheet that culled out controlled substance dispensing events by the Respondent pharmacies pursuant to prescriptions written by Dr. Ronald Lynch.[21] Gov't Ex. 32. Orr removed the header from the CVS spreadsheet, but otherwise did nothing to change the document, which was received into evidence (Lynch Dispensing Chart). Tr. 454; Gov't Ex. 32.

Orr generated two pivot tables from the Lynch Dispensing Chart: one table showing the total amount of specific controlled substances dispensed by the Respondent pharmacies pursuant to prescriptions written by Dr. Lynch (Lynch By-Medication Table) and the other table showing the total amount of controlled substances prescribed by Dr. Lynch and dispensed by Respondent pharmacies to patients, organized by the address cities of the patients (Lynch By-Patient City Table). Tr. 457–58; Gov't Ex. 33 at 1–3.

DI Orr explained that she was aware that Dr. Lynch's DEA registration was revoked on January 18, 2011,[22] and that she searched the Lynch Dispensing Chart[23] for controlled substance dispensing events occurring after the January 18, 2011, revocation date. Tr. 460–61. DI Orr found three instances where Schedule II controlled substances were dispensed for a patient named T.N. after January 18, 2011, and obtained the corresponding hard copies and dispensing labels. Tr. 461–62; Gov't Ex 33 at 4–9; Gov't Ex. 32 at 9. The three prescriptions were written for T.N. for sixty tablets of 10/650 mg Percocet. For all three prescriptions, the prescribing physician is listed as Ronald Lynch, M.D., of Lake Mary, Florida. Gov't Ex. 33, at 4, 6, 8. The earliest of these bares the issuance date of February 2, 2011. Gov't Ex. 33, at 4. The corresponding dispensing label for that prescription reflects that on February 2, 2011, at 7:04 p.m., sixty tablets of 10–650 mg Endocet were dispensed for patient T.N. *Id.* at 5. Another prescription written by Dr. Lynch for T.N. is dated February 25, 2011. Gov't Ex. 33, at 6. The corresponding dispensing label indicates that on February 25, 2011, at 2:02 p.m., sixty tablets of oxycodone-Acetaminophen 10–650 were dispensed. *Id.* at 7. A third prescription is dated March 24, 2011. *Id.* at 8. The

[16] The spreadsheet from CVS was admitted into evidence as Government Exhibit 30.

[17] Though the data on the spreadsheet came from CVS, DI Orr testified that it was her understanding that the data was sent via email to another DI who burned the data onto a CD. Tr. 348. Although the DEA had only requested the dispensing records for only oxycodone 30 mg, the spreadsheet provided by CVS also contained other controlled substances, such as Oxycontin 80 mg and Oxycontin 20 mg. Tr. 350.

[18] DI Orr explained that ''they typically have three kind[s of dispensing records], the hard copies, the electronic copy, and then also the binder that has the other stickers.'' Tr. 544. DI Orr ''found missing prescriptions,'' where a copy or record would not have a corresponding entry in another location. Tr. 544.

[19] A pivot table is ''a tool through Excel that ''breaks * * * up [data] more specifically.'' Tr. 368.

[20] Gov't Ex. 57.

[21] The information was provided to another DI and forwarded to Orr. Tr. 453.

[22] As set forth above, the record evidence establishes that on December 3, 2010, DEA issued a revocation order, effective January 18, 2011. Gov't Ex. 31 at 3–12; *Ronald Lynch M.D.,* 75 FR 78745 (2010). In the order revoking the COR, the Agency found that Dr. Lynch had engaged in the unauthorized practice of medicine and had issued prescriptions which ''lacked a legitimate medical purpose.'' *Lynch,* 75 FR at 78753.

[23] DI Orr limited her search to Schedule II controlled substances because she ''had only requested Schedule II hard copy prescriptions * * * so anything else I wasn't able to verify hard copies.'' Tr. 462.

corresponding dispensing label for this prescription reflects that on March 24, 2011, at 12:42 p.m., sixty tablets of oxycodone-Acetaminophen 10–650 were dispensed. *Id.* at 9. All three controlled substance dispensing events occurred after Dr. Lynch's January 18, 2011, revocation date, when Lynch had no authority to prescribe controlled substances. All three dispensing events occurred at Respondent 219. Gov't Ex. 32 at 9. Further, the Lynch Dispensing Chart reflects that Respondent 219 dispensed controlled substances pursuant to prescriptions written by Dr. Lynch no fewer than twenty-seven (27) times after Dr. Lynch's COR was revoked. Gov't Ex. 32. Of these twenty-seven prescriptions, seven were dispensed later than June of 2011. Gov't Ex. 32, at 5, 7. Similarly, Respondent 5195 filled four prescriptions after the January 18, 2011, revocation, one of which fell in June. Gov't Ex. 32, at 12. Thus, the Respondent pharmacies were dispensing controlled substances on Dr. Lynch's prescriptions approximately six months after he had lost his authority to prescribe them.

DI Orr also queried the CVS Dispensing Data for prescriptions for controlled substances dispensed pursuant to prescriptions written by Dr. Anthony Wicks, a physician with offices located in Winter Springs, Florida. These prescriptions were targeted because Orr was aware that Dr. Wicks' DEA COR expired on May 11, 2011. Tr. 468. DI Orr created a chart setting forth oxycodone 30 mg dispensing events from Respondent 219 (Wicks 219 Dispensing Chart) and Respondent 5195 (Wicks 5195 Dispensing Chart), as well as a chart reflecting combined dispensing events from both pharmacies regarding those prescriptions from Dr. Wicks. (Wicks Combined Dispensing Chart). Tr. 464–70; Gov't Exs. 10, 27 at 1–8, 28 at 1–7. DI Orr also compared the Wicks dispensing events reflected in the two charts with hard-copy prescription scrips of the medications dispensed at those pharmacies. Gov't Exs. 27 at 9–58, 28 at 8–37. An analysis of the data revealed thirty-eight (38) dispensing events where Respondent 219 dispensed controlled substances for Wicks prescriptions after his DEA COR expired on May 31, 2011. Tr. 468. Respondent 5195 dispensed controlled substances seventeen (17) times pursuant to Wicks' prescriptions after Wicks' COR expired. Tr. 469. Thus, the two Respondent pharmacies filled a total of fifty-five (55) oxycodone prescriptions written by Dr. Wicks after his COR was expired and he was without authority to write controlled substance prescriptions. Respondent 5195 filled Dr. Wicks' oxycodone prescriptions as late as July 14, 2011, and Respondent 219 dispensed Wicks' oxycodone prescriptions as late as July 15, 2011. Gov't Ex. 10 at 6.

The record also establishes that even prior to the expiration of his COR, Dr. Wicks had a COR-registered address, not in Florida, but in California. Gov't Ex. 26; Tr. 580. Notwithstanding that reality, and the legal requirement to have a COR-registered address in the state where a prescriber is prescribing,[24] from December 17, 2010, through May 31, 2011, Respondent 219 dispensed 117 controlled substance prescriptions on prescriptions issued by Wicks. Gov't Ex. 27. Respondent 5195 dispensed 125 controlled substance prescriptions on Wicks' California-address COR during the same period. Gov't Ex. 28.

At DEA's request, CVS supplied dispensing data on an Orlando, Florida prescribing physician, named Dr. Riyaz Jummani (Jumamani Dispensing Chart).[25] Gov't Ex. 35; Tr. 472–74. Using the data in the Jummani Dispensing Chart, DI Orr created two pivot tables: a table showing the total amount of specific types of drugs dispensed by the Respondent Pharmacies pursuant to prescriptions written by Dr. Jummanni (Jummani By-Medication Table);[26] and a table organizing Dr. Jummani dispensing events at the Respondent pharmacies by patient address city/state (Jummani By-Patient Location Table). Gov't Ex. 36 at 2–4.[27]

At DEA's request, CVS supplied dispensing data from the Respondent pharmacies on a Palm Coast, Florida, prescriber named Dr. Ralph Chambers (Chambers Dispensing Chart).[28] Gov't Ex. 44; Tr. 478–79. Using the data from the Chambers Dispensing Chart, DI Orr created two pivot tables. The first table shows ''the [types of] drugs that [Dr. Chambers] prescribed that were dispensed at CVS 5195 and 219'' (Chambers By-Medication Table). Gov't Ex. 45 at 1. The second table shows ''Dr. Chambers' dispensing records per city and state and quantity'' (Chambers By-Patient Location Table). Gov't Ex. 45 at 2–3; Tr. 481.

At DEA's request, CVS supplied dispensing data from the Respondent pharmacies on a Winter Park, Florida, prescriber named Dr. Michael Moyer (Moyer Dispensing Chart). Gov't Ex. 48. The spreadsheet was sent by CVS to Investigator Carter, who then forwarded it to DI Orr. Tr. 482–84. Using data from the Moyer Dispensing Chart, DI Orr created a pivot table showing total amount of specific types of drugs dispensed by the Respondent pharmacies pursuant to prescriptions written by Dr. Moyer (Moyer By-Medication Table).[29] Gov't Ex. 49; Tr. 482.

At DEA's request, CVS supplied dispensing data from the Respondent pharmacies on a Longwood, Florida, prescriber named Dr. James Pizza (Pizza Dispensing Chart).[30] Gov't Ex. 55; Tr. 485–88. From the Pizza Dispensing Chart, DI Orr generated a pivot table and pie chart setting forth aggregate numbers of three oxycodone medications (oxycodone HCL 15 MG, oxycodone HCL 40 mg, Roxicodone 15 mg or Roxicodone 30 mg) reflected in dispensing events from the Respondent pharmacies from July 19, 2010, through October 17, 2011 (Pizza Pie Chart and Table). Gov't Ex. 56 at 1. Orr also used the Pizza Dispensing Chart to generate a table organizing Dr. Pizza dispensing events at the Respondent pharmacies by patient address city/state (Pizza By-Patient Location Table). Gov't Ex. 56 at 2–4; Tr. 487–89.[31]

The testimony presented by DI Orr was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government also presented the testimony of GS Kyle Wright. Tr. 309. GS Wright testified that he began his employment with the DEA in 1995, and served as a DI, and held various supervisory positions in the agency prior to his current assignment as the Unit Chief of DEA's Targeting and Analysis section, also known as ARCOS. Tr. 309–11.

GS Wright explained that distributors and manufacturers of Schedule I through III controlled substances are required by law to report ''[a]ny transaction involving those controlled substances.'' Tr. 311. The ARCOS section compiles the reports of the distributors and manufacturers and uses this data to fulfill internal requests from the DEA and internal requests from organizations like the United Nations, newspapers, and State attorney general offices. Tr. 312.

In his capacity as Unit Chief of ARCOS, Mr. Wright was asked to provide an overhead map of the Respondents' pharmacy locations and ''other pharmacies within the immediate area.'' Tr. 313. Mr. Wright testified that Government Exhibit 19, which shows the location of the Respondent Pharmacies, as well as other pharmacies in the area, was created using Google Maps. Tr. 313. Also using Google maps, Mr. Wright's unit produced a ''clean'' map of Central Florida. Tr. 316–17. The clean map was admitted as Government Exhibit 63.

Mr. Wright testified to the creation of Government Exhibit 62. Tr. 317–18. Government Exhibit 62 is a map which marks the city of Sanford, and ''the other townships or cities located in southern Florida, in which prescribing doctors resided or operated their offices at,[32] but whose prescriptions were being filled in Sanford.'' Tr. 318. The map shows the ''relative distance'' between the cities of the prescribing physicians and the city of Sanford, where the Respondent pharmacies are located. Tr. 317–18. Government Exhibit 62 does not differentiate between the number of prescriptions filled, the dates prescriptions were filled, or whether the prescriptions

[24] 21 CFR 1301.12.

[25] This data was provided to another DI and forwarded to Orr. Tr. 473.

[26] Gov't Ex. 36 at 1.

[27] On cross-examination DI Orr admitted that two pages that the Government had initially included as part of Government Exhibit 36 actually depicted prescription scrips from a different prescriber which were not problematic. Tr. 476. The Government withdrew these two pages and the Respondents offered it to show a lack of Government infallibility, and handwritten markings on the scrip to establish that their pharmacists were conducting some measure of due diligence in an effort to resolve potential red flags. Tr. 549; Resp't Ex. 94.

[28] This data was provided to another DI and forwarded to Orr. Tr. 478–79.

[29] This data was provided to another DI and forwarded to Orr. Tr. 482–83.

[30] This data was provided to another DI and forwarded to Orr. Tr. 485.

[31] The dispensing records contained in the CVS Dispensing Data only went through October 16, 2011. Tr. 502. At some point after the October 18, 2011, AIW, CVS provided the dispensing data for October 17, 2011, to a DI who forwarded the data to DI Orr. Tr. 502–03.

[32] The locations of the prescribing physicians were provided to Mr. Wright by another component of DEA. Tr. 319.

were filled at Respondent 219 or Respondent 5195. Tr. 329.

ARCOS personnel also used Google Maps to create a map of central Florida, showing the CVS pharmacies located ''within the Orlando and Daytona Beach, Florida area.'' Tr. 321. The map of the other CVS pharmacies, which was admitted as Government Exhibit 17, contains a key which matches the marks on the map to specific CVS pharmacies. Tr. 321. ARCOS personnel obtained the locations of the CVS pharmacies marked in Government Exhibit 17 from the DEA's CSA database, which is a database of information provided to the DEA by DEA registrants. Tr. 322. Specifically, ARCOS personnel queried the CSA database for all pharmacies in Florida, and then selected pharmacies named ''CVS'' with specific zip codes. Tr. 322–24. The key associated with Government Exhibit 17 was downloaded directly from the CSA database. Tr. 324.

Government Exhibit 64 was created by the ARCOS section to show the locations of the Respondent Pharmacies ''relative'' to the locations of other CVS pharmacies and to the ''practitioners * * * identified as having prescriptions filled at one of [the Respondent] pharmacies.'' Tr. 325–26. Put differently, Government Exhibit 64 shows three classes of information: (1) the location of the Respondent Pharmacies (marked in green); (2) the location of other CVS pharmacies in the Sanford area (marked in blue); and (3) the location of practitioners whose prescriptions were filled at the Respondent Pharmacies (marked in red). *Id.* As with Government Exhibit 17, the locations of the CVS pharmacies were taken from the CSA database. Tr. 327. The locations of the prescribing practitioners were provided by DEA's Chief Counsel's Office. Tr. 327. As with Government Exhibit 62, Government Exhibit 64 does not differentiate between the number of prescriptions filled, the dates prescriptions were filled, or whether the prescriptions were filled at Respondent 219 or Respondent 5195. Tr. 329–30.

The testimony presented by GS Wright was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government also presented the testimony of Heather Wehrle, a DI with the Nashville District Office. Tr. 163. DI Wehrle has been employed by the DEA for over eight years, and has attended various in-house DEA training evolutions. Tr. 164–65.

DI Wehrle was a part of the group that served the AIW on Respondent 5195 on October 18, 2011. Tr. 165–66. According to Wehrle, she arrived at Respondent 5195 in support of the AIW at approximately 10:30 a.m., and two hours thereafter, conducted an interview with Marcus Badley, a pharmacy technician who was on duty. Tr. 166–68. At some point during the interview, Badley walked ''in the direction of the drive-through window'' and retrieved a 3½ by 5 inch handwritten piece of paper. Tr. 174–75. The paper had the words ''do not fill'' written across the top, and the names of four doctors written (in different handwriting) below.[33] Tr. 174–75. The four names listed on the document were: (1) Dr. Pizza; (2) Dr. Moyer; (3) Dr. Mammone; and (4) Dr. Jummani. Tr. 174. Mr. Badley stated that the names on the list were doctors that the pharmacy ''look[ed] out for that have been in trouble.'' Tr. 204. DI Wehrle did not learn when the list was created. Tr. 198. Also during the interview Mr. Badley stated that Respondent 5195 only would fill prescriptions in the ''Central Florida area.'' Tr. 175.

DI Wehrle also interviewed five or six customers present at the store at the time of the AIW. Tr. 176. Two of the customers had prescriptions written by Dr. Pizza. Tr. 177–78. One customer had dilated pupils and difficulty concentrating. Tr. 177–78. However, there is no evidence that any of the customers DI Wehrle interviewed had prescriptions filled at Respondent 5195 that day. Tr. 178.

Ten days after the AIW inspection, on October 28, 2011, DI Wehrle interviewed a Respondent 5195 pharmacist named Mark Mascitelli. Tr. 178–80. The interview was conducted at the DEA Office in Orlando, and was attended by DEA GS Ruth Carter, and CVS attorneys John Gilbert, Esq. and Meredith Young, Esq. Tr. 178–79. Pharmacist Mascitelli stated that he had been employed by CVS since of August of 2009, and that he had been employed as a full time employee at Respondent 5195 since May of 2010. Tr. 180.

Pharmacist Mascitelli told DI Wehrle that, although the pharmacy opens at 8:00 a.m., customers ''start showing up early.'' Tr. 180–81. He also told the DEA investigators that ''he could fill oxycodone prescriptions all day long if he had the manpower and the inventory.'' Tr. 181. However, Mascitelli stated that ''whoever opens in the morning * * * has to set limits on how many oxycodone prescriptions are filled for the day due to inventory. Tr. 182. Pharmacist Mascitelli said that Respondent 5195 would not fill prescriptions for Dr. Pizza, Dr. Mammone, Dr. Chambers or Dr. Scolero because of actions taken against the doctors' licenses. Tr. 183. DI Wehrle did not inquire what steps were taken when a prescription from one of these doctors was presented; or when Mascitelli developed his concerns about the physicians. Tr. 199.

Mr. Mascitelli explained that approximately two weeks prior to the serving of the AIW, CVS supervisor Jennifer Lalani told him and Jessica Merrill—the Pharmacist in Charge (''PIC'') at Respondent 5195—that they ''were to identify more filters[34] to put in place for oxycodone prescriptions.'' Tr. 185. In response to this directive, Pharmacist Mascitelli and PIC Merrill, ''decided [to] no longer accept new customers of oxycodone prescriptions * * * that they needed to look for signs of abuse or impairment [and that t]hey needed to do more verifications on the customers.'' Tr. 186. The pharmacy also decided to limit filling prescriptions for only those patients within the Deland to Orlando, Florida, area. Tr. 201.

That same day, DI Wehrle conducted an interview with Marie Morrell, the lead pharmacy technician at Respondent 5195. Tr. 186–87. Like the interview with Pharmacist Mascitelli, GS Carter, and CVS attorneys John Gilbert Esq. and Meredith Young, Esq. were also present during the discussion. Tr. 187. Ms. Morrell testified it was part of her responsibility to receive prescription scrips from Respondent 5195's pharmacy customers. Tr. 187. All Schedule II controlled substance scrips would be taken directly to the pharmacist. Tr. 187–88. If the pharmacist determined that the medication would be dispensed, ''then the customer [was] told * * * that it would be five to six hours before their prescription [was] filled.''[35] Tr. 188. Based ''on inventory and man hours'' limits would be placed on the number of oxycodone prescriptions which could be filled for one day.'' Tr. 188–89. The limit would be satisfied ''on a first-come, first-served basis.'' Tr. 189. According to Morrell, the limit was sometimes reached between 10:00 a.m. and noon; but the limit could be reached as early as 8:30 a.m. (i.e., 30 minutes after the pharmacy opens). Tr. 189. In addition to the foregoing duties, Ms. Morrell also engaged in ''customer verifications.'' Tr. 187–88. In this regard, Morrell related that:

''she normally * * * w[ould] call the doctor's office [and] verif[y] the diagnosis code if there is one on the prescription. If there is not one, she w[ould] get one from the doctor and put it on there. If the customer has seen multiple doctors, she may call [the] other doctors' offices * * * She w[ould also] establish from the doctor how long that person has been a patient of the doctor's.''

Tr. 188. As to the behavior of the customers, Morrell told Wehrle that she looked ''for any signs of rude behavior, rude language, inconsistencies in stories [and] hat and sunglasses.'' Tr. 190.

On November 3, 2011, DI Wehrle interviewed a CVS pharmacist named Randy Dwight. Tr. 190. Mr. Dwight told DI Wehrle that he was a ''floater pharmacist'' for CVS and that he covered twenty stores in two districts. Tr. 191. He worked at Respondent 5195 once, and worked at Respondent 219 ''every other weekend.'' Tr. 191–92. Mr. Dwight explained that these two pharmacies did not fill controlled substances on nights or weekends ''because they cannot contact the doctor's office.'' Tr. 191–92.

The testimony presented by DI Wehrle was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government also presented the testimony of GS Ruth Carter. Tr. 213–14. GS Carter, a 23-year veteran of DEA, currently serves as the Group Supervisor for DEA's Seattle Field Division. Tr. 214.

Carter testified that she became involved with the investigation into the Respondent Pharmacies in October of 2011, when she was assigned as the case agent in a case involving Cardinal Health, a distributor of controlled substances to CVS. Tr. 216. In connection with the Cardinal Health investigation, GS Carter reviewed the

[33] DI Wehrle wrote the names of the doctors on the ''dot not fill'' list down in her notes; but she did not take the list itself. Tr. 196–97.

[34] DI Wehrle testified that she understood ''filters'' to mean procedures ''[t]o catch bad stuff, bad things going through the pharmacy.'' Tr. 186.

[35] If the prescription was for a Schedule III through Schedule V drug, then Ms. Morrell would prepare the bottles and labels for the prescription to be filled. Tr. 187–88.

controlled substance ordering data for CVS stores supplied by Cardinal. Tr. 217. Carter testified that, while reviewing the data, she became ''very concern[ed]'' about the quantity of oxycodone ordered by the Respondent Pharmacies. Tr. 217. It was based on Carter's discomfiture that DEA prepared administrative inspection warrants for the Respondent Pharmacies. Tr. 217. The AIWs were executed at both Respondent pharmacies on October 18, 2011, and GS Carter participated on scene at Respondent 5195. Tr. 218.

During the execution of the AIW at Respondent 5195, GS Carter interviewed employees and examined records. Tr. 218. GS Carter testified that she arrived at Respondent 5195 sometime between 10:00 a.m. and 10:30 a.m. Tr. 219. Upon arriving at Respondent 5195, a special agent presented the AIW to PIC Jessica Merrill. Tr. 219. While the AIW was presented to PIC Merill, GS Carter observed two individuals sitting in the waiting area next to the pharmacy counter. Tr. 219. One of the individuals volunteered that he had driven ''far'' to get his prescription for oxycodone filled, but that he had been told by pharmacy technician Arlene Picccerilli that the store was out of stock. Tr. 220–21.

GS Carter then interviewed Ms. Piccerilli, who said that she had been employed at Respondent 5195 for approximately thirty months. Tr. 222. She also admitted that the pharmacy was not out of oxycodone. Tr. 224–25. When GS Carter inquired why Ms. Piccerrilli had just told a customer that the store was out of oxycodone,[36] Piccerilli replied that ''the pharmacist on duty sets a limit of how many oxycodone prescriptions can be filled each day.'' Tr. 223. On October 18, 2011, Ms. Piccerilli had been ''told how many prescriptions she could accept to be filled that day for the oxycodone and the other prescriptions. The combination [of] the [a]lprazolam and the Soma, those prescriptions.'' Tr. 223–24. Ms. Piccerilli explained to Carter that, on that day, the limit had been reached by the time the customers in the waiting area had presented their prescriptions. Tr. 224.

GS Carter also asked Ms. Piccerilli to show her the prescriptions that had been accepted for filling for that day. Tr. 226. When Ms. Piccerilli showed GS Carter the prescriptions, GS Carter asked her ''What is your opinion as a pharmacy technician of these prescriptions? They're all for the same drugs, pretty much the same amounts.'' Tr. 226. Ms. Piccerilli responded that ''as a pharmacy, we cannot judge whether a prescription is valid. That's up for the doctor to decide.'' Tr. 226. In response to a question about whether the pharmacy filled prescriptions for out-of-state customers, Piccerilli stated that when she had started at Respondent 5195 they had ''accepted prescriptions from other states, but that sometime in the last year or so, the policy had changed, and now they only accepted prescriptions for oxycodone for local customers and local doctors.'' Tr. 226. Ms. Piccerilli explained that ''local'' meant ''somewhere around Daytona Beach or Deltona Beach to Orlando.'' Tr. 226–27. It was GS Carter's recollection that Ms. Piccerilli was cooperative throughout their encounter. Tr. 225.

Approximately an hour after her conversation with Ms. Piccerrili, GS Carter conversed with PIC Merrill behind the shelves of the pharmacy. Tr. 227. During this conversation, DI Wehrle and another DI were ''in and out.'' Tr. 227–28. It was Carter's impression that Merrill was cooperative throughout the conversation. Tr. 228. In her conversation with GS Carter, PIC Merrill made the following representations:

(1) She was hired by CVS in 2009, and a few months later she was promoted to the Respondent 5195 PIC position. Tr. 228.

(2) She could fill ''these oxycodone prescriptions * * * all day long, but that rather than doing that,'' she, or the pharmacist on duty, sets the limit. The daily limit is determined based on ''the inventory that they had on hand that morning, and also the amount of staff that they had on hand because * * * it was very time consuming * * * to call the doctors' offices and verify each prescription.'' Tr. 229–30. If a prescription could not be verified, it would not be filled. Tr. 279.

(3) When the limit fixed by the PIC was reached, subsequent customers were told that the pharmacy is out of stock.

(4) The customers were aware that the limit system is first-come-first-served, so customers would start to ''stagger'' in at 8:02 a.m. Tr. 230–231.

(5) If a prescription for oxycodone, alprazolam and a muscle relaxant was accepted for filling, the customer would be told to return in five hours. Tr. 230, 232.

(6) When setting the daily limit of oxycodone prescriptions, she would make sure to keep some oxycodone on hand to fill prescriptions for her ''real pain patients.'' Tr. 231, 232. She would dispense the prescriptions to customers she classified as other than ''real pain patients'' because ''if she or her staff was able to confirm that a prescription had been issued by a physician who was licensed by the state, and had a DEA license, then as a pharmacy, they should be able to trust that prescription * * * is legitimate.'' Tr. 234.

(7) Before filling prescriptions for oxycodone, the employees at Respondent 5195 would conduct ''very stringent due diligence.'' The steps taken to verify a prescription were: (i) obtain a Florida ID or a Florida driver's license and record the number on the front of the prescription; (ii) call the prescribing physician to confirm the physician had written the prescription, whether any additional prescriptions had been issued and whether a urinalysis test had been performed; (iii) ''sometimes'' call other pharmacies in the area to determine whether the patient was engaging in doctor shopping; (iv) ''sometimes'' call a prior practitioner, if the patient's profile[37] showed that a prior practitioner had prescribed ''anything'' to the patient; and (v) confirm the diagnosis code, if one was absent; (vi) ''sometimes'' check with the state licensing boards regarding the status of the prescribing physician's license; and (vii) use their computer system to verify the prescriber's DEA registration. Tr. 235–36.

When looking through the prescriptions which the store had accepted for filling, GS Carter noticed that ''generally'' the prescriptions accepted for filling would be an oxycodone 30 mg prescription for 180 tablets, paired with a prescription for alprazolam and a prescription for Ibuprofen or carisoprodol.[38] Tr. 237–38. GS Carter also observed that for a particular physician, the prescriptions ''appeared to be all for the same quantity and the same combination of drugs.'' Tr. 239. In this regard, PIC Merrill admitted to GS Carter that she saw the patterns of prescribing in the three drugs, that she noticed that ''a lot'' of the customers with the cocktail were paying for their prescriptions with cash[39] and that ''most of them'' were unemployed. Tr. 238. GS Carter testified that when she suggested to Merrill that the customers may be selling their pills, Merrill simply replied ''I know.'' Tr. 238.

GS Carter also observed that ''some'' of the prescriptions which had been accepted for filling were for customers with IDs from other states but with prescriptions doctors with offices in Florida, far away from Sanford. Tr. 240. Carter recalled that this struck her as odd because ''my experience has been that normally a patient will either fill a prescription by the doctor's office or by their residence. They don't usually stop somewhere in between.'' Tr. 240. PIC Merrill had no explanation for the distances traveled by the patients to fill their prescriptions. Tr. 240.

Carter testified that following her interactions with PIC Merrill and the other members of the Respondent 5195 pharmacy team, she concluded that

> the general attitude was that [the Respondent 5195 pharmacy staff are] not going to question whether the prescription is valid. If the doctor says it's valid, and they do the other verifications, then they fill it. It doesn't matter if they all come in from the same doctor, the same way, or if they suspect that the prescription is not valid. They are going to fill it because the doctor said it was valid.

Tr. 299–300.

As GS Carter was preparing to leave the store, PIC Merrill asked her whether she should fill the prescriptions which had already been accepted that day. Tr. 242–43. When GS Carter asked Merrill whether she felt that the scrips should be filled, Merrill

[36] GS Carter knew that this was untrue because she had observed DEA agents counting oxycodone tablets at the time of the AIW and knew that the store was not out of stock. Tr. 221–22.

[37] GS Carter explained that ''at pharmacies that * * * use[] electronic systems, there usually is a profile [that] will have the patient name and address, and it will show the prior prescriptions that they have had filled at that pharmacy. And in the case of chains, most of them show the prescriptions filled at all the other chains as well.'' Tr. 237.

[38] ''The generic name of a medicinal substance used as a muscle relaxant.'' 1–C Attorneys' Dictionary of Medicine C–20783.

[39] GS Carter testified that, while cash would be paid at the time of pickup, and thus after a determination of validity had been made, she felt that CVS's computer system would have notified the pharmacist that previous prescriptions had been paid for with cash. Tr. 303–04.

responded that she felt she should fill them because they had been filled before. Tr. 242–43. When GS Carter pressed PIC Merrill on this issue, Ms. Lalani, who was also present, stated that none of the prescriptions would be filled. Tr. 243.

On October 28, 2011, GS Carter interviewed Paras Priyadarshi—the PIC at Respondent 219—at the DEA facility in Westland, Florida. Tr. 244–45. Also present were GS Carter, DI Wehrle, John Gilbert, Esq., and Meredith Young, Esq. Tr. 244–45. It was Carter's impression that PIC Priyadarshi appeared cooperative during the interview. Tr. 245. During their conversation, PIC Priyadarshi made the following statements:

(1) He had been employed by CVS for approximately thirteen years, and had been the PIC at Respondent 219 for approximately five years. Tr. 246.

(2) For oxycodone, alprazolam, carisoprodol prescriptions,[40] Respondent 219 would take the following verification steps: (i) examine the prescriptions for alterations; (ii) if there was no diagnosis code on a prescription, then the store would call the physician to verify the prescription. Tr. 246.

(3) If a prescription was presented with a diagnosis code by a patient who had filled at Respondent 219 before, then the store would not call the physician. Tr. 246. Similarly, if a person came in with a patient who had filled at Respondent 219 before, he would not feel the need to verify the prescription. Tr. 251.

(4) Sometime in the previous year, CVS corporate had put out guidelines that the stores should only fill prescriptions for ''local'' doctors and customers, and that the stores should obtain ID for all controlled substance prescriptions. Tr. 246–47. In response to this directive, Respondent 219 had stopped filling out-of-state prescriptions sometimes toward the end of 2010. Tr. 270.

(5) He found nothing odd about the fact that Respondent 219 was filling a like combination of three controlled substances (oxycodone, alprazolam, and carisoprodol), for a high number of prescribing physicians. Tr. 247–48.

(6) For Schedule II controlled substances Respondent 219 dispensed more oxycodone than any other controlled substance. For Schedule III controlled substances Respondent 219 dispensed more hydrocodone than any other substance. For Schedule IVs, Respondent 219 dispensed more alprazolam than any other controlled substance. And for non-controlled substances, Respondent 219 dispensed more Soma or carisoprodol than any other substance. Tr. 248–49.

(7) The oxycodone prescriptions would only be filled by Respondent 219 during the day shift on weekdays. Tr. 249. This was so the store could verify the prescriptions. Tr. 277.

(8) He found nothing odd about a high number of like-ailment diagnosis codes[41] emanating from individual prescribers. Tr. 249–50.

(9) Customers would ask for ''the Ms'' or ''the blues,'' which were slang terms for the Mallinckrodt brand of oxycodone 30 mg tablets; but that he would not find such requests suspicious. Tr. 250, 256, 264.

(10) If a customer asked for a particular brand name, he would fill the prescription with that brand name if the pharmacy had the brand in stock. Tr. 263–64.

(11) Respondent 219 would see ''a lot'' of oxycodone prescriptions from Drs. Zelkowitz, Mammone, Salinas, Hannah and Pizza. Tr. 251.

(12) He would not fill prescriptions written by Dr. Pyko or Dr. Chambers because ''they had prior action taken against them.'' Tr. 252, 933.

That same day (October 28, 2011), GS Carter also conducted an interview with Respondent 219 Pharmacist Susan Masso. Tr. 253. As with the interview with Mr. Priyadarshi, the interview with Ms. Masso was conducted at the Westland field office, with DI Wehrle, attorneys Gilbert, and Young also present. Tr. 253. During the interview Ms. Masso made the following representations:

(1) She had been employed by Respondent 219 since June of 2011, and that for the year before that she had worked as a floater pharmacist for CVS stores in Florida. Tr. 253. Before moving to Florida she had worked as a pharmacist in New York. Tr. 253–54.

(2) Respondent 219 would verify oxycodone prescriptions by calling the physician's office and verifying the diagnosis codes. Tr. 254.

(3) She did not know why a customer who lived in one location, would travel to a second location to see a physician, and then a third location to fill the prescription. Tr. 254.

(4) Customers would request ''blues.'' Tr. 254.

(5) She understood that oxycodone 30 mg was for pain, oxycodone 15 mg was for ''breakthrough'' pain, alprazolam was for anxiety, and Soma was for muscle aches. Tr. 255.

(6) She would see oxycodone prescriptions from Dr. Pizza and Dr. Mammone. Tr. 257.

The testimony presented by GS Carter was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government also presented the testimony of DI Gayle Lane. Tr. 108–09. GS Lane testified that she has been with DEA for thirty-five years, and currently serves as a Group Supervisor at the Miami-Weston field division. Tr. 108–09.

GS Lane testified about two meetings she attended with CVS officials. She testified that she was present at the December 2010 CVS Meeting with DI Langston and CVS representative. Tr. 110. Lane also recalled that investigators from the Florida Department of Health were also present, and that ''there was a discussion about the oxycodone situation in south Florida, especially in light of the new Florida state law that doctors were limited in their dispensing.'' Tr. 110–11.[42]

On August 12, 2011, GS Lane organized a second meeting between DEA and CVS officials (August 2011 CVS Meeting). Tr. 111–12. GS Lane explained that in 2005 the Weston DEA Office ''decided to interview all new pharmacy applicants and also treat all new pharmacy applications the same, and alert the chains. So when there was a new pharmacy opening up, I would contact them and they would come in for a discussion of the situation.'' Tr. 111. The August 2011 CVS Meeting was conducted in response to a CVS application for a new pharmacy in Hollywood, Florida. Tr. 133. The meeting was attended by DI Lenny Levin and twenty-four CVS pharmacy supervisors, including Jennifer Lalani.[43] Tr. 112–13. The purpose of the meeting was to share indicators of diversion (i.e., red flags) ''to help [the stores] make decisions about whether a prescription was legitimate or not, and [to address] the continued high purchases of [the Respondent Pharmacies].'' Tr. 139.

Prior to the meeting, GS Lane created an outline of discussion points.[44] Tr. 113. During the meeting, she told the CVS representatives that ''in the environment that we're in it's not enough to call the doctor to verify and also to get a picture ID.'' Tr. 113. GS Lane also ''cautioned * * * to be leery of Florida ID cards because they are fairly easy to get.'' Tr. 113. As to the red flags[45] of diversion, GS Lane mentioned: (1) ''doctors * * * writing * * * the same cocktail of drugs which was oxycodone 30 milligrams, oxycodone 15 [mg], generic Xanax 2 [mg], Soma, and * * * lately * * * a noncontrolled substance like flexural,'' Tr. 114, 116.; (2) doctors without a specialty in pain management writing ''large quantities'' of prescriptions, Tr. 115; (3) doctors giving the same diagnosis code, ''usually L–4, L–5 lower back pain,'' Tr. 115; (4) patients between the ages of 25 and 40 with cash, Tr. 117; and (5) evidence of doctor shopping,[46] Tr. 118. GS Lane also identified ''sponsor'' arrangements in which ''people from * * * mostly * * * the mountain states * * * come down in buses and vans * * * and drive to the pharmacy'' to fill oxycodone prescriptions. Tr. 117–18. Under this arrangement, the driver of the van would be

[40] DEA inquired about these three drugs ''[b]ecause in looking at the prescribing records that we had obtained from CVS, we * * * observe[d] that the CVS 219 was basically filling prescriptions for the same type of cocktail prescribing pattern that CVS 5195 had been dispensing.'' Tr. 247.

[41] DEA had observed ''that a lot of the prescriptions [had] the same diagnosis code.'' GS Carter specifically mentioned the ''L4, L5'' code. Tr. 250.

[42] The substance of this meeting has been set forth at length above.

[43] Ms. Lalani attended the meeting even though she was not required to because the Hollywood pharmacy was not within her area of supervision. Tr. 149–50.

[44] GS Lane did not provide a copy of the talking points to the CVS Representatives. Tr. 160.

[45] GS Lane's outline referred to ''suspicious activity.'' However, she testified that she would have used the term ''red flag'' during the meeting. Tr. 137.

[46] GS Lane explained ''doctor shopping'' as customers ''spend[ing] their entire day trying to find doctors to write [oxycodone] prescriptions.'' Tr. 118. The customers will collect multiple prescriptions at once, and then fill the prescriptions at various pharmacies. Tr. 138. During the August 2011CVS Meeting, GS Lane told the CVS representatives that the State of Florida planned to implement a prescription drug monitoring program to combat doctor shopping. Tr. 118.

the ''sponsor.'' Tr. 118. The sponsor would normally be paid in drugs.[47] Tr. 118.

A summary Lane prepared at the request of the DEA Chief Counsel's Office sometime after the October 2011 meeting did not contain references to the red flags that she described in her testimony. Tr. 154–156; Resp'ts Ex. 91. Also during her testimony, GS Lane explained that the red flags discussed at the meeting were ''just a snapshot of what [was] going on at that time.'' Tr. 161. By Lane's account, it was her intention to provide red flag guidance to CVS ''in general terms.'' Tr. 161. No written list of red flags was provided to CVS by Lane at the meeting. *Id.*

Distance traveled by the customer was also identified by GS Lane as a potential red flag of diversion. Tr. 119. In particular, Lane told the CVS officials that either the doctor or the patient should be ''nearby'' the pharmacy. Tr. 119. GS Lane suggested that, if a pharmacist has a question regarding the distance traveled by a customer, the pharmacist should ''ask why [the patient is] coming to my pharmacy.'' Tr. 119. GS Lane also demonstrated how to use the Web sites of the DEA and the Florida Department of Health. Tr. 119. In this regard, she showed the CVS representatives the proper login procedures[48] for the DEA Web site, as well as the manner in which to check a doctor's DEA registration. Tr. 121. GS Lane testified that if a registration was invalid, the DEA Web site would show the registration to be ''expired.'' Tr. 122–23. ''If it's a valid DEA number, [the Web site] shows the expiration date, the DEA registered location, and the schedules.'' Tr. 124. She also informed the CVS representatives that the Web site was available free of charge and provided real time data.[49] Tr. 120.

When demonstrating the Florida Department of Health Web site, GS Lane ''explained * * * you can click on [the] link to discipline and get all the details of what happened.'' Tr. 122. GS Lane testified that she believed the Department of Health Web site was updated in real time. Tr. 122.

At the end of the August 12, 2011, meeting, GS Lane gave the CVS representatives a list of the top thirty-four CVS pharmacies that ordered oxycodone in 2010. Tr. 125–26. On the list, GS Lane specifically noted that Respondents 219 and 5195 ranked approximately 23rd and 37th, respectively, in the nation for oxycodone ordering in 2010. Tr. 127. GS Lane inquired what steps had been taken in the wake of the December meeting to address the concerns raised in that meeting regarding Respondents 219 and 5195. Tr. 128. However, since the stores were not within Lane's area of jurisdiction, she ''just asked some questions at the meeting, and that was it.'' Tr. 128. At the close of the October 2011 meeting, Ms. Lalani stated that she had looked into the stores and discovered that ''one was [a] 24 hour store, and they were both very busy stores off of the I–4 corridor.'' Tr. 130.

The testimony presented by GS Lane was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

The Government's Expert

The Government presented the testimony of Professor Paul L. Doering, a retired professor of Pharmacy[50] at the University of Florida's College of Pharmacy, who was accepted as an expert in the practice of pharmacy and the filling and dispensing of controlled substances, as it relates to the practice of pharmacy. Tr. 685. Over the course of his thirty-five-year career, Professor Doering has published many scholarly articles, and although his experience has been largely invested in research and academia, he also testified that he is a certified consulting pharmacist,[51] has served as co-director of the Florida Drug Information and Pharmacy Resource Center, and that he had some limited, part-time experience as a practicing pharmacist while in graduate school at the nascent stages of his career.[52] Tr. 667, 673, 678, 682. He testified that he has presented expert testimony approximately seventy-five times; having been presented as a witness for the Government on every occasion. Tr. 794.

Professor Doering testified that, when presented with a prescription for a medication, a pharmacist's

> [p]rofessional responsibilities include reviewing that prescription to see whether or not the doses are appropriate for that patient, looking at other medications that individual may be taking to see whether there's interactions. If there are problems, phoning the prescriber or other individual to resolve those problems, [] in a nutshell, certifying that that prescription is ready for transfer from the possession of the pharmacist to the ultimate end user [and counseling] the ultimate end user . . . about any information that might be necessary for the safe and effective use of that drug.

Tr. 690. Doering further explained that controlled substances fall within a category of what he terms ''high alert drugs,'' where there is an enhanced potential for problems stemming from incorrect use. Tr. 691. Special care, in Doering's view, must be exercised by a pharmacist dispensing high alert drugs, and particular scrutiny must by leveled at opioids, benzodiazepines, and barbiturates. Tr. 690–92. Although Professor Doering consistently presented his testimony in terms of how *he* would exercise *his* professional judgment, he made it clear that in his opinion, he was presenting the standard for pharmacy registrants in Florida, in his words, ''[i]t's what they're taught in school.'' Tr. 758.

Professor Doering testified that there are there are circumstances surrounding the presentation of a prescription to a pharmacist, i.e., ''red flags,'' that can create an obligation on the part of a reasonable pharmacist to decline to fill, or to take other action in the exercise of the pharmacist's professional judgment. Tr. 693–97. According to Professor Doering, red flags create in a pharmacist the obligation to assure him or herself that the presented prescription may be filled properly. Tr. 843. In Doering's view, the steps taken to address a red flag necessarily are dependent upon the nature of the concern raised by that flag, and are not amenable to the mechanical application of a fixed checklist. Tr. 697–98. For example, requiring identification from the presenter of the scrip can be utilized to ensure that the presenter of the scrip is who he or she claims to be, and can also facilitate the re-contacting of the person if necessary. *Id.* In a similar fashion, contacting the prescriber who drafted the scrip can be helpful in resolving some red flags, but where the red flag (or flags) suggests that the prescriber is ''working collaboratively with patients to divert drugs,'' contacting that physician provides no real assurance of the *bona fides* of the prescription. Tr. 699. Professor Doering indicated that a practice has developed among pharmacists to contact the prescriber in an attempt by some in the profession to create a form of contrived, unfounded absolution for inadequate controlled substance dispensing. In Doering's words, ''over the years there has been a perceived value to the pharmacist that [']it's out of my hands because I called and I got some voice on the other end that said yeah, that's a good scrip.['] But it's my firm opinion * * * that's inadequate to verify the authenticity or appropriateness of that prescription.'' Tr. 699–701. Professor Doering acknowledged that Section 64B of the Florida Administrative Code contains some applicable standards, but testified that this provision is not an exhaustive compilation, and that ''[t]he standards of care . . . are not always determined by law, by statute, by rule. They're determined, in fact, by what pharmacists do under like, or similar circumstances.'' Tr. 921.

Doering also testified that in exercising independent dispensing judgment, the pharmacist will consider and compare the address of the patient on the scrip and the address of the prescriber who drafted it. Tr. 702.

The method of payment is also, in Doering's opinion, a potential red flag of diversion. According to Doering, ''typically, people who may be diverting or otherwise misusing their drugs will pay cash.'' Tr. 703. However, Professor Doering conceded that standing alone, the fact that a controlled substance prescription was purchased in cash would have ''very little'' impact on the decision by a reasonable pharmacist to dispense or decline to dispense. Tr. 705.

Another red flag proposed by Professor Doering is the observation, by a pharmacist, that a particular prescriber is writing ''in a factory-like manner, prescriptions for the same drugs, the same quantities . . . without any kind of variability or change considering the different patients that come into that pharmacy.'' Tr. 708.

[47] GS Lane was not aware of any instances where either of the Respondent Pharmacies filled prescriptions for these ''sponsor'' groups. Tr. 139.

[48] To log into the DEA Web site, a registrant needs their registration and tax ID information associated with their DEA registration. Tr. 123.

[49] Though GS Lane recommended that CVS use the DEA Web site, she conceded that it was ''not uncommon'' for large chains to use third-party systems for checking registrations. Tr. 147.

[50] Professor Doering testified that he is a ''distinguished service professor emeritus.'' Tr. 662.

[51] Professor Doering testified that he has served as a consultant pharmacist at a penal institution. Tr. 684.

[52] Professor Doering's CV was received into the record without objection. Gov't Ex. 6; Tr. 666.

Over the course of his testimony, Professor Doering was asked about individual and groups of dispensing events presented on spreadsheets [53] that were derived from dispensing data furnished to the DEA by the Respondents. For example, Professor Doering discussed eight controlled substance dispensing events that took place on August 16, 2010, at Respondent 219. Gov't Ex. 57 at 33; Tr. 710–23. Doering testified that the data reflected numerous shared red flags for the eight events, to include that cash was the method of payment, like varieties and strengths of medications were dispensed for all but one patient, all medications were dispensed to patients where an out-of-Florida address was provided, and the common prescriber for all eight patients had a listed practice address in Fort Lauderdale, Florida. Tr. 722–23. In Professor Doering's expert opinion, the combination of these red flags in these prescriptions would not be resolvable to a point where a reasonable pharmacist, exercising his or her corresponding responsibility, could dispense the prescribed controlled substances. *Id.* In explaining his conclusion, Doering reiterated his misgivings regarding the efficacy of a pharmacist limiting the inquiry to checking patient identification and telephonic communication with the prescriber (common to all eight patients), who, by his estimation, in view of the nature of the transactions, were likely complicit in diversion. *Id.*

Professor Doering made like observations and a like conclusion regarding the resolvability of four similar controlled substance dispensing events which occurred on September 24, 2010, at Respondent 219. Gov't Ex. 57 at 33; Tr. 723–25. Doering concluded that the confluence of these out-of-Florida patients on a single day receiving the same medications in the same quantities from the same in-Florida prescriber, was ''highly, highly unlikely.'' Tr. 725. Based on this conclusion, Professor Doering testified that, he is ''simply not going to fill those prescriptions,'' and that nothing could be presented in a hard copy of the prescription scrips that could alter his opinion on the matter with respect to either the August 16 or September 24 dispensing events. Tr. 739–41.

According to Professor Doering, four dispensing events at Respondent 219 which occurred between August 29–30, 2010, presented similarly unresolvable red flags. Gov't Ex. 57 at 15; Tr. 752–58. Doering testified that ''it's the conflagration or a combination of things that suggest to me that these prescriptions were not issued in the usual course of medical practice.'' Tr. 757–58. Similar testimony was elicited regarding four controlled dispensing events regarding the same Respondent (219) on August 19, 2010. Gov't Ex. 57 at 38; Tr. 759–64. Again, these red flags, in Doering's view, were not resolvable when examined collectively. Tr. 763–64.

Additional dispensing events which occurred at Respondent 219 on August 16, 2010, were also addressed by Professor Doering. Tr. 917–20; Gov't Ex 57 at 33. Of eight oxycodone 30 mg prescriptions dispensed that date issued by a particular Fort Lauderdale physician, only two had patient addresses in Florida. Tr. 919–20. Doering testified that a reasonable and prudent pharmacist would need to resolve this anomaly prior to filling the prescriptions. Tr. 920.

In similar fashion, Professor Doering addressed four controlled substance dispensing events that occurred at Respondent 5195 on August 26, 2010. Gov't Ex. 57 at 29; Tr. 741–51. Doering found unresolvable red flags based upon the combination of the cash-discount [54] method of payments, the out-of-Florida addresses of the presenting patients, the distance between the patients' home addresses and the Pompano Beach, Florida prescriber, the ''high alert'' nature of the dispensed controlled substances, and the close sequential nature of the transaction numbers, which suggested to him that the medications were dispensed in close temporal proximity.[55] Tr. 751. Like red flags, which according to Professor Doering, presented unresolvable impediments to dispensing within the standard, were identified regarding six (6) controlled-substance dispensing events which occurred at Respondent 5195 on August 11, 2010, regarding prescriptions emanating from the same West Palm Beach, Florida prescriber. Gov't Ex. 57 at 35; Tr. 764–76. Doering testified that the West Palm Beach provider is ''roughly'' 200 miles from Respondent 5195. Tr. 915. Among that group, Professor Doering testified that two of the patients, who had the same last name, lived in the same out-of-Florida address,[56] and received the same quantity of the same controlled substances from the same Pompano Beach physician, were sufficiently questionable that he characterized the confluence of red flags as ''an attention getter.'' Tr. 776. Doering characterized the aggregate of the red flags present as not amenable to sufficient resolution to warrant dispensing. Tr. 916.

Professor Doering also highlighted prescribing red flags relative to medications dispensed to four patients on prescriptions issued by one Longwood, Florida physician on December 23, 2010. On that date, at each of the two Respondent pharmacies, two patients were provided identical quantities of oxycodone 30 mg, oxycodone 15 mg, and alprazolam 2 mg. Stated differently, all four patients received exactly the same quantities of the same medications in the same strength. Gov't Ex. 55 at 15, 47 (Respondent 219) and 62, 74 (Respondent 5195); Tr. 784–86. Professor Doering explained the red flags he identified as follows:

> Well, from a clinical pharmacist perspective that combination of drugs is what I would call a red flag because alprazolam and oxycodone are commonly diverted to nonmedical use. It also, from my perspective, makes no sense at all that there would be two prescriptions for oxycodone, one in a 15 milligram strength and the other in a 30 milligram. Now one might speculate that the reason for that is that pain can vary throughout the day and it may be that the individual is suggested to take the 15 [mg] when the pain is not so great and the 30 [mg] when it is so great. But 30 milligram tablets are scored right down the middle, and it's quite easy to break them in half. It just doesn't make any sense to me why there would be two prescriptions.

Tr. 784. According to Doering, pill cutters are now commonly sold at pharmacies. Tr. 786–87. Professor Doering testified that the similarity in quantity and combination of medications ''would suggest that the one size fits all concept was in the mind of [the prescriber] when he was prescribing. It's just highly suspicious when you see the same drugs, the same quantities, the same patterns over and over again.'' Tr. 784–85. Professor Doering referred to this phenomenon as ''pattern prescribing,'' which he defined as the presence of an ''unwavering combination of the same drugs in the same strengths in the same quantities across numerous patients.'' Tr. 923. Doering classified pattern prescribing as an unresolvable red flag. *Id.* According to Professor Doering, a pharmacist would not need a print-out for such patterns to become apparent. Tr. 927. Regarding the simultaneous prescribing of two strengths of oxycodone (30 mg and 15 mg), Doering explained:

> [T]he sale of drugs on the street doesn't follow supply-side economics. It's sort of get what you can when you can. It's quite common for people to obtain as much of the types of drugs that they might intend to use themselves or sell to other people[]. It just doesn't make sense to me, these combinations.

Tr. 890.

Professor Doering was also asked to evaluate the same three controlled substance

[53] On January 9, 2012, Professor Doering received the spreadsheets from the DEA Investigator Hamilton. Tr. 799. At this time, Investigator Hamilton explained to Professor Doering how to access each file and what the data in the file represented. Tr. 800. Professor Doering spent approximately twelve to fourteen hours with the spreadsheets. Tr. 812. One spreadsheet, Government Exhibit 22, was sent to Professor Doering with the highlights reflected in the exhibit. Tr. 809–10.

[54] As discussed, *infra,* Joseph Abbott, CVS Vice President of Pharmacy Operations, testified that ''cash discount'' on the CVS-furnished spreadsheets denotes that, although, like the ''cash'' designation, full payment was made at the time of the transaction, some manner of group discount (e.g., AARP) was utilized at the time of payment and these transactions may include both cash and credit card payments. Tr. 1234–35. It seems clear from the record that these are transactions where the customers did *not* have the benefit of health insurance assistance. Professor Doering conceded that if ''cash discount'' merely denoted that the patients utilized an AAA discount at the time of purchase that this aspect would lose its potency as a red flag. Tr. 847. However, according to Professor Doering, even if the ''cash discount'' red flag aspect were eliminated from the equation, the remaining red flags are still unresolvable. Tr. 924–25.

[55] Professor Doering did concede, however, that he was not aware at what point a prescription number is assigned to a dispensing event at CVS stores, Tr. 832–33, 876, but testified that he ''would bet a dime to a Dunkin' Donut that [the events with close prescription numbers] were presented in proximity to one another * * *.'' *Id.* at 926–27.

[56] Professor Doering testified that the single in-Florida oxycodone dispensing event entry on that day reflected a patient address in Pompano Beach, Florida, over 200 miles from Respondent 5195. Tr. 915–16.

medications (oxycodone, oxycodone, and alprazolam) that were dispensed in the same quantities (30 mg, 15, mg, and 2 mg) to four out-of-area patients on January 6, 2011 at Respondent 219. Tr. 787–792; Gov't Ex. 55 at 13, 22, 31, 51. Doering provided the following evaluation of the red flags these dispensing events presented to him:

Well, in several instances here there is a great distance between the prescriber and the patient, and the pharmacy is sort of in what I would call an illogical place. I don't think it's a secret [that] there are CVS/Pharmacies all over this nation, and one of the things I did in analyzing this was to look using Google Maps where these people lived, where the doctors were, and where the pharmacies are. It just didn't make sense to me. People are traveling all over creation with gas at nearly $4 a gallon to get a prescription filled in a place that's not near their home [and] it suggests to me that people are driving to these specific pharmacies because they know that they can get these prescriptions filled.

Tr. 791–92. Doering explained that a pharmacist examines multiple red flags collectively,[57] and testified that, in his opinion, contacting the prescribing physician and/or obtaining a diagnosis code would not resolve these red flags to a degree where the medications should have been dispensed. Tr. 792–93. Doering agreed that he did not know what measures, if any, the Respondents' pharmacists took to resolve any conflicts, or whether a patient history screen was consulted prior to the dispensing event. Tr. 868, 873. When pressed on whether the distance red flags were potentially explainable under various hypothetical scenarios involving vacation and travel, Doering had this to say:

The kinds of medications that we're talking about here are for chronic health problems and not acute health problems. So, it would be unlikely that someone comes to Florida on vacation, breaks a leg, and has to get oxycodone in these quantities and in these strengths. So it just doesn't add up.

Tr. 854.

With regard to the resolution of red flags, Professor Doering testified that ''it's customary that pharmacists make a notation'' when resolving red flags. Tr. 773. However, Doering allowed that ''in today's computer age I do not know whether CVS' system allows for memorialization of that type of thing, but historically it's been written by hand, usually on the back of the prescription.'' Tr. 773.

The Respondents contend that Professor Doering's expert testimony should be excluded or, in the alternative, given little or no weight. In support of these arguments, the Respondents contend that Professor Doering's opinions are not based on a reliable methodology, as defined by *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579, 592–93 (1993), and are the product of bias. Resp'ts Brief, at 92–96.

As an initial matter, Courts of Appeals are split on the application of *Daubert* to administrative proceedings such as these. The Third and Ninth Circuit Court of Appeals have held that, insofar as *Daubert* ''rests on an interpretation of Federal Rule of Evidence 702,'' where an agency has not adopted the Federal Rules of Evidence, the rules of *Daubert* will not apply. *See Bayliss v. Barnhart,* 427 F.3d 1211, 1218 n.4 (9th Cir. 2005); *see also National Taxpayers Union v. U.S. Social Sec. Admin.,* 302 Fed. Appx. 115, 121 (3rd Cir. 2008). In contrast, the Seventh and Federal Circuits have applied variations of the *Daubert* inquiry to administrative hearings. *See Pasha v. Gonzales,* 433 F.3d 530, 535 (7th Cir. 2005) (applying ''spirit of *Daubert''* to administrative hearing) ; *see also Libas, Ltd. V. U.S.,* 193 F.3d 1361, 1366 (Fed. Cir. 1999) (*Daubert* factors should be used to determine the reliability and proper weight to be assigned to expert testimony at administrative hearings.).

While the Federal Rules of Evidence ''do not apply directly to these proceedings'' they ''may be used for guidance where they do not conflict with agency regulations.'' *Rosalind A. Cropper, M.D.,* 66 FR 41040, 41041 (2001) (citing *Sinatra v. Heckler,* 566 F.Supp. 1354, 1358 (E.D.N.Y. 1983)). In this vein, the Agency has held that unreliable expert testimony cannot constitute substantial evidence. *Hilmes Distributing, Inc.,* 75 FR 49951, 49954 (2010). Because the reliability of expert testimony is a relevant consideration under Agency precedent, *id.,* and because the *Daubert* test is used to determine the reliability of expert testimony, the *Daubert* test provides appropriate guidance for evaluating the reliability of Professor Doering's testimony. *Id.*

Under *Daubert,* ''expert testimony is admissible if (1) the expert is qualified to testify competently, (2) the expert has used sufficiently reliable methodology in reaching a conclusion, and (3) the testimony will assist the trier of fact.'' *Toole v. Baxter Healthcare Corp.,* 235 F.3d 1307, 1312 (11th Cir. 2000). The first and third prongs of the test are not at issue here: Professor Doering was correctly received as an expert without objection at the hearing, and his testimony addresses the heart of what must be determined in this recommended decision. With regard to the reliability prong, the Supreme Court has provided a list of non-exhaustive factors which a tribunal may consider when evaluating an expert's methodology. *Daubert,* 509 U.S. at 593–94. However, ''district courts need not adhere to those enumerated factors, as the inquiry is a flexible one.'' *Surles ex rel. Johnson v. Greyhound Lines, Inc.,* 474 F.3d 288, 295 (6th Cir. 2007) (internal punctuation omitted). Indeed, ''where non-scientific expert testimony is involved the *Daubert* factors may be pertinent *or the relevant reliability concerns may focus upon personal knowledge or experience.'' Id.* (internal punctuation omitted) (emphasis supplied).

Here, Professor Doering's testimony concerned the application of the standard of care regarding the filling of controlled substance prescriptions in the face of red flags. Such testimony is more akin to ''technical or other specialized'' knowledge than it is to the ''scientific'' testimony which was the subject of *Daubert. Surles ex rel. Johnson,* 474 F.3d at 296. Accordingly, Professor Doering's knowledge and experience, rather than the specific *Daubert* factors, provide the appropriate analytical framework for evaluating the reliability of his opinion. *Id.*

Professor Doering testified that he has been a professor of pharmacy for thirty-five years and that, in this capacity, he has taught classes on controlled substance diversion within the practice of pharmacy. Tr. 662–71. Simply put, Professor Doering has sufficient knowledge and experience to render sufficiently reliable his opinion on the subject of the existence and resolvability of red flags of diversion.

The Respondents also contend that Professor Doering's history of testifying for the Government and ''long standing relationship with the DEA [58] and willingness to be its on-call expert undermine[] his claim to be an expert.'' Resp'ts Brief, at 94–95. Interestingly, as discussed, *infra,* the Respondents' expert (who they propound as the superior source of impartial expert assistance) testified that he has only testified as a witness on behalf of the defense. While Professor Doering's relationship with the DEA and his history of Government testifying were extensively explored by counsel during voir dire at the hearing, and are certainly relevant considerations in evaluating the weight to be assigned to his testimony, he credibly testified that it is his practice to conduct an independent review of records, to ''formulate opinions and if those opinions were favorable to the DEA's position'' to serve as a witness. Tr. 797. Under these circumstances, Professor Doering's testimony was sufficiently credible and persuasive to constitute substantial evidence in these proceedings.

The Respondents' Evidence

The Respondent's presented the testimony of their own expert witness, a statistician, as well as the testimony of the CVS vice president of pharmacy operations.

The Respondents' Expert Witness

The Respondents presented the testimony of Professor David Brushwood. Like the Government's expert, Professor Brushwood is employed [59] at the University of Florida as a Professor in the College of Pharmacy.[60] Tr. 1003. Also like the Government's expert, Professor Brushwood is widely published, and has concentrated the majority of his professional pharmacy experience in academia and research, with an early stint as a part-time pharmacist.[61] Tr. 1003–06. He also holds a law degree and has taught numerous classes on the intersection of law and pharmacy. Tr. 1003–04, 1008. Professor

[57] Tr. 924.

[58] Professor Doering testified that he has an arrangement with the DEA under which he is ''willing to review records and formulate opinions and if those opinions [are] favorable to the DEA's position tha[n] I would be available [to serve as an expert].'' Tr. 797.

[59] Professor Brushwood testified that he is currently on a sabbatical leave.

[60] Professor Brushwood's CV was received into evidence. Resp't Ex. 1.

[61] Although he no longer practices as a pharmacist, Professor Brushwood holds an active pharmacy license in the State of Kansas. Tr. 1004.

Brushwood testified that he has testified as an expert witness on five occasions, always for the defense. Tr. 1009–10. He was received without objection as an expert in pharmacy and the pharmacist's responsibilities for the dispensing of controlled substances. Tr. 1010–11.

Professor Brushwood acknowledged that prescription drug abuse in Florida has reached epidemic proportions. Tr. 1014–16. To address this problem, a pharmacist must ''ensure that controlled substances continue to be available for legitimate medical and scientific purposes while preventing diversion into the elicit market.'' Tr. 1053. Citing Appendix D of the of the *DEA Pharmacist's Manual,*[62] Brushwood refers to this concept as the principle of balance. Tr. 1053. Professor Brushwood interprets the pharmacist's corresponding responsibility in this way:

[O]ur corresponding responsibility is not the same as the prescriber's responsibility. As pharmacists, we have certain knowledge and skill and abilities that are very important and we are to exercise all of that that we have, but it's not the same as what prescribers have. It's their responsibility not to issue a prescription that isn't for a legitimate medical purpose and isn't in the usual course of professional practice. It's our corresponding responsibility to, based on the knowledge of drugs that we have, apply our expertise. If we recognize or have a concern then we stop and say wait a minute. I need to think this through. Maybe I need some additional information, and until I am satisfied that I can fill this prescription and meet my responsibility I'm not going to do it.

Tr. 1024–25. Brushwood clarified that pharmacists ''don't see ourselves as the police of the medical profession [but rather] people who evaluate prescriptions and apply our expertise.'' Tr. 1106. When asked to define a controlled substance red flag, Professor Brushwood testified that:

A red flag means stop. This is the way I define it. A red flag means stop, think, look, examine the circumstances, use what you have available to you—it doesn't take long necessarily—and make a decision. Go forward only after you have had this opportunity for information gathering and reflection and do it only when it's safe. The result of analysis of a red flag will either be to fill a prescription or to not fill a prescription. Those are the only two possible results, and you don't do that if there is a red flag without this introspective activity.

Tr. 1034. Professor Brushwood refers to a red flag that is correctly resolved by a pharmacist in favor of dispensing as a ''red herring.'' Tr. 1035. He testified that, in addition to discussions with patients and prescribers, pharmacists may consider past history with the patients as customers, visual cues (*e.g.,* crutches), and patient profiles maintained at the pharmacy. Tr. 1034–36, 1073–74.

Professor Brushwood testified that he has created a pneumonic, ''VIGIL,'' that he uses to teach a standardized approach to executing the pharmacist's corresponding responsibility. Tr. 1021. The ''V'' in the pneumonic is for ''verification.'' This is to remind the pharmacist to contact the prescriber's office to the extent needed to ''at least assure yourself that the prescription was issued by the prescriber and, if necessary, engage in additional discussion with them.'' Tr. 1027. It is Brushwood's view that this step should always be taken with a certain level of circumspection. He explained his basis for this level of circumspection in this way:

We want to be very economical with our contacts with prescribers' offices because they become irritated when we call them for no good reason. We want them to understand that we're important and we're not bothering them with trivia, so if we don't need to contact them because we've previously verified we don't do it again.

Tr. 1028. Elaborating on the point, Professor Brushwood explained:

Well, we don't want to cry wolf, and I think annoyance is a factor. We want them to take us very seriously, and when they get a call from us they know that we really need them so they pay attention to us. If [the prescribers] become accustomed to the idea that we're calling simply to reconfirm something we already know their perspective is we need to use our professional judgment, not simply defer to them and their professional judgment.

Id.

The ''I'' in Brushwood's VIGIL model stands for ''identification.'' Tr. 1021, 1030. This reminds the pharmacist to seek a government-issued identification from the individual presenting the prescription scrip. Tr. 1030. The ''G'' refers to ''generalization,'' which suggests to the pharmacist that he and the dispensing patients ''reach an agreement'' regarding their mutual responsibilities as pharmacist and patient.[63] Tr. 1031. The second ''I'' in VIGIL stands for ''interpretation,'' which is the process of tallying a set of points assigned to the other aspects of the VIGIL model in analyzing a dispensing decision. Tr. 1031–32. The details of the ''I'' point system or how they are assigned were never explained during the hearing. The ''L'' stands for ''legalization,'' which, according to Professor Brushwood, is a caution against pharmacists' historical ''well-intended tradition to occasionally bend a rule or two * * *'' Tr. 1032.

Reduced to its essence, Professor Brushwood's VIGIL model really contains only two steps to resolve a red flag presented at the time of a scrip presentation: contacting the prescriber (''V'' or ''verification''), and checking the identity of the presenter (''I'' or ''identification). The three remaining parts of the model, including the point or ''interpretation'' (''I'') aspect of the model that was never explained, the ''generalization'' (''G'') portion, which is (even by Brushwood's own estimation) never used by pharmacists, and the ''legalization'' (''L'') part which is a reminder to abide the law, all relate to policy approaches, not red flag resolution.

Regarding red flag resolution, like the Government's expert, Professor Brushwood acknowledged the requirements of Section 64B in the Florida Administrative Code, provided his opinion that the Respondents' policies and dispensing protocols meet the requirements therein,[64] but (like Professor Doering) conceded that the text of Section 64B did not provide an exhaustive list of red flags. Tr. 1091. In this regard, Professor Brushwood testified that ''much of [the Florida standards of pharmacy] simply reiterates language from Federal law.'' Tr. 1208. By Professor Brushwood's estimation:

Pharmacists have to use their best professional judgment at all times, and although not formally stated here * * * pharmacists still have to use their professional judgment, which may go beyond these five [64B] factors.

Tr. 1049–50.

Consistent with the *DEA Pharmacist's Manual* (as well as the view of the Government's expert), Professor Brushwood agreed that the quantity of drugs prescribed and the frequency of prescriptions filled may be non-dispositive indications of fraud or improper prescribing. Tr. 1056–58, 1062–65. Brushwood stated:

I would never teach that a ridiculous outlier high is of no significance in and of itself. I would teach that it is. You better investigate when you see that I would teach a pharmacist.

Tr. 1058. It is Professor Brushwood's opinion, however, that a pharmacist would only be able to see trends in dispensing for a particular patient, rather than for a particular prescriber or multiple patients. Tr. 1069.

An evaluation of Professor Brushwood's testimony demonstrates that he shares many of the views expressed by the Government's expert in many respects. He agreed that a combination of 56 dosage units of oxycodone 15mg, 168 dosage units of oxycodone 30 mg, and 56 dosage units of alprazolam 2 mg did, presented a red flag,[65] but (unlike the Government expert) felt the red flag could be resolved. Tr. 1081–82, 1203–04, 1212. Although opining that physicians are often creatures of habit who frequently stick with historically successful combinations of medications,[66] he concurred that multiple patients from a single prescriber on a single day with the same combination would also be a red flag. Tr. 1093, 1098, 1119, 1168, 1170. He also agreed that oxycodone and alprazolam are medications with a high risk of abuse and diversion. Tr. 1086. Furthermore, he agreed that prescriptions written by local prescribers for out-of-state patients constitute a red flag requiring resolution, that contacting the prescriber will not always be sufficient to resolve every red flag, and that there can be a point where a pharmacist should cease to fill scrips emanating from a particular prescriber based on diversion concerns. Tr. 1119–20, 1124,

[62] A copy of which was received into evidence. Resp't Ex. 19.

[63] Professor Brushwood testified that no pharmacy utilizes this aspect of his VIGIL model. Tr. 1031.

[64] Tr. 1084.

[65] Tr. 1081.

[66] Tr. 1174, 1205–06

1148. He concurred in the principle that distance can be a red flag,[67] and testified that the Sanford area was a ''reasonable geographic area'' for the Respondents' pharmacies (but added the proviso that travelers in need of medication should not go without when in the Sanford area), and conceded that he did not come across a handwritten scrip note addressing any distance red flag in the materials he reviewed for the Respondents. Tr. 1139, 1145, 1166. Brushwood agreed that the prescription events presented to the Government's expert contained multiple cognizable red flags in need of pre-dispensing resolution. Gov't Ex. 57; Tr. 1142–50, 1155–60, 1189.

Areas of mutual accord notwithstanding, Professor Brushwood did not agree with the ultimate conclusion of the Government's expert that the dispensing patterns evident in the reviewed data demonstrate that the controlled substance prescriptions were not issued for a legitimate medical purpose in the usual course of a professional practice, or that the red flags present were unresolvable. Tr. 1068, 1199. Employing a number of double negatives, Brushwood explained his opinion in the following way:

Based on the information I've reviewed, I am not able to conclude that [the Respondents' pharmacists] didn't meet their corresponding responsibility. [This is based upon examination of] their policies and procedures, which in my opinion accurately describe the pharmacist's corresponding responsibility. I have looked at the declaration of [Pharmacists Masso and Merrill] * * * which under oath indicate that they have followed those policies. I have looked at some information that shows me that contact was made with the prescriber's office for verification of prescriptions, that identification was obtained for patients for prescriptions. What I don't know is the relationship that the pharmacists had with the patients. I don't know the patient profile that was available to the pharmacists at the time these prescriptions were filled. I don't know what history they had had with the patients or really what the nature of the conversation they had with the prescribers was, if there was a conversation, or the conversation they had with the patients. There's a lot of aspects of the investigation or the consideration of responsibility that is unavailable to me.

Tr. 1067.

In other words, Professor Brushwood opined that, without the patient profiles and other information, it is impossible to know whether the pharmacies violated their corresponding responsibilities. Tr. 1075, 1199–1200. As a preliminary matter, the affidavits of Masso and Merrill that were referenced among the items which formed his expert opinion were not offered or received into evidence. While an expert is entitled to rely on facts not in evidence when developing his opinion, such reliance does not relieve the proponent of the expert's testimony from establishing the facts on which the expert relied. *See TK–7 Corp. v. Estate of Barbouti,* 993 F.2d 722, 732 (10th Cir. 1993) (''The fact that [the expert] relied upon [a] report in performing his calculation of lost profits did not relieve the plaintiffs from their burden of proving the underlying assumptions contained in the report.'').

Furthermore, although Professor Brushwood went on to explain that he could not draw a conclusion about whether the Respondents' pharmacists had met their obligations absent the additional types of information he listed, which he characterized as ''pretty rich,''[68] the only information his VIGIL model requires the pharmacist to gather and evaluate is verification (''V'') and identification (''I'').

Paradoxically, although Professor Brushwood placed so much emphasis on the extent to which his evaluation was hobbled by his inability to examine items such as any entries in the patient profile maintained by the Respondents, he revealed that he believed the information would have been available upon request, but that he did not ask to see it. Tr. 1073–74.[69] The record contains no reason to question Brushwood's belief that he could have had access to the patient profiles upon request. If the profile was accessible to him and as vital as he claimed, it would make little sense for him not to have asked to review it. Yet he testified that he never asked. In view of his impressive credentials and experience, and the fervor in which he presented his view that the profile information is key, it is unlikely that his failure to request the profile information is based upon a blunder or an oversight. To be clear, the operative fact is not that the Respondents elected not to provide the information at the hearing, but rather, that Brushwood emphatically declared how vital it was, and conceded that he never even asked the Respondents for it—but could have had it upon a mere request. Here it is not imperative to determine whether the information in the profile would have been unhelpful to the Respondents or whether a review of the information is truly a condition precedent to an accurate assessment of the pharmacists' actions. On the present record, that portion of Brushwood's testimony that urges the crucial impact of patient profiles and what they might have demonstrated has been sufficiently neutralized that it neither favors nor disfavors any material issue to be decided in the case.

The only documented actions aimed at red flag resolution that Professor Brushwood described seeing in the materials he reviewed on behalf of the Respondents were notations on numerous prescription scrips he examined in the course of his review. Tr. 1069–70. Brushwood testified that, although the practice among the profession has been uneven, handwritten notes by a pharmacist on a scrip indicate that there has been communication between the pharmacist and/or the prescriber. Tr. 1070–71, 1160–61. Further, with respect to Schedule II prescriptions (such as those examined in the data in this case), Professor Brushwood testified that a handwritten note on the scrip ''is certainly one place where you would expect to see [such notes].''[70] Tr. 1072.

Professor Brushwood disagreed with the Government expert's conclusion that a 210 dose prescription for oxycodone 30 mg was a red flag because of the dosage. Tr. 1076–77. However, the probative value of this inquiry was profoundly undermined by form of the question, which omitted the other red flags identified by the Government expert that were factored into his answer. The Government expert testified that the nature and doses of the medication dispensed to remotely located patients and prescribers were unresolvable because the combinations were consistent with chronic pain, and not acute pain symptoms resulting from accidents while on vacation. Tr. 854. Thus, it was not the dose alone that the Government's expert declared unresolvable, but the confluence of elements attendant on the schedule II dispensing event.

Professor Brushwood presented as a knowledgeable, prepared, and helpful witness. That said, the persuasiveness of his testimony was undermined appreciably by his repeated assurances that the identified red flags could have been resolved by reviewing the entries in the patient profiles that the Respondents maintained and that Brushwood never asked to see. Although Professor Brushwood suggested that there were other areas that could have been explored to resolve conflicts, his VIGIL model only identified checking the identity of the patient and contacting the prescriber and/or the presenter, avenues which he ultimately agreed would not have resolved red flags associated with prescribers who were complicit in diversion No alternative route beyond the patient profile information, prescriber/patient communication, and/or identification verification were proposed by Professor Brushwood. Accordingly, notwithstanding his sincere efforts and credible testimony, his presentation was less helpful than the testimony presented by the Government's expert witness.

The Respondents' Fact Witnesses

The Respondents presented the testimony of Paul Greenberg, the Director of the Health Economics Practice at Analysis Group,[71] ''an economic research and consulting firm in Boston.'' Tr. 948, 948. Mr. Greenberg holds an undergraduate degree in economics from Vassar College, a master's degree in Economics from the University of Western Ontario, and an MBA from the Sloan School

[67] Tr. 1181, 1194.

[68] Tr. 1067–68.

[69] When asked if he could have seen the profile, Brushwood declared ''I'm sure I could have.'' Tr. 1073.

[70] Indeed, Respondent 219 Pharmacist Technician Keyla Perry indicated that such was the practice, Tr. 345, and the Respondents' own dispensing guidelines for pain management that were in effect no later than December of 2010 required the pharmacist to ''[d]ocument communications with prescriber or agent on the back of the prescription to include date, time, outcome and name of person.'' Resp't Ex. 23 at 2. Thus, there is no question that after December of 2010, Respondents' pharmacists were under a duty to document such communications on the back of the prescription scrips.

[71] Mr. Greenberg explained that Analysis Group Inc., (''AGI'') ''is a consulting firm headquartered in Boston, with 10 offices around the country, and one in Montreal, Canada.'' Tr. 949.

of Management at the Massachusetts Institute of Technology.[72] Tr. 945–46; Resp'ts Ex. 2.

Mr. Greenberg testified that he is often involved in litigation ''involving the use of data in one form or another.'' Tr. 948. In this regard, Mr. Greenberg explained that his ''work is really applied economics and statistics in a consulting capacity. We get hired by a variety of clients in the healthcare sector [to perform] analysis of large data sets in which we apply our economics and statistics training to study, examine, and glean insights from those data.'' Tr. 947–48.

Greenberg testified that he was asked by CVS to ''study * * * some of the data surrounding some prescribers who had * * * recently been suspended by CVS, specifically with an eye to the dispensing patterns that were occurring at [Respondents] 219 and 5195.'' Tr. 950. Though the dispensing data was the ''core'' data used in Mr. Greenberg's analysis, he also looked at information provided regarding CVS Extra Care Cards. Tr. 952. Mr. Greenberg testified that his work on the case could be grouped in the following manner: (1) ''proximity analysis,'' which looked at the proximity of prescribers and patients to the Respondent Pharmacies; (2) ''the nature of the transactions and the methods of payment for those transactions;'' and (3) ''patterns of dispensing at [the two pharmacies] based on the kinds of drugs that were dispensed.'' Tr. 952–53.

When looking at the geographic proximity of the prescribers, Mr. Greenberg testified that he looked at the CVS dispensing data and focused on the top 100 prescribers of oxycodone for the Respondent pharmacies. Tr. 954. Based on this data, Greenberg created a map which shows the location of Respondent 5195—marked with a red dot—relative to the locations of the top 100 oxycodone prescribers for the period of March 2010 to February 2012—marked with blue dots. Tr. 955–56. The map was admitted into evidence as Respondents' Exhibit 88. Tr. 961. Mr. Greenberg testified that he created a similar map showing the location of Respondent 5195 relative to the top 100 oxycodone prescribers for the period of January 2011 to February 2012. Tr. 964; Resp'ts Ex. 89. When comparing the two maps, Mr. Greenberg noted that the top 100 prescribers for the March 2010 to February 2012 time period were not the same top 100 prescribers for the time period from January 2011 to February 2012. Tr. 967–68. Mr. Greenberg also created equivalent maps for Respondent 219 for the March 2010 to February 2012 (Respondents' Exhibit 86) and for the January 2011 to February 2012 timeframe (Respondents' Exhibit 87). Tr. 969–73. The maps indicate that a large number of out-of-area prescribers for each pharmacy in the first time frame is apparently reduced to a somewhat smaller number of out-of-area prescribers for each pharmacy in the second time frame.

Mr. Greenberg also testified to an analysis he conducted regarding a specific address in Deland, Florida. Tr. 986–87. In his analysis, Mr. Greenberg found that fifteen ''unique'' individuals had filled prescriptions for oxycodone 30 mg at one or both of the Respondent Pharmacies during the two year time period from March 2010 through February 2012. Tr. 987. All told, the fifteen individuals filled sixty-six prescriptions for oxycodone 30 mg at the Respondent pharmacies. Tr. 989. However, the address field contained ''specific apartment numbers * * * that clearly identified it as an apartment building with different units.'' Tr. 987. Internet research revealed that the address was ''an apartment complex with about 160 or so individual residential units in that complex.'' Tr. 989.

There is no question that Mr. Greenberg presented as a sincere witness essaying to candidly and thoroughly answer questions asked of him. That said, other than highlighting the Respondents' dispensing of controlled substances written by prescribers who were located at some distance from both pharmacies in contracting numbers, he did not offer testimony that shed any appreciable level of light on any issue to be resolved in this recommended decision.

The Respondents also presented the testimony of Joseph Abbott, the Vice President of Pharmacy Operations for CVS.[73] Tr. 1229. Mr. Abbott testified that he holds an undergraduate degree in electric engineering from Duke University and recently completed his coursework for an M.B.A. from the Wharton School at the University of Pennsylvania. Tr. 1229. Though he has been employed by CVS since 2006, Mr. Abbott testified that he assumed his role as Vice President of Pharmacy Operations in March of 2012. Tr. 1230. Prior to becoming the Pharmacy Operations V.P., Mr. Abbott was Senior Director of Pharmacy Operations Services, a position he held since January of 2011. Tr. 1302.

According to Mr. Abbott, the Pharmacy Operations Group is staffed by ''about 50 people'' and ''provide[s] support to [CVS] pharmacy teams and * * * field management teams as it relates to policies and procedures. This includes communications of the policies and procedures as well as a definition of tools and training to support those policies and procedures.'' Tr. 1230. As the Vice President of Pharmacy Operations, Mr. Abbott's ''primary responsibilities are to oversee the team that defines the procedures, defines the supporting tools, and [provide support to] the pharmacy teams and the field management teams.'' Tr. 1230.

Abbott presented some testimony relative to the organization of prescribing data within the CVS computer systems that produced the data supplied to the Government and so widely used in its case-in-chief. Mr. Abbott explained that the ''agency type'' field is a designation employed by CVS ''to classify how the prescription is paid for.'' Tr. 1234. When ''cash'' appears in the ''agency type'' field, that denotes a ''general definition [that] refers to the fact that * * * the full retail price of the prescription would be paid for by the patient or an agent of the patient at the time the prescription is picked up. It can be paid through any means of tender—cash, credit card, check, debit card.'' Tr. 1234. The term ''cash discount'' means that the full payment owed was paid for by the patient, but that ''the patient [was] eligible for some form of discount due to their affiliation with some entity.'' Tr. 1234–35.

Mr. Abbott also testified regarding a computer system called RxConnect, which is ''[t]he primary pharmacy system'' used by CVS pharmacists for the dispensing of controlled substances and other drugs. Tr. 1236. The RxConnect system ''supports clinical checks as well as billing of third party claims.'' Tr. 1236. To assist in the filling of prescriptions, the system displays ''patient information, prescriber information, drug information [and] third party information related to the third party coverage.''[74] The term''[p]atient information'' includes ''the name, the date of birth, the address, the phone number, allergies that the patient has reported, medical conditions the patient has reported [and] history of prescription fills.'' Tr. 1237. While identifying information of a patient may be edited by the pharmacy teams, the history of prescription fills is a product of the system. Tr. 1237–39.

Mr. Abbott explained that the CVS practice has been that when a patient dropped off a prescription at a pharmacy, the pharmacy team would search the system—by last name, date of birth or phone number—to ascertain whether the customer is already in the system. ''If the patient's record is already there, they would select the patient and have the opportunity to edit any of the key information about the patient.'' Tr. 1239. If the patient is not in the system, ''the pharmacy team would choose to add a patient [and] would enter in name, date of birth [and] address based on the information provided on the prescription or by the patient themselves.'' Tr. 1240.

The RxConnect system also includes drug information. Tr. 1242. The drug information includes the drug name, the generic name (if applicable), the strength, the dosage form and the manufacturer. Tr. 1242–43. The system is accompanied by an industry standard automated drug utilization review system, which ''look[s] at the patient's prescription profile and identif[ies] potential drug interactions and so forth.'' Tr. 1243.

Abbott explained that the prescriber information in the RxConnect system currently is supplied by a vendor of prescriber information (data aggregator) called Health Market Science (HMS). Tr. 1241–42. Though Mr. Abbott could not remember the exact datum RxConnect displays for each prescriber, he testified that

[72] Mr. Greenberg's CV was received into evidence. Resp't Ex. 2.

[73] Holiday CVS LLC, the owner of the Respondent Pharmacies, is a wholly owned subsidiary of CVS Pharmacy Inc., which is, in turn, a wholly owned subsidiary of CVS/Caremark. Tr. 1231–32. Mr. Abbott testified that although he was not sure of the precise corporate structure under which he is employed by CVS, to the best of his understanding, he believed that he was employed by CVS/Caremark. Tr. 1232. The fact that the Vice President of Pharmacy Operations at CVS (who is about to receive an M.B.A. from the Wharton School) lacks an understanding over which aspect of CVS actually employs him is puzzling to say the least, but does not impact on any issue to be decided in this recommended decision.

[74] ''Third party'' information refers to a patient's insurance plan. Tr. 1237.

the prescriber profile includes the physician's DEA number and address.[75] Tr. 1266. Other information would be available on other, ''more detailed screens.'' Tr. 1267.

According to Mr. Abbott, HMS ''aggregate[s] [76] prescriber data from various sources and then suppl[ies] it to companies in a variety of industries.'' Tr. 1241. HMS obtains its prescriber information data from an entity called NTIS. Tr. 1247. NTIS, in turn, is a service provided by the Government which supplies prescriber information, including DEA registration data, to non-governmental entities. Tr. 1247. It is further his understanding that once HMS receives data from NTIS, they load it into their system, and then update the records in CVS's system. Tr. 1247. Abbott testified that HMS receives data from NTIS approximately once per week, and updates CVS's data once per week. Tr. 1247–48. HMS became the sole source of the prescriber information in April of 2012 (i.e., the month prior to the hearing in this matter). Tr. 1245.

Mr. Abbott testified that whenever a pharmacy team member attempts to fill a prescription, they must associate a prescriber to the prescription. Tr. 1248. In this regard, they must search for,[77] and select, the appropriate prescribing physician. Tr. 1248–49. Once the prescribing physician has been selected, the system checks the prescription against the physician's prescribing status. Tr. 1249. If the physician does not have authority to prescribe the drug called for by the prescription, then the system will display an error message and prevent the filling of the prescription. Tr. 1249, 1270. A pharmacy employee cannot override the system to fill a prescription for a practitioner who appears unregistered in RxConnect. Tr. 1270.

Prior to April of 2012, prescriber information was provided by HMS, but was also managed by the pharmacy teams at individual stores. Tr. 1245–46. Thus, if a pharmacy technician queried the system for a particular prescriber, RxConnect ''would display both the HMS records as well as some of the historical store entered records from the past.'' Tr. 1246.

Mr. Abbott also addressed an anomaly in the way that CVS produced the historical records which made up the CVS Dispensing Data utilized during these proceedings. Tr. 1254–55. According to Abbott, when the warehouse pulls the data from RxConnect, it will reflect its current status as of the time the report is run. Tr. 1254–55. Put differently, because patient and prescriber information is subject to change, the patient and/or prescriber information reflected on the spreadsheets generated from the CVS Dispensing Data and introduced by the Government could well have been different from the information which appeared to the Respondents' pharmacy staff at the time the controlled substances were actually dispensed. Tr. 1255–56. With this in mind, Mr. Abbott checked CVS's records and ascertained that the ''do not fill'' notations in the address field for Government Exhibit 35 were not associated with the Dr. Jumanni profile at the time the corresponding prescriptions were dispensed. Tr. 1256–59; 1262–63. Mr. Abbott indicated that he was able to divine this reached this conclusion by checking the ''back tag sticker'' [78] associated with the relevant prescriptions. Tr. 1262–63.

Mr. Abbott was also asked about the training that CVS provides to its ''pharmacy team,'' which ''includes the pharmacist * * * the pharmacy technicians [and the] pharmacy supervisors.'' Tr. 1263–64. The pharmacy team members receive new-hiring training, as well as ''twice-a-year compliance and regulatory training, which includes controlled substance defense in training.'' Tr. 1264. The bi-annual compliance and regulatory training is made available to employees via an online management system. Tr. 1264. CVS is ''able to track completion of [the biannual] training,'' and will identify individual employees who have not completed the required outlines. Tr. 1279–80. Dispensing guidelines with regard to controlled substances are sent the pharmacy teams through a program called Workload Manager, and are sent to the field management teams via email. Tr. 1274–75.

Abbott explained that in March and October of 2011, CVS disseminated its bi-annual training outlines (''October 2011 Guidelines'').[79] Tr. 1275–76. Further, in late June of 2011, in response to the Florida Pill Legislation of July 1, 2011, CVS Corporate issued guidelines ''for handling fraudulent or altered prescriptions'' (''June 2011 Guidelines'').[80] Tr. 1275; Resp'ts Ex. 27. Additionally, according to Mr. Abbott, in January of 2012, CVS ''issued an enhanced set of guidelines for dispensing controlled substances'' (''January 2012 Guidelines''). Tr. 1275; Resp'ts Ex. 34. The January 2012 Guidelines replaced a set of guidelines which had been submitted to the field pharmacies in December of 2010 (''December 2010 Guidelines'').[81] Tr. 1284; Resp'ts Ex. 23.

The December 2010 Guidelines, which were sent to CVS pharmacies on December 10, 2010, direct CVS PICs ''to ensure [that] all Pharmacists and support staff understand[] their responsibilities as [they] relate[] to these Dispensing Guidelines.'' Resp'ts Ex. 23. The December 2010 Guidelines state that:

(1) When considering the legitimacy of a prescription, a pharmacy team member should obtain a photo identification and record the patient's name, address and date of birth on the back of the prescription. Resp'ts Ex. 23, at 1–2.

(2) The team member should ''[c]ontact the prescriber with any concerns about the type, dosage, frequent or amount of medication prescribed [and] document communications with [the] prescriber or agent on the back of the prescription to include date, time, outcome and name of person.'' Resp'ts Ex. 23, at 2.

(3) The pharmacy team members should ''[e]xercise heightened scrutiny for prescriptions written by out-of-area doctors or presented by out-of-area patients for certain controlled substances (e.g., oxycodone or hydrocodone) especially new patients from the same prescriber.'' *Id.* The document directs the team member to ''[v]erify out-of-area prescriptions with the prescriber and notify your Pharmacy Supervisor.'' *Id.*

Also, of relevance to these proceedings, the December 2010 Guidelines identify the following ''warning signs [which] can assist in identifying inappropriate prescription-seeking behavior:'' (1) ''[p]atient insists on paying cash for a controlled substance prescription;'' (2) ''[p]atient insists on getting brand name controlled substances only;'' and (3) ''[p]rescribers consistently prescribe the same combination of drugs for most or all patients.'' *Id.*

The June 2011 Guidelines, define the pharmacist's corresponding responsibility, and provide that ''[i]f a pharmacist believes a prescription is suspect, the pharmacist should investigate and/or verify the prescription to ensure the legitimate of the order and to establish the identity of the prescriber and patient.'' Resp'ts Ex. 27. Beyond stating that pharmacists should exercise ''heightened scrutiny'' for ''out-of-area'' [82] oxycodone prescriptions, the June 2011 Guidelines provided four non-exhaustive steps for verifying prescriptions: (1) verifying the identity of the patient by obtaining a photo id; (2) reviewing the patient's profile for prior medication history; (3) contacting the prescriber; and (4) checking the state PMP. *Id.* The document further provides that ''[a]ll communications with the prescriber's office should be documented on the back of the prescription, including the time, date, outcome and name of person with whom the pharmacist spoke at the prescriber's office.'' *Id.*

The October 2011 Guidelines and January 2012 Guidelines include minor changes to CVS's dispensing procedures which, for the reasons discussed below, played no part in these proceedings.

With regard to the issues underlying these proceedings, Mr. Abbott testified that ''the company saw [the execution of the AIWs] as a significant event, and based on the

[75] A doctor may have multiple addresses. Tr. 1267–698.

[76] Mr. Abbott testified that it is important to have one source of aggregated data because ''[i]t allows us to have one record for each prescriber and prevents to the greatest degree possible having incorrect information tied together.'' Tr. 1242.

[77] The search may be conducted through some combination of the prescriber's: (1) last name; (2) NPI number; (3) DEA number; or (4) phone number. Tr. 1248.

[78] ''Since that sticker prints out at the time of filling, all of the information on that sticker reflects what was on the patient record.'' Tr. 1263.

[79] Though the March 2011 outline was not introduced into evidence, excerpts from the October 2011 Outline were. Resp'ts Ex. 32.

[80] The June 2011 Guidelines were not associated with training. Tr. 1301. Rather, they ''[were] an updated set of policies that [were] communicated to the stores and the field management teams.'' Tr. 1301. CVS sought to ensure understanding of the revised guidelines by organizing a conference call led by pharmacists at CVS. Tr. 1301.

[81] Mr. Abbott explained that it was his ''understanding'' that the January 2012 Guidelines were produced in response to ''feedback and guidance'' CVS had received from DEA in the wake of the execution of the AIWs on the Respondent pharmacies. Tr. 1285.

[82] The phrase ''out-of-area'' appears throughout the Respondents' training documents. Mr. Abbott explained that the application of this term is store specific. Tr. 1300.

feedback, we thought it was prudent to take a number of actions in response.'' Tr. 1285. In particular, Mr. Abbott testified that in the wake of the AIWs, CVS:

(1) Mandated 100-percent completion of bi-annual training. Tr. 1280.

(2) Created and distributed the January 2012 Guidelines. Tr. 1284.

(3) Ceased dispensing Schedule II controlled substances for prescriptions written by twenty-two [83] Florida prescribers. Tr. 1286. In this regard, the list of banned prescribers was posted in all 700 CVS pharmacies in the State of Florida. Tr. 1288.

(4) Developed a ''comprehensive * * * training around dispensing of controlled substances as well as DEA record keeping'' to serve as a ''supplement to the bi-annual training.'' Tr. 1286.

(5) Provided access to the Florida PDMP Web site, eForce, a prescription drug monitoring program. Tr. 1291–92.

(6) Began to develop a system for placing ordering limits for Florida pharmacies. Tr. 1291. Conducted a live training with field managers in the State of Florida regarding controlled substance dispensing. Tr. 1295; Resp'ts Ex. 35.

(7) Replaced the PICs at the Respondent pharmacies. Tr. 1294.

The rationale provided by Mr. Abbott as to why the Respondents replaced their PICs is particularly significant. Abbott explained the decision in this way:

[B]ased on the additional scrutiny within the stores related to these hearings, the company felt it was in the best interest of those pharmacies *to bring in new leadership that would not be distracted by these events.*

Tr. 1294 (emphasis supplied). He went on to explain that CVS took these actions because ''it takes its responsibility seriously, and given the * * * elevated level of drug abuse * * * that's * * * in Florida, we don't want to contribute to that, and to the extent that any of our stores could contribute to that, we wanted to take * * * steps to help ensure that no stores do [so] in the future.'' Tr. 1296–97.

The testimony presented by Mr. Abbott was sufficiently detailed, consistent, and plausible to be fully credited in this recommended decision.

Additional facts required for a disposition of this matter are set forth in the Analysis.

The Analysis

Pursuant to 21 U.S.C. 824(a)(4) (2006), the Administrator [84] is permitted to revoke a COR if persuaded that the registrant ''has committed such acts as would render * * * registration under section 823 * * * inconsistent with the public interest * * *.'' The following factors have been provided by Congress in determining ''the public interest'':

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The [registrant's] experience in dispensing, or conducting research with respect to controlled substances.

(3) The [registrant'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.

21 U.S.C. 823(f) (2006 & Supp. III 2010).

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie, M.D.,* 68 FR 15227, 15230 (2003). Any one or a combination of factors may be relied upon, and when exercising authority as an impartial adjudicator, the Administrator may properly give each factor whatever weight she deems appropriate in determining whether a registration should be rejected. *Morall v. DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005); *JLB, Inc., d/b/a Boyd Drugs,* 53 FR 43945, 43947 (1988); *David E. Trawick, D.D.S.,* 53 FR 5326, 5327 (1988); *see also Joy's Ideas,* 70 FR 33195, 33197 (2005); *David H. Gillis, M.D.,* 58 FR 37507, 37508 (1993); *Henry J. Schwarz, Jr., M.D.,* 54 FR 16422, 16424 (1989). Moreover, the 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,* 412 F.3d at 173–74. The Administrator is not required to discuss consideration of each factor in equal detail, or even every factor in any given level of detail. *Trawick v. DEA,* 861 F.2d 72, 76 (4th Cir. 1988) (the Administrator's obligation to explain the decision rationale may be satisfied even if only minimal consideration is given to the relevant factors and remand is required only when it is unclear whether the relevant factors were considered at all). The balancing of the public interest factors ''is not a contest in which score is kept; the Agency is not required to mechanically count up the factors and determine how many favor the Government and how many favor the registrant. Rather, it is an inquiry which focuses on protecting the public interest * * *.'' *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 462 (2009).

In an action to revoke a registrant's COR, the DEA has the burden of proving that the requirements for revocation are satisfied. 21 CFR 1301.44(e) (2011). The Government may sustain its burden by showing that the Respondent has committed acts inconsistent with the public interest. *Jeri Hassman, M.D.,* 75 FR 8194, 8235–36 (2010). Once DEA has made its *prima facie* case for revocation of the registrant's COR, the burden of production then shifts to the respondent to present sufficient mitigating evidence to assure the Administrator that he or she can be entrusted with the responsibility commensurate with such a registration. *Steven M. Abbadessa, D.O.,* 74 FR 10077, 10078, 10081 (2009); *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008); *Samuel S. Jackson, D.D.S.,* 72 FR 23848, 23853 (2007);. *Morall,* 412 F.3d at 174; *Humphreys v. DEA,* 96 F.3d 658, 661 (3d Cir. 1996); *Shatz v. U.S. Dept. of Justice,* 873 F.2d 1089, 1091 (8th Cir. 1989); *Thomas E. Johnston,* 45 FR 72311, 72312 (1980). ''[T]o rebut the Government's *prima facie* case, [the respondent] is required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR at 8236. Normal hardships to the practitioner and even to the surrounding community that are attendant upon the lack of registration are not relevant considerations. *Linda Sue Cheek, M.D.,* 76 FR 66972, 66973 (2011); *Abbadessa,* 74 FR at 10078; *see also Gregory D. Owens, D.D.S.,* 74 FR 36751, 36757 (2009).

The Agency's conclusion that past performance is the best predictor of future performance has been sustained on review in the courts, *Alra Labs. v. DEA,* 54 F.3d 450, 452 (7th Cir. 1995), as has the Agency's consistent policy of strongly weighing whether a registrant who has committed acts inconsistent with the public interest has accepted responsibility and demonstrated that he or she will not engage in future misconduct. *Hoxie,* 419 F.3d at 483; *Ronald Lynch, M.D.,* 75 FR 78745, 78749 (2010) (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66138, 66140, 66145, 66148 (2010); *East Main Street Pharmacy,* 75 FR 66149, 66165 (2010); *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Abbadessa,* 74 FR at 10078; *Krishna-Iyer,* 74 FR at 463; *Medicine Shoppe,* 73 FR at 387.

While the burden of proof at this administrative level is a preponderance-of-the-evidence standard, *see Steadman v. SEC,* 450 U.S. 91, 100–01 (1981), the Administrator's factual findings will be sustained on review so long as they are supported by ''substantial evidence.'' *Hoxie,* 419 F.3d at 481. Thus, ''the possibility of drawing two inconsistent conclusions from the evidence'' does not limit the Administrator's ability to find facts on either side of the contested issues in the case. *Shatz,* 873 F.2d at 1092; *Trawick,* 861 F.2d at 77. However, in rendering a decision, the Administrator must consider all ''important aspect[s] of the problem,'' such as a Respondent's defense or explanation that runs counter to the Government's evidence. *Wedgewood Vill. Pharmacy v. DEA,* 509 F.3d 541, 549 (D.C. Cir. 2007); *Humphreys,* 96 F.3d at 663. The ultimate disposition of the case must be in accordance with the weight of the evidence, not simply supported by enough evidence to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *Steadman,* 450 U.S. at 99 (internal quotation marks omitted).

Regarding the exercise of discretionary authority, the courts have recognized that gross deviations from past agency precedent must be adequately supported. *Morall,* 412 F.3d at 183. Mere unevenness in application standing alone does not, however, render a particular discretionary action unwarranted. *Chein v. DEA,* 533 F.3d 828, 835 (D.C. Cir. 2008) (citing *Butz v. Glover Livestock Comm.*

[83] Mr. Abbott did not know why any of the doctors had been banned. Tr. 1298. Mr. Abbott further testified that he believed at least one of these prescribers was removed from the do not fill list. Tr. 1304–05.

[84] This authority has been delegated pursuant to 28 CFR 0.100(b) and 0.104 (2010).

Co., 411 U.S. 182, 188 (1973)), *cert. denied,* __ U.S. __, 129 S. Ct. 1033, 1033 (2009). It is well-settled that since the Administrative Law Judge has had the opportunity to observe the demeanor and conduct of hearing witnesses, the factual findings set forth in a recommended decision are entitled to significant deference. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496 (1951). Thus, a recommended decision constitutes an important part of the record that must be considered in the Administrator's decision. *Morall,* 412 F.3d at 179. However, any recommendations set forth herein regarding the exercise of discretion are not binding on the Administrator and do not limit the exercise of that discretion. 5 U.S.C. 557(b) (2006); *River Forest Pharmacy, Inc. v. DEA,* 501 F.2d 1202, 1206 (7th Cir. 1974); *Attorney General's Manual on the Administrative Procedure Act* 8 (1947).

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

Regarding Factor 1, the record contains no evidence of a recommendation regarding the Respondents' privileges to operate as a pharmacy by any cognizant state licensing board or professional disciplinary authority. However, the fact that a state has not acted against a registrant's license is not dispositive in this administrative determination as to whether continuation of a registration is consistent with the public interest. *Patrick W. Stodola, M.D.,* 74 FR 20727, 20730 (2009); *Jayam Krishna-Iyer,* 74 FR at 461. It is well-established Agency precedent that a ''state license is a necessary, but not a sufficient condition for registration.'' *Leslie,* 68 FR at 15230; *John H. Kennedy, M.D.,* 71 FR 35705, 35708 (2006). Even the reinstatement of a state license does not affect the DEA's independent responsibility to determine whether a registration is in the public interest. *Mortimer B. Levin, D.O.,* 55 FR 9209, 8210 (1990). 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 FR 6580, 6590 (2007), *aff'd, Chein v. DEA,* 533 F.3d 828 (D.C. Cir. 2008), *cert. denied,* __ U.S. __, 129 S.Ct. 1033 (2009). Congress vested authority to enforce the CSA in the Attorney General and not state officials. *Stodola,* 74 FR at 20375. Thus, on these facts, the fact that the record contains no evidence of a recommendation by a state licensing board does not weigh for or against a determination as to whether the Respondents' continued registrations with DEA would be consistent with the public interest.

Regarding the third factor (convictions relating to the manufacture, distribution, or dispensing of controlled substances), the record in this case does not contain evidence that the Respondents have been convicted of (or charged with) a crime related to the manufacture, distribution, or dispensing of controlled substances. DEA administrative proceedings are non-punitive and ''a remedial measure, based upon the public interest and the necessity to protect the public from those individuals who have misused controlled substances or their DEA COR, and who have not presented sufficient mitigating evidence to assure the [Administrator] that they can be trusted with the responsibility carried by such a registration.'' *Jackson,* 72 FR at 23853; *Leo R. Miller, M.D.,* 53 FR 21931, 21932 (1988). Where evidence in a particular case reflects that the Respondent has acquired convictions relating to the manufacture, distribution, or dispensing of controlled substances, those convictions must be carefully examined and weighed in the adjudication of whether the issuance of a registration is in the public interest. 21 U.S.C. 823(f).

Although the standard of proof in a criminal case is more stringent than the standard required at an administrative proceeding, and the elements of both federal and state crimes relating to controlled substances are not always co-extensive with conduct that is relevant to a determination of whether registration is within the public interest, evidence that a registrant has been convicted of crimes related to controlled substances is a factor to be evaluated in reaching a determination as to whether he or she should be entrusted with a DEA certificate. The probative value of an absence of any evidence of criminal prosecution is somewhat diminished by the myriad of considerations that are factored into a decision to initiate, pursue, and dispose of criminal proceedings by federal, state, and local prosecution authorities. *See Robert L. Dougherty, M.D.,* 76 FR 16823, 16833 n.13 (2011); *Dewey C. Mackay, M.D.,* 75 FR 49956, 49973 (2010) (''[W]hile a history of criminal convictions for offenses involving the distribution or dispensing of controlled substances is a highly relevant consideration, there are any number of reasons why a registrant may not have been convicted of such an offense, and thus, the absence of such a conviction is of considerably less consequence in the public interest inquiry''), *aff'd, Mackay v. DEA,* 664 F.3d 808 (10th Cir. 2011); *Ladapo O. Shyngle, M.D.,* 74 FR 6056, 6057 n.2 (2009).

Accordingly, consideration of the evidence of record under the first and third factors neither supports the Government's argument for revocation nor militates against it.

Factors 2 and 4: The Respondent's Experience in Dispensing Controlled Substances, and Compliance With Applicable State, Federal or Local Laws Relating to Controlled Substances

Agency precedent has consistently held that the registration of a pharmacy may be revoked as the result of the unlawful activity of the pharmacy's owners, majority shareholders, officers, managing pharmacist or other key employee. EZRX, LLC, 69 FR 63178, 63181 (1988); *Plaza Pharmacy,* 53 FR 36910 (1988). The gravamen of the Government's allegations and evidence in this case focuses on the manner in which the Respondent, through its agents, dispensed controlled substances. Factors two and four are most relevant to this analysis.

Regarding Factor Two, in requiring an examination of a registrant's experience in dispensing controlled substances, Congress manifested an acknowledgement that the qualitative manner and the quantitative volume in which a registrant has engaged in the dispensing of controlled substances may be significant factors to be evaluated in reaching a determination as to whether a registrant should be (or continue to be) entrusted with a DEA COR. In some (but not all) cases, viewing a registrant's actions against a backdrop of how she has performed activity within the scope of the certificate can provide a contextual lens to assist in a fair adjudication of whether continued registration is in the public interest. In this regard, however, the Agency has applied principles of reason, coupled with its own expertise in the application of this factor. For example, the Agency has taken the reasonable position that this factor can be outweighed by acts held to be inconsistent with the public interest. *Jayam Krishna-Iyer,* 74 FR at 463; *see also Jeri Hassman, M.D.,* 75 FR 8194, 8235 (2010) (acknowledging Agency precedential rejection of the concept that conduct which is inconsistent with the public interest is rendered less so by comparing it with a respondent's legitimate activities which occurred in substantially higher numbers); *Paul J. Cargine, Jr.,* 63 FR 51592, 51560 (1998) (''[E]ven though the patients at issue are only a small portion of Respondent's patient population, his prescribing of controlled substances to these individuals raises serious concerns regarding [his] ability to responsibly handle controlled substances in the future.''). Similarly, in *Cynthia M. Cadet, M.D.,* 76 FR 19450, 19450 n.1 (2011), the Agency determined that existing List I precedent [85] holding that experience related to conduct within the scope of the COR sheds light on a practitioner's knowledge of applicable rules and regulations, would not be applied to cases where intentional diversion allegations were sustained. The Agency's approach in this regard has been sustained by on review. *Mackay,* 664 F.3d at 819.

Regarding Factor Four (compliance with laws related to controlled substances), to effectuate the dual goals of conquering drug abuse and controlling both legitimate and illegitimate traffic in controlled substances, ''Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.'' *Gonzales v. Raich,* 545 U.S. 1, 13 (2005). Under the regulations, ''[t]he 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). Under this language, a pharmacist has a duty ''to fill only those prescriptions that conform in all respects with the requirements of the [CSA] and DEA regulations, including the requirement that the prescribing practitioner be properly registered.'' *Electronic*

[85] *See, e.g., Volusia Wholesale,* 69 FR 69409, 69410 (2004).

Prescriptions for Controlled Substances, 75 FR 16236, 16266 (2010). In short, a pharmacist has a ''corresponding responsibility under Federal law to dispense only lawful prescriptions.'' *Liddy's Pharmacy, L.L.C.,* 76 FR 48887, 48895 (2011). The corresponding responsibility to ensure the dispensing of valid prescriptions extends to the pharmacy itself. *Medicine Shoppe-Jonesborough,* 73 FR 364, 384 (2008) (Finding that a respondent pharmacy was properly charged with violating corresponding responsibility); *See also United Prescription Services, Inc.,* 72 FR 50397, 50407–08 (2007) (same). *See* Drug Enforcement Administration, *Issuance of Multiple Prescriptions for Schedule II Controlled Substances,* 72 FR 64921, 69424 (2007) (referring to a *pharmacy's* corresponding responsibility); *see also* Drug Enforcement Administration, *Role of Authorized Agents in Communicating Controlled Substance Prescriptions to Pharmacies,* 75 FR 61613, 61617 (2010) (Referring to a pharmacies ''corresponding responsibility regarding the dispensing of controlled substances.''); *EZRX, LLC,* 69 FR at 63181 (''DEA has issued orders to show cause and subsequently revoked the DEA registrations of pharmacies which failed to fulfill *their* corresponding responsibility in Internet prescribing operations.'') (emphasis added). Settled Agency precedent has interpreted this corresponding responsibility as prohibiting the filling of a prescription where the pharmacist or pharmacy ''knows or has reason to know'' that the prescription is invalid.[86] *Bob's Pharmacy & Diabetic Supplies,* 74 FR 19599, 19601 (2009) (citing *Medicine Shoppe-Jonesborough,* 73 FR at 381 (quoting *Medic-Aid Pharmacy,* 55 FR 30043, 30044 (1990))); *See also United Prescription Services, Inc.,* 72 FR 50397, 50407–08 (2007) (Finding violation of corresponding responsibility where pharmacy ''had ample reason to know'' that the practitioner was not acting in the usual course of professional practice).

DEA has interpreted the ''legitimate medical purpose'' feature of the corresponding responsibility duty ''as prohibiting a pharmacist from filling a prescription for a controlled substance when he either knows or has reason to know that the prescription was not written for a legitimate medical purpose,'' and has been equally consistent in its admonishment that ''[w]hen prescriptions are clearly not issued for legitimate medical purposes, a pharmacist may not intentionally close his eyes and thereby avoid [actual] knowledge of the real purpose of the prescription.'' *Sun & Lake Pharmacy, Inc.,* 76 FR 24523, 24530 (2011); *Liddy's Pharmacy, L.L.C.,* 76 FR at 48895; *East Main Street Pharmacy,* 75 FR 66149, 66163 (2010); *Lincoln Pharmacy,* 75 FR 65667, 65668 (2010); *Bob's Pharmacy,* 74 FR at 19601. The Agency does not require omniscience. *Carlos Gonzalez,* 76 FR 63118, 63142 (2011) (citing *Holloway Distrib.,* 72 FR 42118, 42124 (2007)). However, when the circumstances surrounding the presentation of a prescription would give rise to suspicion in a ''reasonable professional,'' there is a duty to ''question the prescription[].'' *Bertolino,* 55 FR at 4730. Though initially framed as a ''reasonable professional'' standard, the Agency has considered the duty to discharge the corresponding responsibility by evaluating the circumstances in light of what would be considered suspicious by a ''reasonable pharmacist.'' *East Main Street Pharmacy,* 75 FR at 66165; *see also Winn's Pharmacy,* 56 FR 52559, 52561 (1991). Accordingly, a pharmacist or pharmacy may not dispense a prescription in the face of a red flag (i.e., a circumstance that does or should raise a reasonable suspicion as to the validity of a prescription) unless he or it takes steps to resolve the red flag and ensure that the prescription is valid. *Id.* Because Agency precedent limits the corresponding responsibility to circumstances which are known or should have been known, *Sun & Lake Pharmacy, Inc.,* 76 FR at 24530, it follows that, to show a violation of a corresponding responsibility, the Government must establish that: (1) the Respondent dispensed a controlled substance; (2) a red flag was or should have been recognized at or before the time the controlled substance was dispensed; and (3) the question created by the red flag was not resolved conclusively prior to the dispensing of the controlled substance. *See Sun & Lake Pharmacy,* 76 FR at 24532 (Finding that pharmacy violated corresponding responsibility where it took no steps to resolve red flags prior to dispensing controlled substances.). The steps necessary to resolve the red flag conclusively will *perforce* be influenced by the nature of the circumstances giving rise to the red flag.

When considering whether a pharmacy has violated its corresponding responsibility, the Agency considers whether the *entity,* not the pharmacist, can be charged with the requisite knowledge. *See United Prescription Services,* 72 FR 50397, 50407 (Respondent pharmacy violated corresponding responsibility because ''an *entity* which voluntarily engages in commerce [to] other States is properly charged with knowledge of the laws regarding the practice of medicine in those States.''). *See also Pharmboy Ventures Unlimited, Inc.,* 77 FR 33770, 33772 n.2 (2012) (''DEA has long held that it can look behind a pharmacy's ownership structure 'to determine who makes decisions concerning the controlled substance business of a pharmacy.'''); *S&S Pharmacy, Inc.,* 46 FR 13051, 13052 (1981) (the corporate pharmacy acts through the agency of its PIC). Knowledge obtained by the pharmacists and other employees acting within the scope of their employment may be imputed to the pharmacy itself. *See U.S. v. One Parcel of Land,* 965 F.2d 311, 316 (7th Cir.1992) (''Only knowledge obtained by corporate employees acting with the scope of their employment is imputed to the corporation.'').

In support of its allegation that the Respondents have violated their corresponding responsibilities, the Government has introduced evidence that the Respondent pharmacies: (1) dispensed controlled substances issued by prescribing physicians who lacked authority to prescribe the controlled substances that were dispensed (Lack of Valid Prescriber Authority); and (2) dispensed controlled substances under circumstances that would lead a reasonable pharmacist to have sufficient doubt about whether the prescriptions were issued for legitimate medical purposes by practitioners acting in the usual course of a professional practice (Questionable Circumstances).

Lack of Valid Prescriber Authority.

The uncontroverted evidence of record establishes that both Respondent pharmacies dispensed controlled substances on prescriptions issued by Dr. Wicks when he no longer possessed authority to issue such prescriptions. The Government's evidence demonstrates thirty-eight (38) dispensing events where Respondent 219 dispensed controlled substances for Wicks prescriptions after his DEA COR expired on May 31, 2011. Tr. 468; Gov't Ex. 26. Respondent 5195 dispensed controlled substances seventeen (17) times after Wicks' COR expired. Tr. 469. Respondent 5195 filled Dr. Wicks' oxycodone prescriptions as late as July 14, 2011, and Respondent dispensed on Wicks' oxycodone prescriptions as late as July 15, 2011. Gov't Ex. 10 at 6.

Likewise uncontroverted record evidence establishes that the DEA revoked the COR of Dr. Lynch, effective January 18, 2011, thereby depriving him of the authority to prescribe, administer or dispense any controlled substances. Tr. 66; *see also,* Gov't Ex. 32 at 3–12. On that date, the DEA Web site maintained for registrants would have reflected that Lynch's registration was ''expired.'' Tr. 74–75. It is beyond argument that Respondent 219 dispensed controlled substances pursuant to prescriptions written by Dr. Lynch no fewer than twenty-seven (27) times after his COR was revoked by the Agency. Gov't Ex. 32. Of these twenty-seven prescriptions, seven were dispensed later than June of 2011. Gov't Ex. 32, at 5, 7. Respondent 5195 filled four prescriptions after the January 18, 2011, revocation, one of which occurred in June. Gov't Ex. 32, at 12. Thus, the Respondent pharmacies were dispensing controlled substances on Dr. Lynch's prescriptions approximately five months (and more) after he had lost his authority to prescribe them.

It would be difficult to imagine a duty of a pharmacy registrant that is more fundamental to the law and spirit of the CSA than the obligation to ensure that controlled substance prescriptions are issued only on the authority of those empowered to prescribe by the DEA. *See Liddy's Pharmacy,* 76 FR at 48895 (defining ''corresponding responsibility under Federal law to dispense only lawful prescriptions.''). Absent

[86] In addition to the foregoing, under Florida law a pharmacist will be subject to discipline if he or she ''dispens[es] any medicinal drug based upon a communication that purports to be a prescription * * *. When the pharmacist knows or has reason to believe that the purported prescription[1] is not based upon a valid practitioner-patient relationship.'' Fla. Stat. § 465.016(1)(s). In *Trinity Health Care Corp.,* 72 FR at 30854, the Agency acknowledged that the Florida state standard reflects essentially the same standard present in the DEA regulations which makes it unlawful to for a pharmacy registrant to intentionally look the other way ''to avoid [actual] knowledge of the real purpose of [an illegitimate] prescription.'' *Bertolino,* 55 FR at 4730.

confirmation of a COR, a prescription written by one without COR authority would authorize the routine distribution of dangerous narcotics on the approval anyone from the uninformed to the malevolent. In this vein, the *DEA Pharmacists Manual* (a copy of which was introduced into the record at the Respondent's request) specifically provides that controlled substance prescriptions may only be issued by a practitioner who is, *inter alia,* ''[r]egistered with DEA or exempted from registration.'' *DEA Pharm. Man.* § IX. The terms of this requirement are replicated in 21 CFR 1306.03(a), which provides that, ''[a] prescription for a controlled substance may be issued only by an individual practitioner who is: (1) Authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession and (2) Either *registered* or exempted from registration pursuant to §§ 1301.22(c) and 1301.23 of this chapter.'' (emphasis added).

Because a prescription issued pursuant to an expired (or revoked) COR is invalid, 21 CFR 1306.03, it follows that the expiration of a COR is a clear red flag that a prescription issued pursuant to that COR is invalid. *Liddy's Pharmacy,* 76 FR at 48895; *Electronic Prescriptions for Controlled Substances,* 75 FR at 16266. Accordingly, the prescriptions issued pursuant to the invalid CORs of Drs. Wicks and Lynch, presented red flags. Having reached this conclusion, the question becomes whether the expirations of the CORs were recognized, or should have been recognized, by the Respondents.

The Respondents argue that they should be shielded from accountability in this regard because the commercial software they employed had a lag time. Even if the accuracy of this position were conceded, *arguendo,* it would afford them no quarter here.[87] The undisputed testimony in this matter establishes that CVS employs a third-party vender (HMS) for its registration verification and that HMS receives its data directly from NTIS, a government Web site. Tr. 1247. HMS receives weekly updates from NTIS, and CVS receives weekly updates from HMS. Tr. 1247–48. Thus, notice of a registration action would reach CVS no later than two weeks from the date of the action. *Id.* Dr. Wicks's registration expired on May 31, 2011, while Dr. Lynch's registration was revoked on January 18, 2011. Accordingly, even under their own theory, the Respondents are accountable with notice of Dr. Wick's expiration on June 15, 2011,[88] and notice of Dr. Lynch's revocation on February 2, 2011. In this regard, Respondent 5195 dispensed controlled substances pursuant to post-expiration Wicks prescriptions twelve times on or after June 15, 2011. Gov't Ex. 27. Respondent 219 dispensed controlled substances under similar circumstances twenty-seven times. Gov't Ex. 28. Similarly, all but one of the post-revocation Dr. Lynch dispensings occurred after February 2, 2011. Simply put, the Respondent pharmacies knew or should have known of the relevant registration statuses for the overwhelming majority of the post-expiration dispensings under either theory.

Turning to third prong of the inquiry—resolution—the record is clear that neither Dr. Wicks nor Dr. Lynch's [89] registration statuses could have been resolved conclusively to warrant dispensing of a controlled substance. DI Langston testified that, if a pharmacist is confronted with an invalid DEA number, the red flag may be resolved by a phone call to the DEA. Tr. 103. Because neither Dr. Wicks nor Dr. Lych regained authority to prescribe after the dates of expiration/registration, a call to the DEA could not have resolved the red flag in favor of dispensing. Therefore, substantial evidence supports the conclusion that the red flags raised by the doctors' registration statuses were not resolved conclusively prior to dispensing.

Accordingly, it is clear that, on numerous occasions, the Respondents dispensed controlled substances in the face of recognizable and unresolvable red flags (expired registration numbers) that put them on notice that the controlled substance prescriptions were not issued in the usual course of a professional practice. 21 CFR 1306.04(a). Such acts are sufficient for the Government to sustain its burden in establishing its prima facie case for revocation.[90]

Questionable Circumstances.

The record also contains evidence of many dispensing events that were attended by circumstances that raised red flags that required resolution. The Government's expert opined that, in many of these circumstances, the confluence of red flags were such that a reasonable pharmacist could not have dispensed pursuant to the prescription while complying with the requirements of his or her corresponding responsibility. *See* Tr. 764–765. The Respondents contend that this testimony must be rejected because: (1) ''Professor Doering's testimony is not based on a reliable methodology,'' Resp'ts Brief, at 92; (2) Professor Doering's opinion is based on bias, Resp'ts Brief, at 95; (3) Professor Doering did not look at the hard copies of any prescriptions when rendering his opinion, Resp'ts Brief, at 98; and (4) the evidence does not support Professor Doering's opinions, Resp'ts Brief, at 104. The first two contentions have been considered, and rejected, above. The third argument, which invokes Professor Doering's methodology, must be rejected for the same reasons as the second. Thus, the question becomes whether Professor Doering's opinion that certain combinations of red flags could not have been conclusively resolved was supported by substantial evidence.

As explained above, Professor Doering testified that, in some circumstances, resolution of red flags would be impossible ''[b]ecause the methods that are available are flawed, and presenting identification simply identified the individual as the person presenting the prescription, and phoning the practitioner is so subject to fraud and deceit that even if a practitioner told me or his representative that, yes, the doctor wrote those that's not good enough for me.'' Tr. 764. The Respondents argue that this conclusion misstates the value of verification and contacting; and also that ''the evidence clearly shows that Respondents did much more to evaluate and verify the legitimacy of prescriptions presented.'' Resp'ts Brief, at 104.

The Respondents have consistently and repeatedly urged that these two methods (verification and contacting) circumscribe the entire imposable duty upon a pharmacy registrant and defend this approach on multiple levels.[91] The Respondent's expert, Professor Brushwood, distilled his understanding of pharmacy registrant obligations under his VIGIL protocol, which, as discussed at length, *supra,* essentially verifies only through ''verification'' (V), contacting the prescriber's office, and ''identification'' (I), seeking government-issued identification from the scrip presenter. Tr. 1021, 1030. The position of the Government's expert that these methods are of no avail when the scenario includes a complicit prescriber and/or a diverting presenter [92] is logically more persuasive. In fact, the Respondents' expert ultimately conceded that checking ID and contacting a prescriber will not uniformly be sufficient to resolve every red flag. Tr. 1148. Thus, both experts who presented testimony at the hearing concurred that an ID check coupled with a prescriber contact (the only types of verification employed by the Respondent

[87] If the law were as the Respondents urge, then only those registrants who engage reliable and current software systems could be held accountable for dispensing controlled substances on the authorization of the unregistered or improperly registered. Suffice it to say that such a structure would hardly encourage responsible purchasing decisions by DEA registrants (or even consistent and cogent legal counsel by those advising them).

[88] In their post-hearing brief, the Respondents claim that the date of notice of the Wicks Expiration was two weeks after July 1, 2011, the date the registration was ''retired.'' Resp'ts Brief, at 119 n. 116. This is contrary to the testimony. DI Langston testified that a number will appear as ''expired'' on the date of expiration. Tr. 79, 102–03.

[89] Admittedly, beyond the three scrips that were written on behalf of patient T.N. and dispensed by Respondent 219 (Gov't Ex. 33), the Government did not introduce evidence regarding the dates that Dr. Lynch's prescriptions were actually issued by him. However, the **Federal Register** entry ordering revocation, which was published prior to dispensing, indicates that the Agency found that Dr. Lynch had engaged in the unauthorized practice of medicine and had issued prescriptions which ''lacked a legitimate medical purpose.'' Gov't Ex. 31 at 3–12; *Ronald Lynch M.D.,* 75 FR 78745, 78753 (2010). Thus, at the time the controlled substances were dispensed, not only did Dr. Lynch lack authority, but the public notice announced that his privileges were revoked for issuing illegitimate controlled substance prescriptions. Significantly, Paras Priyadarshi, the Respondent 219 PIC, indicated to GS Carter that he did not fill prescriptions written by certain doctors because ''they had prior action taken against them.'' Tr. 252, 933.

[90] Having reached this conclusion, this opinion will not address whether the dispensing of prescriptions pursuant to Dr. Wicks's California registration could rise to the level of a violation of the corresponding responsibility.

[91] Respondent 5195 PIC Merrill testified that some other measures were utilized ''sometimes.'' Tr. 235–36.

[92] Tr. 699.

pharmacies) will not always be sufficient to resolve red flags.

In further support of their assertion that verification and contact are valid means of resolution, the Respondents point to written guidance distributed by the DEA and the State of Florida. First, the Respondents cite to Florida Administrative Code § 64B16–27.823,[93] which, in pertinent part, directs pharmacists to contact the prescribing physician and verify identification when a combination of any two of five enumerated red flags is encountered.[94] The Respondents take the position that ''[t]here are no other formal standards in Florida that govern pharmacists for purposes of dispensing controlled substances.'' Resp't Brief at 11.

Employing similar logic, the Respondents point to Appendix D of the *DEA Pharmacist's Manual,*[95] which provides, *inter alia,* that

[w]hen there is a question about any aspect of the prescription order, the pharmacist should contact the prescriber for verification or clarification [and i]f at any time a pharmacist is in doubt, he/she should require proper identification.

Id. The Respondents urge that ''[t]here is no other guidance from the DEA or any other federal entity with regard to the exercise of a pharmacist's corresponding responsibility.'' Resp't Brief at 15.

Thus, the Respondents appear to argue that, because Florida and DEA have published sources that list prescriber contact and ID check procedures, that no other measures are required. The Respondents' posture in this regard is illusory, inconsistent with the testimony of its expert witness, and even internally inconsistent with its own arguments. While positing that isolated lines from Appendix D of the *DEA Pharmacist's Manual* and Florida Administrative Code § 64B16–27.823 comprise the entire universe of correct steps to resolve controlled substance prescribing red flags, the Respondents have simultaneously argued that

[t]he process of identifying and resolving red flags requires the exercise of individual professional judgment. Different pharmacists can have a different approach to dealing with red flags, and can reach different conclusion, but that does not mean they are not both exercising their corresponding responsibility.

Resp't Brief at 8 (internal record citations omitted). It would be difficult to reconcile the Respondents' argument that prescriber contact and ID check are the sole means of red flag resolution with their simultaneous position that the process of identifying and resolving red flags should be entrusted to multiple valid approaches by individual pharmacists.

The Respondents' position that prescriber contact and ID check are the alpha and omega of red flag resolution also flies in the face of common sense. By adopting this argument the Agency would be endorsing an approach wherein a pharmacist who had even actual knowledge of intentional diversion on the part of prescriber and/or patient could completely discharge his duties to ensure a closed regulatory system by doing no more than ascertaining the true identity of the scrip presenter and procuring assurances from a complicit prescriber. While mindful of the established maxim that a specific provision controls over one of more general application,[96] the proposed interpretation of a pharmacist's obligations based on the offered sources would present a ludicrous result that was obviously never intended by the drafters of the Florida Administrative Code or the *DEA Pharmacist's Manual,* and are not endorsed in this recommended decision. *Chowdhury v. Ashcroft,* 241 F.3d 848, 853 (7th Cir. 2001) (''regulations * * * should not be so strictly interpreted as to provide unreasonable, unfair, and absurd results.''); *see also State v. Iacovone,* 660 So.2d 1371, 1373 (Fla. 1995) (''[s]tatutes as a rule will not be interpreted so as to yield an absurd result.'') (internal punctuation omitted) Professor Doering credibly and persuasively testified that the provisions in the Florida Administrative Code do not provide an exhaustive compilation of a pharmacists obligation, and that ''[t]he standards of care * * * are not always determined by law, by statute, by rule [but are] determined, in fact, by what pharmacists do under like, or similar circumstances.'' Tr. 921. On this point, the Respondent's expert, Professor Brushwood, agreed. Tr. 1091. Professor Brushwood stated that the use of a pharmacist's professional judgment goes beyond the factors set forth in the Florida Administrative Code. Tr. 1049–50. The pharmacy registrant's duty that ripens while acting as a reasonable professional to question a controlled substance prescription, based on the circumstances surrounding the presentation of the scrip,[97] must be and is, much richer than the inexorable execution of a mechanical ID check and prescriber call. Merely effecting either or both of these steps will not, in all circumstances somehow magically absolve a DEA registrant of all responsibility stemming from dispensing a controlled substance pursuant to an illegitimate prescription. To be clear, verification and contact are useful for resolving specific types of red flags. *See* Tr. 764. However, the situational values of these two means of resolution do not undermine Professor Doering's conclusion (concurred in by Professor Brushwood) that their use will not discharge a corresponding responsibility in all circumstances.

Turning to the Respondents' contention that their pharmacists performed checks beyond verification and contact—even assuming *arguendo* that the pharmacists performed all the checks alleged, the record stands uncontradicted that ''the methods that are available are flawed.'' Tr. 764. Indeed, no expert who testified actually presented any manner in which the presented combination of red flags actually could be resolved. Thus, the fact that the Respondents may have employed additional procedures when attempting to establish the validity of the prescriptions does not undermine Professor Doering's testimony that the particular combination of red flags were unresolvable and that the controlled substance prescriptions just should not have been dispensed. As discussed, *supra,* the credible and persuasive evidence of record establishes that in the credited opinion of the Government's expert, on various occasions, each of the Respondents dispensed controlled substances in the face of red flags that were or should have been recognized, and that could not have been resolved to the satisfaction of a reasonably prudent pharmacist.

In its brief, the Government highlights many dispensing events that did not have the benefit of explanatory testimony from its expert witness. Given the number and strength of the instances that were the subject of Professor Doering's testimony, it is not necessary to determine whether his expert opinions should be extrapolated to events over which he was not queried and cross-examined at the hearing.

As discussed, *supra,* Professor Doering described multiple dispensing events on multiple dates from both Respondents that evidenced red flags that could not, in his expert opinion, have been sufficiently resolved to warrant filling the prescriptions. The testimony from Professor Brushwood, that there may be information set forth in a patient profile database that could theoretically resolve these red flags is simply not persuasive on this record.[98] In any event, the only two forms of verification offered by Professor Brushwood in this VIGIL model and his review of Respondents' operating procedures were presenter ID check and practitioner contact. Professor Doering convincingly testified that these two avenues would provide little insight in scenarios where patient and/or physician were complicit in diversion; a condition that

[93] A copy of which was received into evidence. Resp't Ex. 20.

[94] The specified red flags are (a) frequent loss of controlled substance medications; (b) only controlled substance medications are prescribed for a patient; (c) one person presents controlled substance prescriptions with different patient names; (d) same or similar controlled substance medication is prescribed by two or more prescribers at same time; (e) patient always pays cash and always insists on brand name product. *Id.*

[95] A copy of which was received into evidence at the Respondents' request. Resp't Ex. 19.

[96] *Cf. Gozion-Peretz* v. *United States,* 498 U.S. 395, 407 (1991).

[97] *Bertolino,* 55 FR at 4730.

[98] In *Int'l Union (UAW) v. NLRB,* 459 F.2d 1329, 1336 (D.C. Cir. 1972), the United States Court of Appeals for the District of Columbia Circuit held that National Labor Relations Board committed reversible error by declining to apply the ''adverse inference rule'' where one of the parties had ''relevant evidence within his control which he fail[ed] to produce.'' The applicability of the adverse inference rule is not dependent upon the issuance of a subpoena seeking to compel production. *Int'l Union v. NLRB,* 459 F.2d at 1338. This precedent was embraced by the Eleventh Circuit in *Callahan v. Schultz,* 783 F.2d 1543, 1545 (11th Cir. 1986). The judicious utilization of the adverse inference rule allows an administrative tribunal to use the tools available to it and ''permits vindication of the tribunal's authority in situations where vindication might, as a practical matter, be impossible otherwise.'' *Int'l Union v. NLRB,* 459 F.2d at 1339. While the present record provides more than ample basis for the application of an adverse inference that material in the Respondents' patient profile databases would not be helpful to their cases, this case can be decided without the need to apply such an inference.

Doering believed was likely based on the transactions he reviewed.

The statements and actions of the Respondents' employees speak volumes on the culture that existed in the two pharmacies whose conduct is the subject of these proceedings. The PICs and other employees from both Respondent pharmacies told DEA investigators that there was a practice that oxycodone prescriptions would be shut off at a given time each day.[99] Respondent 5195 PIC Jessica Merrill stated that she could fill oxycodone prescriptions all day, but that the pharmacist on duty sets a time where pharmacy customers presenting oxycodone prescriptions would be falsely told that the pharmacy was out of stock. Merrill told investigators that, because the oxycodone customer are aware of the first-come-first served practice, they start to ''stagger'' in at 8:02 a.m. Tr. 230–31. PIC Merrill even offered the astonishing comment that that she makes a practice of keeping some oxycodone on hand in case it is needed to fill prescriptions for ''real pain patients.'' Tr. 231. The practice of shutting off the pharmacy at a given hour to oxycodone patients was corroborated in a separate interview of another Respondent 5195 pharmacist, named Mark Mascitelli. Tr. 180–82. Lead pharmacist Marie Morrell told investigators that the first-come-first served oxycodone cut off time was sometimes reached between 10:00 a.m. and noon, but could be reached as early as 8:30 a.m. Tr. 188–89.

During the course of the execution of an AIW, GS Carter actually heard one of the Respondent 5195 pharmacy technicians, Arlene Piccerilli falsely tell a customer that the pharmacy was out of stock. Piccerilli explained that she knew this was a lie, but that this was the practice at the store. Tr. 224–25. Tellingly, Piccerilli also related her understanding that pharmacy staff cannot judge whether a prescription is valid, and that such a determination is within the exclusive purview of the prescribing physician. Tr. 226.

Interestingly, PIC Merrill acknowledged that she had perceived patterns in prescribing related to oxycodone, that she did not understand why patients traveled distances of over thirty miles to have their oxycodone prescriptions filled at Respondent 5195, and that she was aware of occasions where her pharmacy dispensed medications to patients with identical addresses who presented identical controlled substance prescriptions issued by the same physician. Tr. 238, 240–41, 301–02. When it was suggested to PIC Merrill that the patients may be selling the oxycodone medications her pharmacy was dispensing, her response was not surprise, shock, or denial, but merely ''I know.'' Tr. 238. It was revealing that Pharmacist Mascitelli related that he and PIC Merrill had a conversation with CVS supervisor Jennifer Lalani wherein they were instructed to ''identify more filters to put in place for oxycodone prescriptions.'' Tr. 185. Whatever the verification checks that Respondent 5195 urges as sufficient, it seems that at least in the opinion of company supervisor Jennifer Lalani, there was more that could and should have been done.

Interviews with personnel at Respondent 219 were similarly informative. Respondent 219 PIC Paras Priyadarshi and Pharmacist Susan Masso both told investigators that it was not uncommon for their pharmacy customers to request name-brand oxycodone by its slang monikers ''the Ms'' or ''the Blues.'' Tr. 250, 256, 264. PIC Priyadarshi told investigators that he found nothing remarkable about such requests, or that Respondent 219 was filling a like combination of three controlled substances (oxycodone, alprazolam, and carisoprodol), to the exclusion of other medications, for a high number prescribing physicians. Tr. 247–48. Priyardarshi also indicated that he found nothing unusual about a high number of common ailment diagnosis codes emanating from individual prescribers, or the high concentrations of oxycodone prescriptions emanating from five doctors. Tr. 249–51. Pharmacist Masso told investigators that she did not know why customers at her pharmacy would travel a distance from their residence to see a physician and then another distance to fill the prescription. Tr. 254. Significantly, Appendix D of the *DEA Pharmacist's Manual,* cited by the Respondents and admitted into evidence at their request,[100] lists the following factors among criteria that may indicate that a prescription was not issued for a legitimate medical purpose:

- The prescriber writes significantly more prescriptions (or in larger quantities) compared to other practitioners in the area;
- A number of people appear simultaneously, or within a short time, all bearing similar prescriptions from the same physician;
- People who are not regular patrons or residents of the community, show up with prescriptions from the same physician.

Id. at 66–67; Resp't Ex. 19 at 67. Professor Doering testified that pattern prescribing and distances could be red flags indicating diversion. Tr. 784–85, 791–92, 923. The Respondents' expert witness, Professor Brushwood, agreed that distance can present a red flag requiring resolution. Tr. 1145, 1181, 1194. Remarkably, when asked about the significance of pattern prescribing, Professor Brushwood replied that he ''just simply didn't see dispensing patterns * * *'' in the data he reviewed. Tr. 1068. Brushwood indicated he was dubious about the value of analyzing trends, as opposed to individual dispensing events. *Id.* However, Professor Brushwood concurred that multiple patients from a single prescriber on a single day with the same combination would be a red flag. Tr. 1093, 1098, 1119, 1168. Here, however, PIC Priyardarshi's statements to investigators indicate that he had observed distance anomalies and actually accepted the presence of a cognizable prescribing pattern and yet attached no significance to the information.

Notwithstanding the foregoing, the Respondents contend that the red flags identified by Professor Doering are either not red flags or were not red flags at the time the controlled substances were dispensed. Resp'ts Brief at 108–115. Despite the Respondents' arguments, substantial evidence supports the conclusion that the following circumstances presented red flags of diversion during the relevant time period: (1) ''pattern prescribing,'' defined as ''prescriptions for the same drugs, the same quantities[101] coming in from the same doctor;'' Tr. 708, 1119; (2) the prescribing of oxycodone and alprazolam to a patient,[102] Tr. 784, 1170; (3) ''prescriptions written by a local prescriber for out-of-state patients,'' or where the pharmacy is not near the patient or the prescriber,[103] Tr. 791, 1119; (4) shared addresses by customers presenting on the same day, Tr. 749–50; and (5) the prescribing of controlled substances in general,[104] Tr. 689. These red flags are consistent with Agency and circuit precedent. *See East Main Street Pharmacy,* 75 FR 66149, 66164 (2010) (relying on expert testimony to conclude that the distance traveled by a customer to a pharmacy was a red flag of diversion); *U.S.* v *Hammond,* 781 F.2d 1536, 1538 (11th Cir. 1986) (relying on expert testimony to conclude that ''the lack of individualized dosing should have * * * alerted [pharmacist] to diversion.''); *U.S.* v. *Veal,* 23 F.3d 985, 988 (6th Cir. 1994) (relying on expert testimony to conclude that prescribing of a ''well known combination'' of controlled substance would have made ''any reasonable pharmacist * * * suspicious.'').

Regarding the dispensing events reviewed by Professor Doering, the Government's

[99] PIC Merrill's explanation that this practice is based on workload considerations (Tr. 229–30) is wholly unpersuasive. No evidence was introduced that oxycodone prescriptions require or receive verification beyond the (minimal) steps afforded to all controlled substances dispensed from the Respondent 219 pharmacy. Yet there is no indication that all controlled substances are rendered unavailable by this policy of fabricating depleted stocks to the customers. The Respondents' reliance upon this yarn in its Brief did not render it more convincing in any respect. Resp't Brief at 35–36.

[100] Resp't Ex. 19.

[101] While there was conflicting testimony as to whether quantity alone (other than in exceptional circumstances) could constitute a red flag, Tr. 1054, it cannot be disputed that quantity, insofar as it implicates pattern prescribing, is a red flag. Tr. 708, 1119.

[102] The Respondents contend that the oxycodone-alprazolam combination was not a red flag in 2010, when most of the allegedly wrongful dispensing occurred. Respondent's Brief, at 115. Contrary to this contention, DI Langston testified that the combination of oxycodone and Xanax (the brand name for alprazolam) was a red flag of diversion for at least ''[a] couple of years ago.'' Tr. 90.

[103] The Respondents argue that, because the pill mill problem was not identified until 2010, a South Florida location could not be a red flag because ''it is not clear that a reasonable and prudent pharmacist would have appreciated the significance of a Broward County address in 2010.'' Resp'ts Brief, at 112–113. However, there is no indication that Professor Doering's conclusion that a South Florida physician constituted a red flag was based on the pill mill problem, and not the fact that South Florida is approximately 200 miles from Sanford.

[104] Respondents object to this red flag on the basis that there is no evidence that the prescriptions for ''oxycodone or other drugs could not be prescribed legitimately. Respt's Brief, at 110. This argument must be rejected for the simple reason that a red flag's overall resolvability does not render it any less a red flag.

evidence demonstrated by a preponderance of the evidence that both Respondents dispensed controlled substances in the face of unresolvable and recognizable [105] red flags and satisfied its *prima facie* burden.

Accordingly, consideration of Factors 2 and 4 militate persuasively in favor of the revocation sought by the Government.

Factor Five: Such Other Conduct Which May Threaten the Public Health and Safety

The fifth statutory public interest factor directs consideration of ''[s]uch *other conduct* which may threaten the public health and safety.'' 21 U.S.C. 823(f)(5) (emphasis supplied). Existing Agency precedent has long held that this factor encompasses ''conduct which creates a probable or possible threat (and not only an actual [threat]) to public health and safety.'' *Dreszer,* 76 FR at 19434 n.3; *Aruta,* 76 FR at 19420 n.3; *Boshers,* 76 FR 19403 n.4; *Dreszer,* 76 FR at 19386–87 n.3. Agency precedent has generally embraced the principle that any conduct that is properly the subject of Factor Five must have a nexus to controlled substances and the underlying purposes of the CSA. *Terese,* 76 FR at 46848; *Tony T. Bui, M.D.,* 75 FR 49979, 49989 (2010) (prescribing practices related to a non-controlled substance such as human growth hormone may not provide an independent basis for concluding that a registrant has engaged in conduct which may threaten public health and safety); *cf., Paul Weir Battershell, N.P.,* 76 FR 44359, 44368 n.27 (2011) (although a registrant's non-compliance with the Food, Drug, and Cosmetic Act is not relevant under Factor Five, consideration of such conduct may properly be considered on the narrow issue of assessing a respondent's future compliance with the CSA).

Similar ''catch all'' language is employed by Congress in the CSA related to the Agency's authorization to regulate controlled substance manufacturing and List I chemical distribution, but the language is by no means identical. 21 U.S.C. 823(d)(6), (h)(5). Under the language utilized by Congress in those provisions, the Agency may consider ''such *other factors* as are relevant to and consistent with the public health and safety.'' *Id.* (emphasis supplied). In *Holloway Distributors,* 72 FR 42118, 42126 (2007), the Agency held this catch all language to be broader than the language directed at practitioners under ''other conduct which may threaten the public health and safety'' utilized in 21 U.S.C. 823(f)(5). In *Holloway,* the Administrator stated that regarding the List I catch all:

> [T]he Government is not required to prove that the [r]espondent's conduct poses a threat to public health and safety to obtain an adverse finding under factor five. *See T. Young,* 71 [FR] at 60572 n.13. Rather, the statutory text directs the consideration of ''such other factors as are relevant to and consistent with the public health and safety.'' 21 U.S.C. 823(h)(5). This standard thus grants the Attorney General broader discretion than that which applies in the case of other registrants such as practitioners. See id. sec. 823(f)(5) (directing consideration of ''[s]uch other conduct which may threaten the public health and safety'').

72 FR at 42126.[106] Thus, the Agency has recognized that, while the fifth factor applicable to List I chemical distributors—21 U.S.C. 823(h)(5)—encompasses all ''factors,'' the Factor Five applied to practitioners—21 U.S.C. 823(f)(5)—considers only ''conduct.'' However, because section 823(f)(5) only implicates ''such *other* conduct,'' it necessarily follows that conduct considered in Factors One through Four may not be considered at Factor Five.

In this case, the Government has not alleged or argued reliance upon any conduct which may be properly considered under Factor Five.[107] Accordingly, Factor Five does not weigh for or against revocation.

Recommendation

Based on the foregoing, the Government has established that the Respondents have committed acts that are inconsistent with the public interest. Consideration of the record evidence under the Fourth and Second Factors weighs in favor of revocation. The Respondents dispensed controlled substances where the prescribers were without authorization to prescribe, and under circumstances where a reasonable pharmacist would have concluded that the prescriptions were not issued for a legitimate medical purpose and in the usual course of a professional practice. The red flags that existed were recognized, or should have been, and the convincing expert evidence of record establishes that the red flags were not resolvable by a reasonable and professional pharmacist.

Because the Government has sustained its burden of showing that Respondents committed acts inconsistent with the public interest, the burden shifts to the Respondents to show that they can be entrusted with a DEA registration. A long line of consistent Agency precedent has established that ''to rebut the Government's *prima facie* case, [the Respondents are] required not only to accept responsibility for [the established] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the reoccurrence of similar acts.'' *Jeri Hassman, M.D.,* 75 FR at 8236; *Hoxie v. DEA,* 419 F.3d 477, 483 (6th Cir. 2005); *Ronald Lynch, M.D.,* 75 FR 78745, 78749 (Respondent's attempts to minimize misconduct held to undermine acceptance of responsibility); *George Mathew, M.D.,* 75 FR 66138, 66140, 66145, 66148 (2010); *George C. Aycock, M.D.,* 74 FR 17529, 17543 (2009); *Steven M. Abbadessa, D.O.,* 74 FR 10077, 10078 (2009); *Jayam Krishna-Iyer, M.D.,* 74 FR 459, 463 (2009); *Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008). The failure to accept responsibility is a condition precedent for the Respondent to prevail once the Government has established its *prima facie* case. *Matthew,* 75 FR at 66140. This feature of the Agency's interpretation of its statutory mandate on the exercise of its discretionary function under the CSA has been sustained on review. *Mackay,* 664 F.3d at 822.

Notwithstanding ambiguous and nuanced representations to the contrary in the Respondents' consolidated brief, it is beyond argument that the Respondents' have not accepted responsibility for the actions that form the basis of the Government's *prima facie* case. When asked about personnel actions taken in the wake of the DEA investigation of the Respondents' prescribing practices, CVS Pharmacy Operations V.P. Joseph Abbott made it clear that these actions were not an acknowledgement of any degree fault or mismanagement on the part of the affected employees, but rather a device ''to bring in new leadership that would not be distracted by these events.'' Tr. 1294; *see also* Resp't Brief at 126. The message to the employees, the public, and the DEA regulators is clear: there were no missteps on the part of the Respondent pharmacies and their staff, and the personnel changes will reduce ''distraction'' and allow the enterprise to carry on without admitting fault. ''Distraction'' in this context appears to be synonymous with ''inconvenience,'' and inasmuch as the characterization and carefully-chosen explanation was offered by the V.P. of Pharmacy Operations, there can be no doubt that CVS has spoken authoritatively on the matter. Even those portions of the Respondents' brief that purport to accept responsibility merely set forth vague platitudes extolling the Respondents' ''responsibility to ensure that its pharmacies are compliant with state, federal, and local legislation and requirements and to provide the stores with the tools and information required for them to do so.'' Resp't Brief at 121 (internal quotation marks omitted). The Respondents' offer of an acknowledgement of their responsibility to adhere to their responsibility as registrants to comply with the law is a wholly inadequate substitute for an acceptance of responsibility under Agency precedent.

The Respondents also assert that their ''acceptance of responsibility is demonstrated by their swift and decisive actions in response to the DEA's execution of the AIWs at the two pharmacies.'' *Id.* at 122. Purported remedial measures are, thus, offered as

[105] Insomuch as Professor Doering's conclusion as to the unresolvable nature of the foregoing prescriptions rested on a finding of a pattern prescribing red flag, it is clear that knowledge of the presentation of the similar prescriptions on that day must be able to be attributed to the pharmacy. While the knowledge of the prescriptions presented to the pharmacy technicians and pharmacists is attributable to the Respondents, *One Parcel of Land,* 965 F.2d at 316 (''Only knowledge obtained by corporate employees acting with the scope of their employment is imputed to the corporation.''), because Professor Doering's testimony addressed only the dispensing events *as a whole,* it is unclear at what point the aggregate of the red flags of the customers rendered the red flags unresolvable. That said, it is more than clear that, at the very minimum, the corresponding responsibility was conclusively violated by the time the final dispensing event in each scenario was completed.

[106] In *Bui,* the Agency clarified that ''an adverse finding under [Factor Five did not require a] showing that the relevant conduct actually constituted a threat to public safety.'' 75 FR 49888 n.12.

[107] In its Brief, the Government acknowledges that Factors 1 and 3 have no application to the present litigation, but make no mention of whether any evidence of record should be evaluated under Factor 5. Gov't Brief at 58.

acceptance of responsibility. This argument comingles two independent responsibilities under Agency precedent in an impermissible manner. The Agency has framed the dual prongs of the required rebuttal showing in this way:

[T]o rebut the Government's *prima facie* case, [a registrant] is required not only to accept responsibility for [] misconduct, but also to demonstrate what corrective measures [have been] undertaken to prevent the re-occurrence of similar acts. Jayam Krishna-Iyer, 74 [FR] 459, 464 & n.8 (2009). *Both conditions are essential requirements* for rebutting the Government's prima facie showing that * * * continuing an existing registration would be ''consistent with the public interest.'' 21 U.S.C. 823(f) (emphasis supplied).

Hassman, M.D., 75 FR at 8236 (emphasis supplied). By pointing to purported corrective measures, the Respondents have offered the second requirement in the place of both.

The decision by the Respondents' to support their staffing decisions based on ''distraction'' reduction also tacitly accepts the actions of their employees as consistent with company policy. Thus, the value that can be attached here to testimony from Professor Brushwood that corporate guidance issued to CVS field components is consistent with their obligations [108] is less probative than an examination of what the employees actually were doing as evidenced in the record. *See Pharmboy Ventures Unlimited, Inc.,* 77 FR 33770, 33772 n.2 (2012) (''DEA has long held that it can look behind a pharmacy's ownership structure 'to determine who makes decisions concerning the controlled substance business of a pharmacy.'''); *S&S Pharmacy, Inc.,* 46 FR 13051, 13052 (1981) (the corporate pharmacy acts through the agency of its PIC).

The Respondents have also tendered the peculiar concept that as registrants, they are somehow exempt from a demonstration of responsibility acceptance because they are entities, not individual practitioners, or that their corporate status renders the acceptance of responsibility requirement as elusive. The Respondents posit that

because [several Agency decisions cited by the Respondent] involve circumstances where a registrant acted through multiple agents and through a corporate structure as Respondents do here, none of [the cases cited by the Respondents] squarely address the sufficiency of a registrant's acceptance of responsibility, let alone provides a precedent for revoking the Respondents' registrations.

Resp't Brief at 123. Because there is a wealth of Agency precedent on point which directly contradicts the Respondents' suggestion that the rebuttal required of corporate registrants lessened by virtue of their status a corporation, it is unnecessary to address the merits of this position. *See e.g., Sun & Lake Pharmacy,* 76 FR at 24529 (pharmacy registration revoked in the absence of acceptance of responsibility); *Liddy's Pharmacy, L.L.C.,* 76 FR at 48897 (application of pharmacy denied in absence of acceptance of responsibility); *East Main Street Pharmacy,* 75 FR at 66165 (immediate suspension order of pharmacy affirmed in face of absence of acceptance of responsibility); *Medicine Shoppe,* 73 FR at 387 (pharmacy registration revoked in the absence of acceptance of responsibility). Suffice it to say that the Respondents' argument that they unable to discern the nature of the required acceptance of responsibility because they function as corporations is without merit.

Accordingly, in view of the fact that the Government has established its *prima facie* [109] case by a preponderance of the evidence, and the Respondents have declined to accept responsibility,[110] the Respondents' Certificates of Registration should be REVOKED [111] and any pending applications for renewal should be DENIED.

Dated: June 8, 2012

JOHN J. MULROONEY, II

Chief Administrative Law Judge

[FR Doc. 2012–25047 Filed 10–11–12; 8:45 am]

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[108] Tr. 1084.

[109] Accordingly, the Respondent's motion for a ''directed verdict'' made (and reserved upon) during the course of the hearing is herein denied.

[110] In view of the Respondents' election to avoid acceptance of responsibility, it is not necessary to analyze the adequacy of purported corrective measured offered to demonstrate that similar acts will not occur in the future. *See Hassman, M.D.,* 75 FR at 8236.

[111] The Respondents have requested that any imposed sanction be limited to the controlled substances that were the subject of the Government's case. Resp'ts Brief at 127–28. In view of the strength of the evidence that shows a pervasive disregard for their duties as registrants, as well as their persistent denial of any measure of culpability, entrusting these registrants with the responsibilities of a DEA COR regarding other dangerous controlled substances would be illogical and unwise. Accordingly, after a considered review of the Respondents' position on the issue, revocation is the sanction that is most consistent with the evidence adduced at the hearing.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195; Denial of Request for Redactions

On August 31, 2012, I issued a Decision and Final Order (hereinafter, Order) revoking the DEA Certificates of Registration issued to Holiday CVS, L.L.C., d/b/a CVS/Pharmacy Nos. 219 and 5195 (hereinafter, Respondents). Prior to publication, counsel for Respondents contacted my staff to request a delay in the publication of the Order in the **Federal Register**, on the basis that it, as well as the Administrative Law Judge's Recommended Decision (R.D.), may contain trade secrets and confidential business information; Respondents sought leave to review the Order and to file a request for redactions. My staff agreed to the request, and on September 18, 2012, counsel for Respondents filed a letter proposing various redactions to both the Order and the ALJ's R.D.; therein, Respondents set forth four reasons in support of their proposed redactions. Letter of Catherine O'Neill, Esq., to Administrator, DEA (Sept. 18, 2012) (hereinafter, Resp. Req.). Thereafter, the Government was directed to file a response to Respondents' request. On September 29, 2012, the Government filed its Response (hereinafter, Gov. Resp.), objecting to the proposed redactions.

Respondents' proposed redactions involve various portions of the Order and the ALJ's R.D. that discuss the manner in which information was obtained for Respondents' pharmacy information management system. Respondents maintain that this information contains ''trade secret[s] and confidential business information regarding Respondents' business practices,'' which ''is exempt from disclosure under the Freedom of Information Act (FOIA) and [that] its publication will cause significant, and irreparable, harm to their business operations.'' *Id.* at 1. In addition to these contentions, Respondents argue: (1) That the ALJ's Protective Orders and bench rulings support redaction of the Final Order; (2) that the ALJ's various rulings continue in effect after the termination of the proceeding; and (3) that adoption of the ALJ's Confidentiality Designations is consistent with the manner in which the Agency has treated confidential information in other cases. *Id.* at 3–5.

Opposing the redactions, the Government argues that Respondents have not established that the information at issue involves trade secrets or confidential business information. Gov. Resp. at 1. The Government further argues that the information at issue ''is essential to an understanding of the ALJ's Recommended Decision and the Administrator's Final Order.'' *Id.* at 2. Having carefully reviewed the parties' submissions, I conclude that Respondents have not established their entitlement to the relief sought. *See* 5 U.S.C. 556(d) (''Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.'').

As noted above, Respondents' first contention is that the proposed redactions involve trade secrets [1] and

[1] Respondents err in contending that the information constitutes a trade secret. As the D.C. Circuit has explained, a trade secret is ''a secret, commercially valuable plan, formula, process, or

commercial information which is exempt from disclosure under Exemption 4 of the Freedom of Information Act (FOIA). *See* 5 U.S.C. 552(b)(4). Notwithstanding their assertion that publication of the information will cause them ''significant, and irreparable, harm to their business operations,'' Resp. Req., at 1, they invoke the standard from *Critical Mass Energy Project* v. *NRC,* 975 F.2d 871 (D.C. Cir. 1992), which does not require any showing of competitive harm where trade secrets or confidential business information are voluntarily provided to an agency, to argue that because they voluntarily provided this information to the Agency, it is exempt from disclosure ''if it 'would customarily not be released to the public by the person from whom it was obtained.' '' Resp. Req. at 3 (quoting 975 F.3d at 879). Respondents thus contend that ''[i]t is proper and consistent with FOIA for this information to remain protected from public disclosure.'' *Id.*

However, in *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 292 (1979), the Supreme Court held ''[t]hat the FOIA is exclusively a disclosure statute.'' In so holding, the Court examined the FOIA's ''provision for judicial relief,'' which grants the federal district courts only '' 'jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.' '' *Id.* (quoting 5 U.S.C. 552(a)(4)(B)). As the Court explained, this ''provision does not give the authority to bar disclosure.'' *Id.* The Court further explained that ''the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.'' *Id.* at 293. The Court thus held that the FOIA's exemptions ''were only meant to permit the agency to withhold certain information, and were not meant to mandate nondisclosure.'' *Id.* at 294.

Respondents point to no other provision of law which bars the Agency from disclosing the information in the Decision and Order.[2] Instead, they cite to two prior Agency orders which adopted an ALJ's ruling that certain information was entitled to protection. Resp. Req. at 4–5 (citing *Penick Corp.,* 68 FR 6947 (2003); *Johnson Matthey,* 67 FR 39041 (2002)). Yet neither of these cases explains what legal standard was applied by the Agency in making the determination to continue to protect the information from disclosure in the final order. *See Penick,* 68 FR at 6948; *Johnson Matthey,* 67 FR at 39041. Moreover, each of these cases involved a challenge to an application of an entity to import schedule II controlled substances by competitors of the applicant. *See Penick,* 68 FR at 6947, 6949; *Johnson Matthey,* 67 FR at 39043.

By contrast, this matter involves an enforcement proceeding brought to protect the public interest pursuant to 21 U.S.C. 824(a). It is manifest that in such a proceeding, the Government has a substantial, if not a compelling interest, in ensuring that both the public and the regulated industry fully understand the basis for the Agency's action. *See FCC* v. *Schreiber,* 381 U.S. 279, 293 & n.20 (1965) (noting ''the general policy favoring disclosure of administrative agency proceedings''); *see also Bartholdi Cable Co., Inc.,* v. *FCC,* 114 F.3d 274, 282 (D.C. Cir. 1997) (upholding FCC's conclusion ''that the public ha[d] a compelling interest in the [confidential business] information'' submitted by an applicant, ''as it [bore] directly on [its] fitness as a license applicant''); 21 CFR 1316.67 (requiring that Agency publish its final orders in the **Federal Register**). The Agency's Final Order establishes precedent for future cases and the Agency has an obligation to provide fair notice to the regulated industry of what conduct it deems constitutes an act which renders a registration ''inconsistent with the public interest.'' 21 U.S.C. 824(a)(4); *see also* 5 U.S.C. 552(a)(2) (''A final order [or] opinion * * * that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if * * * it has been * * * published * * * or * * * the party has actual and timely notice of the terms thereof.'').

This is not to say that the redaction of bona fide trade secrets and confidential business information will never be warranted in an enforcement proceeding brought under 21 U.S.C. 824. But Respondents' proposed standard, which focuses entirely on whether the information is of the type which they customarily release to the public and requires no showing of how the disclosure will result in competitive harm, clearly ill-serves the public interest.

In any event, here, the Government demonstrated that much of the information regarding the operation of Respondents' pharmacy management information system (as well as its use of a third-party data aggregator) is publicly available through a Google search. *See* Gov. Resp. at 2 and Attachments. This alone shows that most of the information, which Respondents proposed be redacted, is not treated as confidential by CVS.

To be sure, the evidence that local stores were previously allowed to input prescriber information into the database; that the database formerly displayed

device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.'' *Public Citizen Health Research Group* v. *FDA,* 704 F.2d 1280, 1288 (D.C. Cir. 1983). Moreover, there must be a ''direct relationship'' between the trade secret and the productive process. *Id.* As the D.C. Circuit has further explained, this definition ''narrowly cabins trade secrets to information relating to the 'productive process' itself.'' *Center for Auto Safety* v. *NHTSA,* 244 F.3d 144, 151 (D.C. Cir. 2001). As these authorities make clear, because Respondents' pharmacy management information system is not used to make, prepare, compound or process a trade commodity, the information is not a trade secret.

[2] Respondents do not contend that the Trade Secrets Act, 18 U.S.C. 1905, bars the disclosure of the information. Nor could they, as the statute does not prohibit those disclosures which are ''authorized by law.'' *Id.*

Shortly after the Supreme Court issued its decision in *Chrysler Corp.* v. *Brown,* the Office of Legal Counsel issued an Opinion upon the request of the Federal Mine Safety and Health Review Commission on the issue of whether the Commission could publish confidential financial information about a mine operator in an opinion or order. *Memorandum Op. for the Gen. Counsel, Federal Mine Safety and Health Rev. Comm'n,* 3 U.S. Op. Off. Legal Counsel 201 (1979). Therein, the Office of Legal Counsel noted its prior opinion that ''the phrase 'authorized by law' does not require that an otherwise prohibited disclosure be specifically authorized by law. '[I]t is sufficient if the activity is ''authorized in a general way by law.'' ' This includes an authorization that is reasonably implied.'' *Id.* at 203 (citing 41 Op. Att'y Gen. 166, 169 (1953) (other citation omitted)).

The Office of Legal Counsel then noted that while ''[t]here is no statute that specifically authorizes the Commission to publish, in its opinions or orders, information within the scope of the prohibitions of § 1905[,] * * * the Commission is a quasi-judicial body with the authority both to hold hearings in the first instance and to review decisions made by its administrative law judges.'' *Id.* (citation omitted). Because the Commission's ''decisions * * * must be based upon the record as well as the law,'' and ''[i]t is authorized and directed to make findings of fact, which must be sustained on judicial review if supported by substantial evidence[,] * * * the Commission is * * * authorized by clear implication of law to include in its opinions and orders a recitation of evidence in the record upon which its findings and legal conclusions are based.'' *Id.* at 203–04 (citations omitted). The Office of Legal Counsel thus concluded that ''[t]his is sufficient authorization by law, within the meaning of § 1905, to allow the Commission to publish in its opinions and orders evidence of record that would otherwise be protected from disclosure.'' *Id.* at 204.

In performing its functions under 21 U.S.C. 823 and 824, DEA likewise acts as a quasi-judicial body and the Agency's decisions and orders ''must be based upon the record as well as the law.'' *Id.* at 203; *see also* 21 U.S.C. 824(c) (''Proceedings to deny, revoke, or suspend shall be conducted pursuant to this section in accordance with subchapter II of chapter 5 of Title 5.''). So too, the Agency ''is authorized and directed to make findings of fact, which must be sustained on judicial review if supported by substantial evidence.'' 3 U.S. Op. Off. Legal Counsel, at 203; *see also* 21 U.S.C. 877 (''Findings of fact by the Attorney General, if supported by substantial evidence, shall be conclusive.'').

both the data obtained from HMS (the third-party aggregator), as well as that inputted at the local stores; and that CVS obtained updated data from HMS on a weekly basis; is not specifically addressed by the attachments. Yet even with respect to this information, Respondents offered no evidence that CVS treats this information as confidential.[3]

Moreover, Respondents offer absolutely *nothing* in the way of evidence to support their claim that ''publication [of this evidence] will cause significant, and irreparable, harm to their business operations.'' Resp. Req. at 1. In short, Respondents have offered no more than conclusory assertions of competitive harm, which are manifestly inadequate to overcome the substantial public interest in publication of the Order without the proposed redactions.

Nor do Respondents' remaining contentions support their proposed redactions. While the ALJ's protective order did protect against the disclosure of ''commercially sensitive information,'' *see* Resp. Req. at 3–4, the protective order defined this term to ''mean[] information that, if publicly disclosed, would be a windfall to Respondents' competitors and would put Respondents at a competitive disadvantage.'' ALJ Ex. 20, at 3. Respondents thus had notice that they were required to establish that the publication of any information, which they seek to protect from disclosure, would cause them competitive harm. Yet not only did Respondents fail to elicit any testimony from CVS's Vice President explaining why public disclosure of the information as to the workings of its pharmacy management information system ''would be a windfall'' to their competitors or place them ''at a competitive disadvantage,'' *id.,* they also failed to submit any such affidavits establishing such facts in support of their request for redactions.

Contrary to Respondents' contention, the ALJ's explanation for closing the hearing during the testimony of the CVS Vice President does not support the proposed redactions. While the ALJ explained that ''[a] party will be seeking to introduce evidence that is likely to compromise a trade secret and/or commercially sensitive information,'' he also explained that this ruling was based on ''information represented by counsel for the Respondent.'' Tr. 1225–26. The ALJ's ruling does not constitute a finding that Respondents had satisfied their burden of showing that disclosure of the information would cause competitive harm, and while the ALJ appropriately proceeded with caution given the representation of Respondents' counsel, ultimately, no such evidence was forthcoming. I thus reject this contention.

Finally, Respondents' contend that the ''publication and dissemination to non-covered individuals of the unredacted Final Order is inconsistent with the Protective Order because it is a transmittal of information to any person 'not entitled to access pursuant to [the] Protective Order,' '' which remains in effect even after the termination of the proceeding. Resp. Req., at 4 (quoting ALJ Ex. 20, at ¶¶7 and 9). However, the Protective Order does not (and cannot) bind the Administrator, and indeed, it expressly provides that after the ALJ transmits the record, the Order may be modified by the Administrator. ALJ Ex. 20, at ¶ 7.

In any event, as explained above, Respondents have not established that any of the information which they seek to redact is confidential. Nor have they established that publication of the information will cause them any competitive harm. Accordingly, I reject their request for redactions. I also conclude that modification of the protective order is warranted and will direct that the ALJ remove the confidential and protected designation from those portions of the record which are marked as such based on Respondents' assertion that they include trade secrets or confidential business information.

It is so ordered.

Dated: October 4, 2012.

Michele M. Leonhart,

Administrator.

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[3] Thus, even under the *Critical Mass* standard, Respondents are not entitled to the redactions.

FEDERAL REGISTER

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Part III

Merit Systems Protection Board

5 CFR Parts 1200, 1201, 1203, *et al.*
Practices and Procedures; Final Rule

MERIT SYSTEMS PROTECTION BOARD

5 CFR Parts 1200, 1201, 1203, 1208, and 1209

Practices and Procedures

AGENCY: Merit Systems Protection Board.

ACTION: Final rule.

SUMMARY: The Merit Systems Protection Board (MSPB or the Board), following an internal review of MSPB regulations, publication of a proposed rule, and consideration of comments received in response to the proposed rule, hereby amends its rules of practice and procedure in order to improve and update the MSPB's adjudicatory processes.

DATES: Effective November 13, 2012.

FOR FURTHER INFORMATION CONTACT: William D. Spencer, Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419; (202) 653–7200, fax: (202) 653–7130 or email: *mspb@mspb.gov.*

SUPPLEMENTARY INFORMATION: On June 7, 2012, the Merit Systems Protection Board (MSPB or Board) proposed numerous amendments to its regulations. 77 FR 33663. In response to publication of this proposed rule, the MSPB received 105 pages of comments from 25 commenters. The comments received by the MSPB are available for review by the public at *www.mspb.gov/regulatoryreview/index.htm.*

Comments and Summary of Changes to the Proposed Rule

Set forth below is a short summary of the changes proposed by the MSPB, a discussion of the comments addressing the proposed rule, and a summary of the changes the MSPB is making to the proposed rule. Readers desiring a more detailed summary of the amendments proposed by the MSPB should consult the proposed rule at 77 FR 33663.

This Final Rule will become effective 30 days after publication in the **Federal Register**. The MSPB is aware that changes to its adjudicatory procedures may pose special problems in cases that are pending on the date this Final Rule takes effect. In any such case, judges have authority under 1201.12 to waive a regulation for good cause, except where a statute requires application of the regulation.

Section 1200.4 Petition for Rulemaking

The MSPB proposed adding this new regulation to set forth procedures for filing petitions for rulemaking under 5 U.S.C. 553(e). Numerous commenters objected to this proposed regulation on the grounds that the MSPB should always employ notice and comment rulemaking due to its unique mission as an adjudicative body and the regulation could be read as authorizing the MSPB to publish a direct final rule not authorized under the Administrative Procedure Act (APA). However, the APA does not require notice and comment in all instances of agency rulemaking. 5 U.S.C. 553(b). While the MSPB does have a unique mission, publication of a direct final rule remains an important tool to quickly implement minor technical amendments. However, in an effort to address the concerns raised by these commenters, the MSPB has added a requirement to the regulation that final rules will be issued ''consistent with the Administrative Procedure Act.''

A commenter suggested that the MSPB, either by regulation or practice, should post petitions for rulemaking and responses thereto on the MSPB's Web site. The MSPB agrees that this proposal has merit and will undertake in the future to post such information on its Web site. A commenter suggested that the regulation include advice concerning a petitioner's right to judicial review. The MSPB has chosen not to amend the regulation as requested. Finally, a commenter suggested that the MSPB include a procedure for seeking reconsideration of a denial of a petition for rulemaking. The regulation presently gives each petitioner a full opportunity to present his or her petition to the Board. No further procedures for reconsideration will be included in the final rule.

Section 1201.3 Appellate Jurisdiction

The amendments proposed by the MSPB explained that this regulation is not a source of MSPB jurisdiction and that jurisdiction depends on the nature of the employment or position held by the employee as well as the nature of the action taken. The proposed regulation also revised the listing of appealable actions within the MSPB's appellate jurisdiction.

A commenter suggested several editorial changes to paragraph (a) and, in response, the MSPB has amended this regulation. A commenter pointed out that the MSPB has jurisdiction over ''suitability actions,'' not ''suitability determinations.'' The MSPB has amended the proposed regulation to address this comment.

A commenter recommended that the regulation should be amended to include more specific information concerning what constitutes a suitability determination and how a suitability determination is made. In response, the MSPB has included changes to paragraph (a)(9).

A commenter suggested that the statement in paragraph (a)(3) of the proposed rule that appeals of probationary terminations ''are not generally available to employees in the excepted service'' is insufficient for pro se appellants. The commenter further suggested that the regulation should be revised to clearly identify when an excepted service employee has the right to appeal such an action by listing any exceptions to the general rule. In response, the MSPB notes that one such exception to the general rule exists for Veterans Readjustment Act appointments. While appointments under this authority are excepted service appointments, because they are positions that would otherwise be in the competitive service, many competitive service rules apply to them, including those at 5 CFR part 315, subpart H. *See McCrary* v. *Department of the Army,* 103 M.S.P.R. 266, ¶ 11 (2006); 5 CFR 307.103–.104. The MSPB therefore believes the use of the term ''generally'' is justified. In addition, given the possibility that the MSPB might overlook an exception that ought to be included in such a list or that the list could become outdated at some future point, the MSPB is satisfied that the use of the term ''generally'' is appropriate. Finally, MSPB administrative judges are required to identify jurisdictional elements to the parties after an appeal is filed and, therefore, there is no need to amend this regulation as requested.

The MSPB has also made several minor changes in the proposed rule. First, in paragraph (a)(10), we changed the citation to authority for this grant of jurisdiction. There is no longer any Subpart E to 5 CFR Part 752. The correct sources of jurisdiction are 5 U.S.C. 7543(d) and 5 CFR 752.605. Second, in paragraph (a)(11), we pluralized ''right'' in the first grant of jurisdiction and broke out the particular grants of jurisdiction into separate paragraphs (a)(11)(i) through (a)(11)(vii).

Section 1201.4 General Definitions

The MSPB proposed revising subsection (a) to eliminate the phrase ''attorney-examiner'' and revising subsection (j) due to a concern that the term ''date of service'' was unclear.

In response to a concern expressed by a commenter that the term ''grievance'' should be defined, the MSPB has added a new paragraph (o) defining a ''grievance'' as ''[a] complaint by an employee or labor organization under a negotiated grievance procedure covered

by 5 U.S.C. 7121.'' While this definition was not included in this regulation in the proposed rule, the MSPB believes it is appropriate to include this new material here because the MSPB did propose to amend 1201.153 to substitute the term ''under a negotiated grievance procedure'' for the word ''grievance.'' The new definition of ''grievance'' is intended simply to recognize the need to clarify the meaning of the term ''grievance'' throughout the MSPB's regulations.

A commenter objected to the current definition of ''date of service'' in paragraph (j) as circular and suggested that it should take the form of a narrative definition without reference to ''date of filing.'' The MSPB rejects this suggestion as the date of service and date of filing are intended to be identical.

A commenter suggested that the MSPB delete ''calendar'' as a description of days in paragraph (j) because days is already a defined term in paragraph (h). The final rule adopts this suggestion.

Several commenters suggested that language authorizing that 5 extra days will be provided when a pleading is filed by mail should be moved to 1201.23 or that a reference to 1201.23 should be added to the proposed language in paragraph (j). A commenter also suggested that the MSPB amend the language of paragraph (j). In response to these suggestions, the MSPB has amended the language of paragraph (j) and moved the language providing 5 extra days when a pleading is filed by mail to 1201.23.

A commenter expressed a concern that the MSPB's definition of ''date of service'' is flawed because it fails to recognize that irradiation of mail delays receipt of mail by Federal agencies. The MSPB is aware that when an appellant files via regular mail, and the agency representative is located in Washington, DC, the pleading will go to an irradiation center and it may take more than 5 days for the agency to receive it. While this is a valid concern, the MSPB does not think it justified a special provision in the regulations. If irradiation has caused a significant delay that adversely impacts an agency's opportunity to submit a responsive pleading, the agency can ask for additional time or seek to excuse a late response, and there is no reason to believe our judges will not deal with such matters appropriately.

A commenter suggested that the MSPB amend the definition of ''judge'' in paragraph (a) to add ''any member of the Merit Systems Protection Board'' to the listing of persons who can be a judge and further amend the regulation to make clear that only individuals ''experienced in hearing appeals'' may hear an appeal of a removal action. We have revised the regulation to include Members of the Board in the definition of the word ''judge.'' The MSPB is cognizant of the requirement in 5 U.S.C. 7701(b)(1) that a removal case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The MSPB ensures that cases are assigned to experienced judges in accordance with the statutory requirement.

Section 1201.14 Electronic Filing Procedures

The MSPB proposed adding new language to reflect current MSPB policy and procedures regarding Sensitive Security Information (SSI) and classified information. The MSPB proposed to revise paragraph (m) to make the regulation consistent with the intent expressed by the Board when it originally published this provision at 73 FR 10127, 10128 (2008). Finally, additional language was added to provide that amici are not permitted to e-file.

A commenter suggested that the MSPB should change the restriction on SSI so that it applies only when a document has been marked by the agency as containing SSI. The MSPB believes the current language concerning filing of SSI and classified information is more appropriate in so far as it contemplates additional scenarios in which a party other than the agency submits a pleading containing information that it knew or should have known contains SSI. A commenter objected to the MSPB's restrictions on filing pleadings containing SSI as overly broad. However, these restrictions are compelled by the fact that SSI and classified information require security beyond that available in the MSPB e-filing system. A commenter questioned the continued exclusion of class appeal-related filings and requests to appear as amici from the MSPB's e-appeal system. As the MSPB noted in the proposed rule, we considered the option of reconfiguring e-Appeal Online to address Privacy Act concerns and allow amici to file using e-Appeal Online but determined that the cost of such a systemic change outweighed the benefit of e-filing by amici. A commenter observed that the MSPB should adjust its e-filing system to account for regional time differences rather than address this issue in a regulation. While the e-filing system of the Federal judiciary may accommodate such difference, the MSPB remains concerned that such a change to its e-filing system risks compromising the reliability and integrity of its filing process.

Section 1201.21 Notice of Appeal Rights

The MSPB proposed to change longstanding jurisprudence concerning allegations of reprisal for whistleblowing under 5 U.S.C. 2302(b)(8) where an employee has been subjected to an otherwise appealable action. Subsection (g)(3) of 5 U.S.C. 7121 provides that an individual who has been subjected to an otherwise appealable action and who alleges retaliation for whistleblowing must elect one of 3 actions: (A) an appeal to the Board under 5 U.S.C. 7701; (B) a negotiated grievance under 5 U.S.C. 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (5 U.S.C. 1214), which can be followed by an Individual Right of Action appeal filed with the Board (5 U.S.C. 1221). Subsection (g)(4) provides that an election is deemed to have been made based on which of the 3 actions the individual files first. The proposed regulation would require agencies to fully notify employees of their rights in these situations so that they can make an informed choice among the available 3 options. Paragraph (e) was added to require notice in mixed cases.

A commenter suggested that the MSPB should define what constitutes a grievance. In response to this comment, the MSPB has added a new definition in a new paragraph (o) in 1201.4.

Several commenters suggested that the MSPB clarify its proposed regulation and/or provide ''model'' language for agencies to use with respect to the Board's requirements in paragraphs (d) and (e) relating to elections between different forums that employees are required to make with respect to claims of retaliation for protected whistleblowing disclosures or claims of unlawful discrimination. The Board does not believe that detailed model language is required, as the regulations at 5 CFR 1209.2 and 29 CFR 1614.301 and .302 provide adequate guidance.

A commenter pointed out that while the proposed regulation would require agencies to give notice of rights under 5 U.S.C. 7121(g), it failed to require notice of rights under 5 U.S.C. 7121(c)(1) and (d). The MSPB believes these concerns are already addressed in paragraphs (d) and (e) of the regulation. We revised paragraph (e) to add the phrase ''or to grieve allegations of unlawful discrimination'' and added

references to 5 U.S.C. 7121(d) and 29 CFR 1614.301 to clarify the notice that must be provided regarding discrimination claims.

A commenter urged the MSPB to make clear that an appellant may make separate elections of remedies for a proposed decision and a final decision. This issue is presently addressed in Example 4 in 1209.2.

Commenters also were concerned that increasing the amount of information already included in notices was unreasonable and that the exact parameters of the notice required may not be clear at the time an action is taken against a probationary employee. The complexity of notices is a product of the complexity of the law governing Federal employees. With regard to notices given to probationary employees, when an agency takes an action against a probationary employee, it must inform the employee of the circumstances in which such terminations are appealable to the Board.

The MSPB has made two other amendments to this regulation. We revised paragraph (e) because it only referred to elections between the MSPB and the EEOC under 29 CFR 1614.302. This paragraph now also addresses election of the negotiated grievance process for claims of prohibited discrimination. In response to other comments regarding this regulation, the MSPB also added a new paragraph (f) requiring agency decision notices to include the name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal. This minor change will help ensure proper service of the MSPB's Acknowledgment Order, thereby expediting the processing of appeals.

Readers also should review the discussion of comments under 5 CFR 1209.2.

Section 1201.22 Filing an Appeal and Responses to Appeals

The MSPB proposed to revise this regulation to include a new section stating the MSPB's general rule about constructive receipt and included several illustrative examples.

A commenter objected to the use of the terms ''relative'' and ''of suitable age and discretion'' as overly vague. The MSPB does not use the word ''relative'' in this regulation. The use of the term ''persons of suitable age and discretion'' is taken from Rules 4 and 5 of the Federal Rules of Civil Procedure.

A commenter asked the MSPB to modify the regulation to clarify that, in cases where the appellant and his or her representative receive a document on different dates, the date of the representative's receipt should control. The MSPB has elected not to make this change as the present rule is adequate and this proposal will introduce further complexity.

A commenter objected to the use of examples because such examples might be read as determinative in circumstances where they might be misleading. The MSPB disagrees and views these examples as an effective means to explain the rule to pro se litigants. However, the MSPB will note in the examples that the cited circumstances in each example ''may'' establish the contested issue.

A commenter proposed that the MSPB require an agency to provide contact information for the agency official designated to receive notice of a change in an appellant's address. The MSPB has added a new paragraph (f) in 1201.21 that will require the agency to supply contact information for a responsible agency official in all decision notices.

Section 1201.23 Computation of Time

The MSPB proposed to amend this regulation so that it will apply to all situations in which a deadline for action is set forth in the MSPB's regulations or by a judge's order, including discovery requests and responses between the parties.

A commenter requested the MSPB to incorporate constructive receipt language from 1201.22 in this regulation. The MSPB will not implement this suggestion because 1201.23 concerns solely with how time is computed, not when receipt is effective. A commenter recommended a change in wording to shorten the description of the 5 extra days provided when a pleading is filed by mail. The commenter also recommended moving this language from 1201.4 to 1201.23. The MSPB agrees with these suggestions. The final rule contains a modified version of this commenter's suggested language. The MSPB deleted the word ''calendar'' as a description of days because it is already a defined term in paragraph (h) of 1201.4.

Section 1201.24 Content of an Appeal; Right to Hearing

The MSPB proposed to change the scope of requested attachments to an initial appeal from ''any relevant documents'' to a request for the proposal notice, decision notice, and for the SF–50 if available. The MSPB also proposed to amend the definition of ''right to hearing'' in paragraph (d) to state that, ''in an appeal under 5 U.S.C. 7701, an appellant generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal.''

A commenter objected to the limitations on the amount of material an appellant may submit with an appeal on the grounds that this change will increase the time it takes an agency to assess the case and provide an appropriate response. While the proposed amendment might limit the initial receipt of relevant material in some cases, in many others it will serve to curtail the submission of extraneous material, while ensuring that the MSPB receives information necessary to identify the nature of an appellant's claims.

A commenter agreed that evidence on jurisdiction should be filed in response to Board orders but only if the Board would hold in abeyance the agency's narrative response to the appeal until the question of jurisdiction is resolved. The MSPB will not make any changes in response to this suggestion since this issue can be addressed on a case-by-case basis in acknowledgment of other orders issued by an administrative judge.

A commenter objected to the proposed amendment on the grounds that it disadvantages appellants and precludes the appellant from submitting additional information that may be relevant. The MSPB disagrees with this comment because the amendment to this regulation concerns only the timing of submissions by an appellant and does not ultimately limit the scope of what an appellant may submit.

A commenter suggested that in subparagraph (a)(7), the MSPB should require that appellants in Veterans Employment Opportunities Act (VEOA) and Individual Right of Action (IRA) cases submit relevant documents, as these documents are almost always exclusively in the appellant's possession. The MSPB believes that under current practice jurisdictional and show-cause orders adequately address requirements for appellants to show exhaustion in VEOA and IRA appeals.

A commenter suggested that the MSPB should develop a mechanism for summary judgment and amend paragraph (d) to add information concerning an appellant's right to a hearing where summary judgment is granted. The Court of Appeals for the Federal Circuit has found that the MSPB lacks authority to order summary judgment. *Crispin v. Department of Commerce,* 732 F.2d 919, 924 (Fed. Cir. 1984). Therefore, we cannot make the suggested changes.

A commenter objected to the word ''generally'' in paragraph (d) since 5 U.S.C. 7701 includes a right to a hearing. The MSPB has removed the reference to 5 U.S.C. 7701 from this regulation because there are other appeals that lack a right to a hearing.

Section 1201.28 Case Suspension Procedures

The MSPB proposed to overhaul its case suspension procedures to allow for more than a single 30-day suspension period, eliminate current restrictions on when a request must be filed, and remove separate paragraphs for unilateral requests and joint requests.

A commenter suggested that the MSPB should grant its administrative judges the power to initially suspend case processing for up to 60 days instead of 30 in order to facilitate settlement. The MSPB believes that further expansion of the initial suspension period to 60 days is unwarranted because the proposed rule ultimately allows for suspension up to 60 days and allowing an initial suspension period of 60 days could negatively affect the time it takes to issue a decision in an initial appeal. However, in light of this comment, and another comment seeking to amend the regulation to suspend a case referred to the MSPB's Mediation Appeals Program (MAP), the MSPB has added a new paragraph (d) suspending the processing of an appeal that is accepted into MAP. This amendment reflects the MSPB's current practice.

Several commenters suggested that suspension sought jointly by the parties should be granted automatically. The MSPB disagrees and believes that its judges need to retain control of case processing and will exercise suitable discretion in acting upon jointly filed suspension requests.

A commenter asked the MSPB to consider amending the regulation to specify that adjudication of a motion to compel discovery does not require termination of the suspension period. The regulation states that a judge may terminate the suspension period when the parties request the judge's assistance and the judge's involvement is likely to be extensive but does not require termination. We believe that leaving such matters to the judge's discretion preserves the maximum flexibility for efficient and effective case processing.

Section 1201.29 Dismissal Without Prejudice

The MSPB proposed adding this new regulation that codified existing case law on the subject of dismissals without prejudice.

A commenter suggested that there was a typographical error in paragraph (a) and that the correct reference should be to 1201.22, not 1201.12. The reference to 1201.12 was intentional because we wanted to allow for certain exceptions where the Board's reviewing court has held that the MSPB should not specify a date certain for refiling. The MSPB has modified paragraph (c) to specify the exception.

A commenter suggested that the MSPB should rewrite paragraph (c) to provide that a waiver of a late refiling will be granted where an appellant establishes good cause for the untimely filing. The MSPB believes that requiring judges to liberally construe such requests is more appropriate. See 5 CFR 1201.29(d).

A commenter suggested that the MSPB revise the regulation to require that a judge notify the parties and give them an opportunity to object before dismissing an appeal without prejudice. While the MSPB agrees with this suggestion in principle, we remain convinced that the current provision must be retained in order to allow a judge to dismiss a case without prejudice sua sponte in exceptional circumstances, such as when a hurricane closes a regional office for an extended period.

A commenter recommended allowing the judge to set the refiling deadline based on an applicable triggering event instead of a date certain. Board case law does not allow judges to set the refiling date based solely on a subsequent triggering event, without also providing an alternate date certain.

A commenter recommended requiring that judges set a refiling date within 6 months of the order dismissing the appeal and that the MSPB mandate that an appeal may not be dismissed without prejudice for more than two 6-month periods. Administrative judges are in the best position to set a refiling date. Based upon experience, the MSPB believes that a 12-month period may not be sufficient in all circumstances.

A commenter expressed a preference for the automatic refiling of all cases dismissed without prejudice, especially retirement cases. Automatic refiling is not practical in all cases. In many cases, refiling is neither necessary nor desired because the matter has been fully resolved. For example, when an adverse action has been dismissed without prejudice so that the appellant can pursue an application for disability retirement, if the application is granted, no further action is required.

A party suggested that the proposed regulation should be revised and reorganized. In response, we have made non-substantive revisions to the organization and language of the regulation.

Section 1201.31 Representatives

The MSPB proposed to add the phrase ''or after 15 days after a party becomes aware of the conduct'' at the end of the third sentence in 5 CFR 1201.31(b) to acknowledge that a representative's conflict of interest may not be readily apparent to a party wishing to challenge the designation of a representative. The MSPB also proposed to move provisions governing exclusion and other sanctions for contumacious behavior by parties and representatives to 5 CFR 1201.43. Readers are advised to review comments under 1201.43.

A commenter suggested that the MSPB should offer appellants the option to obtain an interlocutory appeal of a disqualification of his or her representative. One reason for the change from the current regulation is the practical consideration that allowing an automatic interlocutory appeal, as the current regulation does, would unnecessarily delay the processing of the appeal. Another is that the revised regulation does not prohibit a request for an interlocutory appeal in these circumstances; it simply does not provide for the automatic certification of an interlocutory appeal that does not meet the requirements of section 1201.92(b), including that the matter in question ''involves an important issue of law or policy about which there is substantial ground for difference of opinion.'' A party affected by the exclusion of a representative who believes that an interlocutory appeal would meet the requirements of 1201.92 remains free to seek one.

Section 1201.33 Federal Witnesses

The MSPB proposed adding language to clarify that an agency's responsibility under this regulation includes producing witnesses at depositions as well as at hearings.

A commenter observed that ''to appear at a deposition'' appears in the first sentence of (a), but not in the second sentence. This issue has been addressed in the final rule.

Several commenters asked the MSPB to amend the regulation to clarify that the employing agency is responsible for pay and benefit costs resulting from the production of witnesses not employed by the responding agency. Other commenters objected that the proposed amendment appears to make party agencies responsible for ensuring the appearance of individuals employed by nonparty agencies. The proposed regulation is not intended to apportion

these costs, which are for the involved agencies to resolve. However, we have revised the regulation to indicate that the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations such as those issued pursuant to *United States, ex rel.* v. *Touhy,* 340 U.S. 462, 467 (1951) regarding the production of evidence from Federal employees in matters in litigation.

A commenter recommended adding a provision requiring that the nonparty agency be served with any order requiring testimony of one of its employees. This commenter further suggested that the nonparty agency be given an opportunity to object or seek modification of such an order before it becomes effective. The Board is disinclined at this time to formalize such a process in this regulation in order to minimize the risk of collateral litigation. However, administrative judges currently have the authority to resolve any such objections.

A party recommended that the MSPB eliminate the possibility of an adverse inference against a respondent agency with respect to non-appearance of any employee not under its control. Under the MSPB's regulations, when a party fails to comply with an order, the judge may draw an inference in favor of the requesting party with regard to the information sought. The existing regulation does not provide for such a sanction against a party when a nonparty violates an MSPB order.

A commenter suggested that the MSPB amend the regulation to ''permit a witness, who is a nonparty Federal employee, to provide telephonic or video testimony at the hearing upon the agency's request.'' Such a request may be submitted to the judge, but the MSPB cannot tie the judge's hands with a blanket rule that gives the agency power to decide whether a witness will testify in-person or by video or telephone.

A commenter suggested that the MSPB should amend this regulation to require agencies to pay for travel to depositions and that depositions should be taken in the local commuting area where the witness resides, if possible, or where there are videoconferencing capabilities. The parties to an MSPB appeal are free to make such arrangements to control costs and present the issue to the judge when the parties cannot agree on such cost control measures.

A party suggested that the MSPB review and clarify its regulations regarding third party discovery. The MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

Section 1201.34 Intervenors and Amicus Curiae

The MSPB proposed to amend this regulation to address the fact that it receives motions to file amicus briefs for the first time on petition for review and provide further explanation as to what an amicus is permitted to do. The proposed amendment also included general guidelines indicating when requests to file amicus briefs will be granted or denied.

A commenter generally approved of the proposed amendments but suggested that the MSPB should reference its recent practice of soliciting amicus briefs through **Federal Register** notices if it intends to continue using this practice. The MSPB has revised the final regulation to include a provision stating that the MSPB may solicit amicus briefs on its own motion.

A commenter suggested that the MSPB should include a provision stating that, when the Board solicits amicus briefs on its own initiative, the Board will serve the amicus briefs on the parties. The MSPB currently serves the amicus briefs on the parties and sees no need to include this level of detail in the regulation.

A commenter suggested that the MSPB add to the regulation a provision stating that an amicus curiae is not entitled to receive service of any pleadings or submit replies to briefs filed by the parties. As currently drafted, subparagraph (e)(5) of the regulation states that amici are not parties and may not participate in hearings but does not explicitly say that amici should not be served with copies of pleadings. However, the MSPB will not make the suggested change as the draft regulation makes clear that amici are not parties and, as such, plainly implies that they need not be served with copies of pleadings.

A party recommended that the MSPB should require that requests for participation as an amicus be served on the parties, assuming the identity of the parties is known to the amicus. This issue was not addressed in the MSPB's proposed rule. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

Section 1201.36 Consolidating and Joining Appeals

The MSPB proposed to substitute ''removal'' for ''dismissal'' as the latter is not a term used by the Board to describe an employee's separation from employment for disciplinary reasons. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.41 Judges

The MSPB proposed to amend this regulation to reflect the language used in the MSPB Strategic Plan. The MSPB received no negative comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.42 Disqualifying a Judge

The MSPB proposed to amend this regulation to reflect the fact that under current MSPB practice a judge who considers himself or herself disqualified notifies the Regional Director, not the Board. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.43 Sanctions

The MSPB proposed moving its regulation regarding exclusion of parties and representatives for contumacious behavior from 5 CFR 1201.31 to this regulation. The MSPB further proposed to provide judges with explicit authority to suspend or terminate a hearing already underway and to delete the requirement of a show cause order, substituting instead a requirement that judges provide adequate prior warning before imposing a sanction and document the reasons for any such sanction. The MSPB proposed to eliminate the provision for an interlocutory appeal of a sanction for contumacious behavior and allow a judge to limit participation by a representative without excluding the representative from the case entirely. Finally, the proposed rule deleted the term ''appellant's representative'' and instead substitutes the term ''party's representative.''

A commenter observed that it was unclear whether the MSPB was expanding a judge's authority for sanctioning contumacious behavior to include witnesses or other persons rather than just parties or representatives. MSPB judges had authority to exclude persons other than parties from participation in a proceeding prior to publication of the proposed rule under 1201.31(d), and the

proposed rule continues to include this authority.

A commenter suggested that the MSPB amend the regulation to state that, when the judge excludes a party's representative, the judge will give the party a reasonable time to obtain another representative. The proposed and final rules include this provision in paragraph (d).

A commenter suggested that the MSPB revise the first sentence of this regulation to state that the Board or a judge may impose sanctions ''for good cause shown, and as necessary to serve the ends of justice.'' The MSPB will not amend the regulation as suggested because the definition of ''judge'' now expressly includes the Board and the addition of the phrase ''for good cause shown'' does not usefully add to the proposed standard, ''as necessary to serve the ends of justice.''

Three commenters urged the MSPB to maintain the interlocutory appeal process in cases where a sanction is imposed. The proposed change recognizes, however, that providing for an automatic interlocutory appeal, as the current regulation does, may unnecessarily delay the processing of an appeal. Moreover, the revised regulation does not prohibit a request for an interlocutory appeal of an imposed sanction. A sanctioned party who believes an interlocutory appeal would meet the requirements of 1201.92 remains free to seek one. In making proposed amendments to our regulations, the Board did not propose changes to the substantive criteria in 1201.92 for granting interlocutory appeals. It would be inappropriate to publish a final rule that goes beyond the scope of the proposed amendments. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

Section 1201.51 Scheduling the Hearing

The MSPB proposed to delete the current list of approved hearing sites contained in Appendix III, in favor of a posting of such sites on the Board's Web site, thereby facilitating greater flexibility in the selection of cost effective locations.

Several commenters expressed the concern that this section appears to be aimed at saving the MSPB travel expenses but is likely to result in greater costs for the responding agency. These commenters suggested that the regulation should be amended to maximize savings to the Federal Government as a whole. The MSPB's intent in proposing this amendment was not to minimize MSPB travel expenses at the expense of the parties, however, but rather to ensure that hearing site locations can be flexibly adjusted in response to ongoing changes in the relative costs of travelling to particular sites. Parties may request a change in an approved site if lower costs can be achieved in a particular case.

A commenter recommended that the last sentence should be modified to state that rulings on motions requesting a different hearing location should ''be based on a showing that a different location will result in lower cost to the government as a whole.'' The MSPB does not believe that this suggestion accounts for the costs borne by appellants and therefore will not adopt the commenter's proposal.

A commenter approved of the proposed regulation but recommended that the MSPB expressly authorize telephonic or video hearings and direct parties to its Web site for resources. The MSPB did not address the question of expressly authorizing telephonic or video hearings in its regulations and therefore the MSPB will not address this issue herein, except to say that this has been noted and may be considered in the future.

Finally, a commenter reported that in his experience judges have displayed poor judgment by scheduling hearing and prehearing deadlines far before the completion of discovery, unilaterally setting hearing dates for personal convenience, and denying unopposed motions to reschedule hearings. This commenter also suggested that the MSPB has seemingly taken the approach of cutting short discovery to meet the prehearing dates selected by the judge. Parties may request a suspension under 1201.28 when additional time is needed for discovery. Concerns that a judge is improperly managing a particular case should be directed to the appropriate Regional Director or Chief Administrative Judge.

Section 1201.52 Public Hearings

The MSPB proposed to amend this regulation to give administrative judges express authority to control the use of electronic devices at a hearing.

A commenter suggested that this regulation should be broken out into two parts, one addressing closure of a hearing and the other addressing use of electronic devices. The MSPB agrees that this proposed change will improve the regulation, and the final rule has been amended accordingly.

A commenter objected to language in this regulation allowing a judge to close hearings and recommended that such authority be limited to appeals involving classified information or in the case of a pseudonymous or anonymous appeal. Another commenter suggested that the MSPB replace the second sentence with: ''However, the judge may order a hearing or any part of a hearing closed when [Sensitive Security Information (SSI)] or classified information will be discussed, and/or when doing so would be in the best interests of the appellant, a witness, the public or any other person affected by the proceeding.'' A different commenter suggested that the MSPB amend this regulation to state that all or part of a hearing may be closed when doing so is in the best interests of a party, instead of limiting the inquiry to the best interests of an appellant. The MSPB has amended this regulation to substitute ''interests of a party'' for ''interests of an appellant'' since a respondent may offer good reasons to close a hearing, including the possible disclosure of classified information or SSI. The MSPB otherwise declines to further restrict when a hearing may be closed to the public, based on the foreseeability of circumstances where the closure of a hearing may be justified and necessary.

A commenter recommended clarifying that the section's reach extends to devices which have electronic recording and two-way communication functionality, even if those are not the device's primary functions. A commenter suggested that, because cell phones are often used as clocks, a representative should be allowed to keep a cell phone in silent mode or a laptop with them during the hearing. This commenter further observed that an administrative judge can issue an order at the outset of the hearing that requires representatives to comply with all terms and sanction any party for not complying. Another commenter observed that the MSPB should reasonably control the use of cellphones during a hearing rather than deny such use. The proposed rule gives the administrative judge sufficiently broad flexibility to address the concerns raised in these comments on a case-by-case basis.

Section 1201.53 Record of Proceedings

The MSPB proposed to make several changes to the regulation. The term ''tape recording'' was replaced by the word ''recording'' and the term ''written transcript'' was replaced by ''transcript.'' The MSPB also proposed to allow a judge or the Board to order

the agency to pay for a transcript in certain circumstances.

A commenter objected to the proposed deletion of paragraph (e), which specifies the contents of the official record of the appeal. The deletion of this paragraph was unintentional. The paragraph has been reinserted into the final rule with minor amendments.

Several commenters argued that the MSPB lacks the authority to require that agencies pay for transcripts as proposed in paragraph (b). While not conceding that it lacks authority to take such action, the MSPB is removing this provision from the final rule.

A commenter offered a complete rewrite of this regulation to correct what it viewed as redundant and internally inconsistent provisions. In response, the MSPB has deleted a sentence in paragraph (a) that is duplicative of language in paragraph (c). The matter identified as inconsistent related to the requirement that an agency procure a transcript and has been addressed by the deletion of that provision.

Section 1201.56 Burden and Degree of Proof; Affirmative Defenses

The Board proposed to amend this regulation in an attempt to reconcile the existing regulation with a significant body of Board case law holding that some jurisdictional elements may be established by making nonfrivolous allegations. The MSPB received numerous helpful comments concerning the proposed amendments to this regulation. Commenters suggested that the regulation's discussion of the varying degrees of proof would be confusing to pro se appellants and the phrase ''jurisdictional hearing'' should be substituted with the word ''hearing,'' to avoid any suggestion that a hearing with respect to a jurisdictional element confers any fewer rights with respect to discovery and other elements of MSPB due process, in a hearing on the merits. Other commenters recommended that the MSPB revise the definition of a ''nonfrivolous allegation'' and insert a sentence stating that a judge may dismiss a case for not meeting the nonfrivolous allegation standard. Finally, a commenter suggested that the MSPB offer further clarification of the burden that IRA appellants must meet to establish jurisdiction so as to avoid the dismissal of meritorious IRA appeals at the jurisdictional stage.

Considering these comments, and after additional internal review, the Board has determined that it is appropriate to withdraw the proposed amendments to this regulation. We agree with many of the comments and conclude that it would be inappropriate to publish a final rule that goes beyond the scope of the proposed amendments. The MSPB plans to reconsider the current regulation in its entirety and, if amendments are determined to be necessary, offer proposed amendments to this regulation in a future rulemaking.

Section 1201.58 Closing the Record

The MSPB proposed amending this regulation to conform with case law indicating that, notwithstanding an order setting the date on which the record will close, a party must be allowed to submit evidence or argument to rebut new evidence submitted by the other party just prior to the close of the record.

A commenter generally agreed with the proposed amendment but was concerned that the addition of the words ''or argument'' could be interpreted to allow a party to add additional arguments that they had failed to raise before the filing deadline. The final rule revises the proposed language in 1201.58(c) to address this concern and clarifies that the regulation is intended to allow new evidence or argument that is offered in rebuttal of new evidence or argument submitted by the other party just before the record closed.

A party observed that acknowledgment orders often include conflicting provisions that theoretically allow for discovery but close the record on issues of jurisdiction or timeliness before discovery can be completed. This commenter suggested that this regulation should be amended to require judges to properly address the relationship between the closing of the record on a particular issue and the close of discovery. This complaint was aired by more than one commenter. The MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

Section 1201.62 Producing Prior Statements

The MSPB proposed to delete this regulation in its entirety as it has virtually never been invoked or applied and is believed to be unnecessary. The MSPB received no comments concerning its proposed deletion of this regulation and the final rule makes the proposed deletion.

Section 1201.71 Purpose of Discovery

The MSPB proposed an amendment adding a sentence stating that discovery requests and discovery responses should not ordinarily be filed with the Board, as is currently done in standard orders.

A commenter voiced complaints about the current rule requiring that a motion to compel be filed within 10 days. This commenter instead suggested that such motions should be filed within a reasonable time prior to the prehearing conference or the current standard should be changed to allow the parties to agree upon a longer period of time in which to file the motion to compel. This area of discovery practice was not addressed in the proposed rule. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

Section 1201.73 Discovery Procedures

The MSPB proposed to eliminate the initial disclosure requirement of subsection (a), eliminate unnecessary distinctions between discovery on parties and nonparties, increase the time period in which initial discovery requests must be served, revise subparagraph (d)(4) to clarify that, if no other deadline has been specified, discovery must be completed no later than the prehearing or close of record conference, and amend subparagraph (c)(i) to reflect the MSPB's view that a motion to compel must contain a statement showing that the request was not only for relevant and material information, but that the scope of the request was reasonable. The proposed amendment also makes several other minor changes in the regulation.

A commenter queried why certain text in paragraph (c) was absent from the proposed regulation. The changes proposed in the comprehensive rewrite of this regulation were explained in the supplementary information section of the proposed rule.

A commenter suggested that the MSPB should address the application of (d)(1) and (d)(4) to matters refiled following a dismissal without prejudice by stating that the time for conducting discovery should restart on the date the judge issues an order reinstating the appeal. The MSPB believes that this change would be unwise and prefers to allow judges to address this matter in specific cases.

A commenter proposed to add the word ''final'' before the phrase ''prehearing or close of the record conference.'' The MSPB will not make this change as there are not multiple prehearing or close of the record conferences in a case.

A commenter suggested that the MSPB replace ''file'' with ''serve'' in the first sentence of paragraph (d)(2) so it is clear that discovery responses should not be filed with the Board unless in connection with a motion to compel. The MSPB has amended paragraph (d)(2) by substituting the word ''serve'' for the word ''file'' to clarify that responses to discovery requests are served on the other party.

A commenter suggested that the MSPB should require that all discovery requests made upon nonparties be served on the opposing party. A party can request in discovery that such requests be disclosed.

A commenter agreed with the elimination of initial disclosures for agencies but objected to the elimination of initial disclosure requirements for appellants because the agency will lack key information about the appellant's witnesses if it must affirmatively ask for this information through discovery. The MSPB believes that removing the initial disclosures requirements for one party but not the other would be unfair.

A commenter recommended adding limits on discovery and interrogatory requests, including subparts, consistent with those under the Federal Rules of Civil Procedure. Such limits are set forth in paragraph (e) of the proposed rule.

A commenter suggested that the MSPB add a requirement similar to FRCP 26(b)(5), which requires a party to produce a privilege log when it asserts a privilege as the basis for withholding otherwise discoverable information. In making proposed amendments to our regulations, the Board did not propose changes to this area of discovery practice. It would be inappropriate to publish a final rule that goes beyond the scope of the proposed amendments. However, the MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

A commenter suggested that the MSPB should set prehearing deadlines to accommodate the completion of discovery instead of limiting discovery to meet prehearing dates. The scheduling of a prehearing conference must be left to the discretion of the judge. If a party believes insufficient time is available for discovery, he or she may seek a suspension under 1201.28.

A commenter suggested that the MSPB include a provision mandating an automatic stay of all discovery deadlines if the Board's jurisdiction is called into question, with the stay remaining in effect until the jurisdictional issues are adjudicated. The MSPB has determined that adding such a provision is inadvisable because it would add significant delay to the adjudication of cases ultimately found to be within its jurisdiction. A party is free to ask for such a stay in an individual case.

A commenter opposed the requirement of (c)(1)(i) that the party moving to compel discovery produce ''a statement showing that the information is relevant and material and the scope of the request is reasonable'' as contrary to the proper standard for discovery—that the information sought is likely to lead to the discovery of admissible evidence. In response to this comment and the differing scopes of discovery that apply to parties and nonparties (see § 1201.72(a) and (b)), the MSPB has modified paragraph (c)(1)(i), to refer back to 1201.72.

Section 1201.81 Requests for Subpoenas

The MSPB did not offer any amendments to this regulation in the proposed rule. However, in light of the amendment in the final rule to 1201.73(c)(1)(i) regarding motions to compel or issue a subpoena, the MSPB also deemed it appropriate to amend 1201.81(c) so that it is consistent with the standard described in section 1201.72(b): ''Discovery requests that are directed to nonparties and nonparty Federal agencies and employees are limited to information that appears directly material to the issues involved in the appeal.''

Section 1201.93 Procedures

The MSPB proposed to replace ''hearing'' with the word ''appeal'' because there may or may not be a pending hearing in a case where an interlocutory appeal has been certified to the Board. The MSPB also proposed to use the term ''stay the processing of the appeal'' in lieu of the term ''stay the appeal'' to avoid any ambiguity.

A party observed that the proposed rule allows a stay during an interlocutory appeal, but it is unclear whether this stay is charged against the 60-day aggregate limit on case suspensions. We agree and have revised the regulation to clarify that a stay granted in response to an interlocutory appeal is not related to a case suspension under 1201.28 and therefore any time the case is subject to such a stay is not counted against the time allowed for case suspensions under 1201.28.

Section 1201.101 Explanation and Definitions

The MSPB proposed an amendment to clarify that Mediation Appeals Program (MAP) mediators and settlement judges may discuss the merits of an MSPB case with a party without running afoul of the prohibition on ex parte communication. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.111 Initial Decision by the Judge

The MSPB proposed to delete language about serving the Office of Personnel Management (OPM) and the Clerk of the Board with initial decisions to conform with longstanding Board practice under which OPM has access to all of the Board's initial and final decisions via the MSPB Extranet.

A party recommended against deleting all reference to the Board's responsibility to serve OPM, as this is a statutory duty under 5 U.S.C. 7701(b)(1). The MSPB has amended the proposed rule to address this comment.

Section 1201.112 Jurisdiction of the Judge

The MSPB proposed an amendment that would allow an administrative judge to vacate an initial decision to accept a settlement agreement into the record when the settlement agreement is filed by the parties prior to the deadline for filing a petition for review but is not received until after the date when the initial decision would become the Board's final decision by operation of law. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.113 Finality of Decision

The MSPB proposed to amend paragraph (a) to conform this regulation to the proposed revision to 5 CFR 1201.112(a)(4) described above. The MSPB proposed to add paragraph (f) to indicate that the Board will make a referral to OSC to investigate and take any appropriate disciplinary action whenever the Board finds that an agency has engaged in reprisal against an individual for making a protected whistleblowing disclosure.

A commenter suggested that the MSPB address the difficulty that arises when a judge orders compliance with an initial decision on a date prior to the date the initial decision becomes final. Except for orders granting interim relief, compliance should not be ordered before the finality date and the MSPB's standard orders are formatted to avoid

this from occurring. The MSPB sees no need to address this situation in its regulations.

Several commenters pointed out a typographical error in the opening sentence. The MSPB has corrected this error.

A commenter noted that the proposed language places no restriction on the timeframe for a final decision. There is no time limit within which the Board must issue a decision on a pending petition for review, but the Board attempts to resolve cases as quickly as it can.

A commenter objected to the ''reason to believe'' standard for referral of a prohibited personnel practice to OSC as too low and vague. The commenter further suggested that referral to OSC should remain limited to IRA appeals in which the Board found that the agency retaliated against the appellant and that such a referral divests the agency of its responsibility to address the issue internally. In the MSPB's view, the reasonable belief standard is neither too vague nor too low. In any event, the ''reason to believe'' standard is prescribed by statute, 5 U.S.C. 1221(f)(3), and the Board is not free to modify it. The Board has an obligation to make such a referral whenever it makes a finding that an appellant in a Board proceeding suffered retaliation for protected whistleblowing in violation of 5 U.S.C. 2302(b)(8). In our view, a referral by the Board to OSC does not in any way prevent the agency in question from taking appropriate disciplinary action. The Board proceeding focuses on whether the appellant suffered such retaliation; it does not focus on who was responsible for the retaliation, whether such official(s) should be disciplined, and, if so, what the extent of such discipline should be. OSC is the agency charged with making those determinations.

Section 1201.114 Petition and Cross Petition for Review—Content and Procedure

The MSPB proposed page limitations for pleadings on petition for review, to allow for replies to responses to petitions for review, and to define petitions for review and cross petitions for review. Paragraph (b) was amended to specify that a petition or cross petition for review must include ''all of the party's legal and factual arguments.''

A commenter noted that the references in (a)(1), (2), (4), and (5) to ''a party'' are incomplete to the extent they do not include OPM and the Special Counsel. The phrase ''a party'' includes both of these agencies. *See* 5 CFR 1201.4(e).

A commenter asked the MSPB to clarify in its regulations whether a reply to a response to a petition for review is permitted. The proposed regulations clearly indicate that such a pleading is authorized.

Commenters recommended spacing limits and/or word limits, in addition to page limits and set forth the consequences of noncompliance. In response to this comment, the MSPB has modified paragraph (h) to include alternate word count requirements (in addition to page limits) and modified other language slightly. Paragraph (l) was added to address the consequences of noncompliance.

A commenter noted that paragraph (f) only allows a party to file an extension ''before the date on which the petition for review is due'' and that the MSPB should provide for extenuating circumstances that may arise on the date of filing. This comment was addressed in a minor amendment to paragraph (f).

A commenter recommended that the MSPB, when the timeliness of a petition for review is at issue, should address the timeliness issue of a petition for review before the agency is required to submit its response on the merits. While this suggestion has some merit, it is impractical for the MSPB to adopt this suggestion given the number of petitions for review it receives. In addition, adopting this suggestion would inevitably delay the resolution of those petitions for review ultimately found to have been timely filed.

A commenter was unsure of the value of a reply brief and suggested that the MSPB allow the filing of such brief on a trial basis. The MSPB does not plan to implement this change as a trial project. If this new pleading proves unhelpful, the MSPB may address it in a future rulemaking.

A commenter noted that the provisions on extensions of time and late filings seem to provide that an extension request made prior to the filing deadline serves as an extension without a formal ruling by the Board, at least until such a formal ruling is made and suggested that the automatic extension created by the filing of an extension request should be made explicit in the paragraph addressing extensions of time to file. The proposed rule does not provide that an extension request made on or before the filing deadline serves as an extension without a formal ruling by the Board.

Section 1201.115 Criteria for Granting Petition or Cross Petition for Review

The MSPB proposed an amendment to address the criteria for granting petitions and cross petitions for review.

A commenter objected that the use of the phrase ''including but not limited to'' when describing situations in which the MSPB may grant a petition or cross petition for review left the MSPB's authority too open-ended. The MSPB's intent in using this language was to give the MSPB the authority in other rare circumstances, either not foreseen in the regulation or inadvertently left out of the regulation, to grant such a petition. The general intent of the regulation is to grant a petition for review whenever the petitioner shows that: (1) The case was incorrectly decided based on the existing record; (2) new and material evidence indicates that the outcome should be different than in the initial decision; or (3) the petitioner did not get a full and fair adjudication process. As written, the regulation tries to capture the most common situations in which these conditions are present, but it could not capture all such circumstances.

A commenter suggested amending paragraph (e) to be clearer and preserve the power to reopen in 1201.118. We modified the wording of paragraph (e) to convey the meaning more clearly.

A commenter suggested that the MSPB adopt a 30-day time limit for reopening appeals. The MSPB believes such a rule lacks sufficient flexibility.

A commenter objected to the inclusion of ''or legal argument'' in the discussion in paragraph (d) concerning reliance upon new evidence or legal argument at the petition for review level. The MSPB's intent in this regulation is to allow parties to raise new legal arguments arising from the discovery of new evidence, not any new legal argument a party wishes to raise belatedly. In addition, this language anticipates situations in which governing law has changed since the initial decision was issued.

Section 1201.116 Compliance With Orders for Interim Relief

The MSPB proposed to amend this regulation to combine the existing contents of 5 CFR 1201.116 with the provisions of 5 CFR 1201.115(b) and (c).

A commenter suggested that this regulation should be revised to provide an agency the opportunity to seek a stay of interim relief while its petition for review is pending. Another commenter expressed the concern that under paragraph (g) an appellant could be granted full interim relief although he or she is not the prevailing party in the final Board order. The Board declines to adopt these suggestions because stays of interim relief undermine the very purpose of granting such relief and risk engendering collateral litigation. The

MSPB sees no value in creating a separate system of reviewing this aspect of an initial decision while the petition for review is being considered.

A commenter suggested that the language of (d) should state that ''[i]f the agency files a petition for review or a cross petition for review *or* has not provided required interim relief * * *.'' The MSPB will not implement this change as the dismissal of a petition or cross petition for review for failure to provide required interim relief is only possible in cases where such a pleading has been filed.

A commenter suggested that the regulation was unclear and asked if it is intended to give the appellant a discretionary opportunity to request dismissal of an agency petition for review for lack of proper interim relief under (d) and to provide another opportunity to challenge the completeness of interim relief under (g) in the event the agency petition for review is granted. The commenter's interpretation of the proposed rule is correct, and the proposed rule is unambiguous.

Section 1201.117 Procedures for Review or Reopening

The MSPB proposed to amend subparagraph (a)(1) to reflect the significant revision to 5 CFR 1201.118, which would restrict ''reopening'' to situations in which the Board members have previously issued a final order or the initial decision has become the Board's final order by operation of law.

A commenter requested that the MSPB reconsider its distinction between nonprecedential final orders and precedential opinions and orders as the commenter failed to see the characterization of a decision as ''non-precedential'' as meaningful. As the commenter noted, this request concerns an issue not addressed in the proposed rule. Therefore, while the MSPB has taken note of this comment, no amendment to the MSPB's regulations is contemplated in this final rule. The MSPB is willing to consider any specific suggestions to improve its regulations and procedures in this area and invites any interested party to submit a petition for rulemaking addressing this area of MSPB practice and procedure.

Section 1201.118 Board Reopening of Final Decisions

The MSPB proposed to amend this regulation to state that ''reopening'' only applies to, and should be reserved for, instances in which the Board has already issued a final order or the initial decision has become the Board's final decision by operation of law. The MSPB also amended this regulation to incorporate well-established case law addressing the rare and limited circumstances in which the Board will reopen a final decision.

A commenter objected to the MSPB's proposed amendment on the grounds that it would establish a very high standard that will make it difficult for OPM or other Federal agencies to successfully seek relief from an erroneous decision. The Board thinks the proposed standard is an appropriate general standard for reopening an appeal and believes that the concern that OPM will have difficulty seeking reopening is unwarranted as OPM can seek reconsideration under 5 U.S.C. 7701(e) and 1201.119.

A commenter observed that the amended regulation includes no time limit on the Board's authority to reopen a case. The MSPB does not believe that a preset time limit for filing a request to reopen an appeal is appropriate and is confident that that current language stating that such a request must generally be filed within a short time after the decision becomes final is sufficient to guard against late-filed requests.

A commenter was concerned that the proposed regulation would severely limit the MSPB's authority to reopen and reconsider cases on its own motion and appears to conflict with the broad authority granted the MSPB under 5 U.S.C. 7701(e)(1). The Board believes that reopening or reconsidering a final decision must be confined to rare and limited circumstances and that nothing in the proposed regulation conflicts with the grant of authority given to the MSPB under 5 U.S.C. 7701(e)(1).

A commenter requested clarification of the impact of the proposed amendments on petitions for review. The proposed rule has no effect on petitions for review.

Section 1201.119 OPM Petition for Reconsideration

The MSPB proposed to make minor wording changes in this regulation in light of the language used in 5 CFR 1201.117 and 1201.118, and to eliminate any confusion between ''Final Order'' as the document title of a particular type of final Board decision and the generic term ''final decision,'' which applies to any type of final decision, whether it is an Opinion and Order or a ''Final Order.''

The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.122 Filing Complaint; Serving Documents on Parties

This proposed rule was intended to correct an oversight in the MSPB's regulations relating to the use of e-Appeal in original jurisdiction actions. The MSPB also proposed to amend paragraph (a) to require OSC to file a single copy of the complaint. Paragraphs (d) and (e) were deleted as unnecessary.

The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.128 Filing Complaint; Serving Documents on Parties

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.134 Deciding Official; Filing Stay Request; Serving Documents on Parties

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.137 Covered Actions; Filing Complaint; Serving Documents on Parties

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. A commenter recommended that the MSPB eliminate the requirement in paragraph (c) that the agency file two copies of the complaint on the MSPB. The MSPB has made this change in the proposed rule.

Section 1201.142 Actions Filed by Administrative Law Judges

The MSPB proposed to correct a typographical error in this regulation. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.143 Right to Hearing; Filing Complaint; Serving Documents on Parties

The proposed amendments to this regulation were similar to the proposed amendments to 5 CFR 1201.122. A minor technical amendment has been made to paragraph (c) to be consistent with requirements for filing new appeals under the Board's appellate jurisdiction. Section 1201.26(a) provides

that the appellant ''must file two copies of both the appeal and all attachments with the appropriate Board office, unless the appellant files an appeal in electronic form under § 1201.14. Unlike the original jurisdiction appeals under 1201.122, .128, and .134, the MSPB needs a second copy for service on the opposing party.

Section 1201.153 Contents of Appeal

The MSPB proposed to amend (a)(2) to clarify that not all discrimination matters may be raised with the Board and substitute the term ''under a negotiated grievance procedure'' for the word ''grievance'' to reflect that these are the only types of grievances covered under the mixed cases regulations. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.154 Time for Filing Appeal; Closing Record in Cases Involving Grievance Decisions

The MSPB proposed to incorporate by reference the rules governing constructive receipt as proposed in 5 CFR 1201.22(b)(3). The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.155 Requests for Review of Arbitrators' Decisions

The MSPB proposed to remove the existing regulation as unnecessary and put in its place a new regulation addressing requests for review of arbitrators' decisions. The proposed rule also removed the existing regulation at 5 CFR 1201.154(d) and moved it into 5 CFR 1201.155. The MSPB has noted that the instructions in the proposed rule did not actually delete paragraph (d) from section 1201.154; nor did it delete paragraph (e), which also relates to review of arbitrators' decisions, from section 1201.155. In addition, the MSPB had neglected to incorporate language from paragraph (d) as to when a request for review of an arbitrator's decision must be filed. The final rule corrects these oversights. The requirement as to when a request for review must be filed is now paragraph (b) in section 1201.155, and what had been proposed as paragraphs (c) through (e) have become paragraphs (d) through (f).

Several commenters objected to a provision in paragraph (d) (now paragraph (e)) allowing an issue to be given to a judge for development of the record. These commenters stated that where a remand is necessary, the matter should be returned to the arbitrator, that the MSPB's proposed rule conflicts with the collective bargaining process, and that it would be prejudicial to the agency to allow the claim to be raised for the first time upon the MSPB's review of an arbitrator's award. We were concerned that remand to the arbitrator is not practical or feasible in most cases. Arbitration is a matter of contract and, once the arbitrator has issued an award, the contract has been performed and the arbitrator has been paid. The arbitrator could not become involved with the case on remand unless the union and the agency agreed to create a new contract. We felt it would be more practical and efficacious to forward such cases to MSPB judges where further development of the record is required.

A commenter objects to paragraph (b), which would limit review to cases in which the employee's claim of discrimination was raised in the negotiated grievance procedure as inconsistent with the ''notwithstanding'' clause of 5 U.S.C. 7702. The Board does not believe this change is inconsistent with the ''notwithstanding'' clause of section 7702, and does not construe the Federal Circuit's decision in *Jones* as compelling a contrary conclusion. An appellant who raises a discrimination claim to the arbitrator in addition to the Title 5 or other employment claim will be entitled to an adjudication of both. All the Board is doing is specifying when the claim of discrimination must be raised. We note that section 7121(d) provides for Board review of ''the final decision [of the arbitrator] pursuant to section 7702 of this title * * *.'' If the Board were to adjudicate a claim of discrimination that could have been but was not raised to the arbitrator, it would not be reviewing the arbitrator's final decision with respect to that claim; it would be adjudicating the claim de novo.

Section 1201.181 Authority and Explanation

The MSPB proposed non-substantive changes to this regulation that merely reordered the information and added descriptive labels to each paragraph. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.182 Petition for Enforcement

The MSPB proposed to amend this regulation to clarify that the Board's enforcement authority under 5 U.S.C. 1204(a)(2) extends to situations in which a party asks the Board to enforce the terms of a settlement agreement entered into the record for purposes of enforcement as well as to situations in which a party asks the Board to enforce the terms of a final decision or order.

A commenter observed that few agencies inform the appellant when they believe that compliance is complete and therefore the time limit for filing an enforcement petition will rarely be triggered by the issuance of a notice of compliance by the agency. This commenter suggested that the Board should provide a deadline for an agency to issue a compliance notice and, if the compliance notice is issued, provide the appellant 30 days to file an enforcement petition. The commenter further suggested that, if the agency does not file a compliance notice, the regulation should give the appellant a reasonable period of time to file his or her petition after such notice should have been filed by the agency. The MSPB recognizes and appreciates the concerns raised by the commenter but believes that the current rule is more appropriate, especially in light of the complicated issues that sometimes arise in an agency's attempt to comply with an MSPB order, such as when compliance with a Board order requires the involvement of another agency.

Section 1201.183 Procedures for Processing Petitions for Enforcement

The MSPB proposed amendments to this regulation to change the nature of an administrative judge's decision in a compliance proceeding from a ''recommendation'' to a regular initial decision, which would become the Board's final decision if a petition for review is not filed or is denied. The proposed regulation provided that the ''responsible agency official,'' whose pay may be suspended should a finding of noncompliance become the Board's final decision, will be served with a copy of any initial decision finding the agency in noncompliance. To the extent that an agency found to be in noncompliance decides to take the compliance actions identified in the initial decision, the proposed regulation increases the period for providing evidence of compliance from 15 days to 30 days. The MSPB also proposed in paragraph (c) to codify the different burdens of proof that apply in these enforcement actions.

Commenters observed that the proposed rule, which eliminates the ''good faith'' consideration in evaluating a party's compliance with a final decision, establishes a stricter standard than that provided for under Rule 70 of the Federal Rules of Civil Procedure and arguably establishes a strict liability standard. These commenters recommended that the good faith

element be re-inserted into the regulation as there are occasions when an agency, even if it acted with diligence in attempting to comply with an order, cannot do so within the time frame specified by the order. The objective behind the change to this regulation is threefold: (1) To get the agencies to take their obligations seriously during the regional office proceeding; (2) to get the judges to actually resolve and make concrete what the agency's obligations are; and (3) to the maximum feasible extent, get actual compliance at the regional office level. Under this new framework, it is irrelevant whether the agency has made a good faith attempt to comply with its obligations. What is required is full and complete compliance. Retaining the ''good faith'' provision would run counter to these purposes.

A commenter recommended that the regulation be amended to require that a copy of the initial decision finding noncompliance be served not only on the responsible agency official, but also on all other parties on the certificate of service. The MSPB will not make this proposed amendment as nothing in the regulation suggests that the requirement to serve the responsible agency official will affect service on any other person.

A commenter pointed out that the Board stated in the notice of proposed rulemaking that an initial decision finding noncompliance would become final if neither party petitioned for review, but paragraph (b) of the proposed regulation stated that, ''[f]ollowing review of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance.'' This seemed to imply that initial decisions would not become final if no pleadings were filed. New paragraph (b) clarifies this issue by providing that the initial decision will become the Board's final compliance decision if the noncomplying party files neither a petition for review nor a statement of compliance, and that the matter will then be processed further under the enforcement provisions of the regulation.

Heading of Subpart H

The Board proposed to revise the heading for Subpart H of Part 1201 to reflect that the subpart addresses attorney fees and related costs, consequential damages, compensatory damages, and liquidated damages. The MSPB received no comments concerning this proposed amendment and is adopting the proposed change as previously published.

Section 1201.201 Statement of Purpose

The MSPB proposed to amend this regulation by adding a provision relating to awards of liquidated damages under VEOA. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1202.202 Authority for Awards

The MSPB proposed to amend this regulation by adding a provision relating to awards of liquidated damages under VEOA. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1201.204 Proceedings for Consequential, Liquidated, and Compensatory Damages

The MSPB proposed to change ''3-member Board'' to ''the Board'' in order to cover situations in which there are only two Board members. In addition, because requests for ''liquidated damages'' in VEOA appeals are also handled in addendum proceedings, the MSPB proposed to modify this regulation to include requests for such damages. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Appendix III to Part 1201

The MSPB proposed to remove and reserve Appendix III. See earlier discussion regarding proposal to amend 5 CFR 1201.51(d).

Section 1203.2 Definitions

The MSPB proposed to revise this regulation to acknowledge that there are now 12 prohibited personnel practices. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1208.3 Application of 5 CFR Part 1201

The MSPB proposed to amend this section to reflect the references to liquidated damages in section 5 CFR 1201.204. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1208.21 VEOA Exhaustion Requirement

The MSPB proposed to amend paragraph (a) to clarify and codify an appellant's burden of proving exhaustion in a VEOA appeal. The MSPB proposed in paragraph (b) to add a section addressing equitable tolling. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1208.22 Time of Filing

The MSPB proposed to add paragraph (c) to address the possibility of excusing an untimely filed appeal under the doctrine of equitable tolling.

A commenter stated that by providing examples of circumstances that could support equitable tolling, the MSPB may be limiting the circumstances that will be described by appellants and recommended that the MSPB change the language from ''examples include'' to ''examples include, but are not limited to.'' The MSPB sees no need to make this change as the phrase ''examples include'' clearly indicates that the stated examples are not an exclusive list of all available circumstances that could support a claim of equitable tolling.

Section 1208.23 Content of a VEOA Appeal; Request for Hearing

The MSPB proposed to amend this regulation to reflect the fact that it will scrutinize the exhaustion issue in a VEOA appeal in the same way that it scrutinizes the exhaustion issue in an IRA appeal. The proposed amendment therefore added a new subparagraph between current 5 CFR 1208.23(a)(4) and (5), stating that a VEOA appeal must contain evidence to identify the specific claims that the appellant raised before the Department of Labor. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1209.2 Jurisdiction

The MSPB proposed to change the reference in paragraph (a) from 5 U.S.C. 1214(a)(3) to 5 U.S.C. 1221(a). In addition, in light of a 1994 amendment to 5 U.S.C. 7121 adding paragraph (g), the MSPB proposed to overrule a significant body of Board case law and amend this regulation to provide that an employee affected by a prohibited personnel practice ''may elect not more than one'' of 3 remedies: (A) An appeal to the Board under 5 U.S.C. 7701; (B) a negotiated grievance under 5 U.S.C. 7121(d); or (C) corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). The proposed amendment also made clear that an election is deemed to have been made based on which of the 3 actions the individual files first. The proposed rule further stated that when taking an otherwise

appealable action, agencies would be required, per revised 5 CFR 1201.21, to advise employees of their options under 5 U.S.C. 7121(g) and the consequences of such an election.

Several commenters object to the new election of remedies provision contained in paragraph (d). These commenters argue that the election requirement in paragraph (d) is not required under 5 U.S.C. 7121(g) because that statute applies only to employees covered by collective bargaining agreements. As explained in the supplementary information section of the proposed rule, the MSPB is convinced that a plain reading of 5 U.S.C. 7121(g) indicates that an individual who has been subjected to an otherwise appealable action, but who seeks corrective action from OSC before filing an appeal with the Board, has elected an IRA appeal and is limited to the rights associated with such an appeal. The proposed rule therefore adopted the plain language reading of 5 U.S.C. 7121(g) and proposed to overrule *Massimino* v. *Department of Veterans Affairs,* 58 M.S.P.R. 318 (1993) and its progeny.

An employee who is not covered by a negotiated grievance procedure does not have all three of the options listed in subsection 7121(g)(3), as he or she cannot elect the negotiated grievance procedure. That does not mean, however, that the statute therefore contemplates that such an individual may elect both of the other two options; it simply means that the individual has to select one or the other of those two options. We note in this regard that the term ''employee'' in 5 U.S.C. chapter 71 is not limited to those covered by negotiated grievance procedures. See 5 U.S.C. 7103(a)(2).

Several commenters expressed concern about the relationship between elections following proposed and effected personnel actions. One commenter noted that when an employee has filed a complaint with OSC at the proposal notice stage and thereafter wants to file a direct appeal once an action has been taken, the employee will be required to withdraw the OSC complaint regarding the proposal notice in order to get full direct appeal rights as to the removal. The MSPB does not agree that the new election provision would require this result. In the MSPB's view, an employee would be able to make separate elections for both the proposed and effected actions and pursue the remedy selected for each action. The MSPB understands that there remain practical concerns when an individual wants to pursue with OSC the claim that a proposal notice was retaliation for whistleblowing, while pursuing a direct appeal with the Board for the effected adverse action. In particular, there would be the possibility that the adverse action appeal might proceed toward the issuance of an initial decision before OSC has the opportunity to investigate the claim and pursue corrective action on the individual's behalf. We note in this regard that the appellant in the adverse action appeal could seek a stay under section 1201.28 or a dismissal without prejudice under section 1201.29, to ensure that OSC has an opportunity to complete its investigation and seek corrective action.

A commenter agreed that the MSPB had no choice but to reconcile its regulations regarding election of remedies with the requirements of 5 U.S.C. 7121(g) but argued that the MSPB should not apply the new election provision retroactively as retroactive application is not favored in the law and would lead to confusion and increased litigation. The new election of remedies provision does not address whether it may be applied retroactively. However, with regard to this issue, it must be noted that Congress amended 5 U.S.C. 7121 to add paragraph (g) in 1994. Public Law 103–424, section 9(b), 108 Stat. 4361, 4365–66 (1994). There would be difficult interim questions concerning cases that are already in the pipeline. One issue would be whether, despite the seemingly clear language and consequences of § 7121(g), the appellant should be deemed to have made a valid and binding election. An argument might be made that an election is not binding unless it constitutes a knowing and informed decision. *Cf. Atanus* v. *Merit Systems Protection Board,* 434 F.3d 1324, 1326–27 (Fed. Cir. 2006) (concluding that the appellant made a knowing and informed, and therefore binding, election under § 7121(e)). The proposed regulation does not resolve this question, which would be resolved in particular appeals. If the Board were to hold that some elections were not binding, a related question would be whether the Board should excuse the untimely filing of the Board appeal, which would be filed well after the 30-day deadline of 5 CFR 1201.22(b)(1). Again, this would be resolved in particular appeals.

Section 1209.4 Definitions

The MSPB proposed to amend the definition of ''whistleblowing.'' The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Section 1209.5 Time of Filing

The MSPB proposed to amend this regulation to eliminate the distinction between IRA appeals and otherwise appealable actions in light of the change made to 5 CFR 1209.2, and to revise the language regarding equitable tolling consistent with the changes made in sections 5 CFR 1208.21 and .22.

A commenter stated that by providing examples of circumstances that could support equitable tolling, the MSPB may be limiting the circumstances that will be described by appellants and recommended that the MSPB change the language from ''examples include'' to ''examples include, but are not limited to.'' The MSPB sees no need to make this change as the phrase ''examples include'' clearly indicates that the stated examples are not an exclusive list of all available circumstances that could support a claim of equitable tolling.

Section 1209.6 Content of Appeal; Right to Hearing

As in the modification to 5 CFR 1201.24(d), the MSPB proposed to clarify that an appellant does not automatically have a right to a hearing in every Board appeal and that such a right exists, if at all, only when the appeal has been timely filed and the appellant has established jurisdiction over the appeal. The MSPB received no comments concerning its proposed changes to this regulation and is adopting the proposed rule as final.

Comments Beyond the Scope of the Proposed Rule

The MSPB solicited comments on any other aspect of its adjudicatory regulations in its proposed rule. The MSPB received a number of comments on such matters and appreciates the thoughtfulness with which the commenters made their views known. The MSPB has reviewed these submissions and will consider each of the commenters' ideas as it continues to strive to improve its adjudicatory regulations.

One comment received by the MSPB addressed two issues that the commenter, after noting that the two issues were beyond the scope of matters addressed in the proposed rule, asked the MSPB to consider as a petition for rulemaking. In keeping with the MSPB's proposed rule regarding petitions for rulemaking and the MSPB's commitment to post such requests on its Web site, the MSPB will shortly post this request on its Web site with a request for comments from interested parties. The petition asks the MSPB to replace the definition of

''preponderance of the evidence'' in 5 CFR 1201.56(c)(2) and correct a perceived error regarding the burdens of proof in a case under 5 U.S.C. 4303 in its holding in *Griffin v. Department of the Army,* 23 M.S.P.R. 657 (1984).

List of Subjects in 5 CFR Parts 1200, 1201, 1203, 1208, and 1209

Administrative practice and procedure.

Accordingly, for the reasons set forth in the preamble, the Board amends 5 CFR parts 1200, 1201, 1203, 1208, and 1209 as follows:

PART 1200—[AMENDED]

■ 1. The authority citation for 5 CFR part 1200 continues to read as follows:

Authority: 5 U.S.C. 1201 et seq.

■ 2. Add § 1200.4 as follows:

§ 1200.4 Petition for Rulemaking.

(a) Any interested person may petition the MSPB for the issuance, amendment, or repeal of a rule. For purposes of this regulation, a ''rule'' means a regulation contained in 5 CFR parts 1200 through 1216. Each petition shall:

(1) Be submitted to the Clerk of the Board, 1615 M Street NW., Washington, DC 20419;

(2) Set forth the text or substance of the rule or amendment proposed or specify the rule sought to be repealed;

(3) Explain the petitioner's interest in the action sought; and

(4) Set forth all data and arguments available to the petitioner in support of the action sought.

(b) No public procedures will be held on the petition before its disposition. If the MSPB finds that the petition contains adequate justification, a rulemaking proceeding will be initiated or a final rule will be issued as appropriate under the Administrative Procedure Act. If the Board finds that the petition does not contain adequate justification, the petition will be denied by letter or other notice, with a brief statement of the ground for denial. The Board may consider new evidence at any time; however, repetitious petitions for rulemaking will not be considered.

PART 1201—PRACTICES AND PROCEDURES

■ 3. The authority citation for 5 CFR part 1201 continues to read as follows:

Authority: 5 U.S.C. 1204, 1305, and 7701, and 38 U.S.C. 4331, unless otherwise noted.

■ 4. In § 1201.3, revise paragraph (a) to read as follows:

§ 1201.3 Appellate Jurisdiction.

(a) *Generally.* The Board's appellate jurisdiction is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. The Board's jurisdiction does not depend solely on the label or nature of the action or decision taken or made but may also depend on the type of Federal appointment the individual received, e.g., competitive or excepted service, whether an individual is preference eligible, and other factors. Accordingly, the laws and regulations cited below, which are the source of the Board's jurisdiction, should be consulted to determine not only the nature of the actions or decisions that are appealable, but also the limitations as to the types of employees, former employees, or applicants for employment who may assert them. Instances in which a law or regulation authorizes the Board to hear an appeal or claim include the following:

(1) *Adverse Actions.* Removals (terminations of employment after completion of probationary or other initial service period), reductions in grade or pay, suspension for more than 14 days, or furloughs for 30 days or less for cause that will promote the efficiency of the service; an involuntary resignation or retirement is considered to be a removal (5 U.S.C. 7511–7514; 5 CFR part 752, subparts C and D);

(2) *Retirement Appeals.* Determinations affecting the rights or interests of an individual under the Federal retirement laws (5 U.S.C. 8347(d)(1)–(2) and 8461(e)(1); and 5 U.S.C. 8331 note; 5 CFR parts 831, 839, 842, 844, and 846);

(3) *Termination of Probationary Employment.* Appealable issues are limited to a determination that the termination was motivated by partisan political reasons or marital status, and/or if the termination was based on a pre-appointment reason, whether the agency failed to take required procedures. These appeals are not generally available to employees in the excepted service. (38 U.S.C. 2014(b)(1)(D); 5 CFR 315.806 & 315.908(b));

(4) *Restoration to Employment Following Recovery from a Work-Related Injury.* Failure to restore, improper restoration of, or failure to return following a leave of absence following recovery from a compensable injury. (5 CFR 353.304);

(5) *Performance-Based Actions Under Chapter 43.* Reduction in grade or removal for unacceptable performance (5 U.S.C. 4303(e); 5 CFR part 432);

(6) *Reduction in Force.* Separation, demotion, or furlough for more than 30 days, when the action was effected because of a reduction in force (5 CFR 351.901); Reduction-in-force action affecting a career or career candidate appointee in the Foreign Service (22 U.S.C. 4011);

(7) *Employment Practices Appeal.* Employment practices administered by the Office of Personnel Management to examine and evaluate the qualifications of applicants for appointment in the competitive service (5 CFR 300.104);

(8) *Denial of Within-Grade Pay Increase.* Reconsideration decision sustaining a negative determination of competence for a general schedule employee (5 U.S.C. 5335(c); 5 CFR 531.410);

(9) *Suitability Action.* Action based on suitability determinations, which relate to an individual's character or conduct that may have an impact on the integrity or efficiency of the service. Suitability actions include the cancellation of eligibility, removal, cancellation of reinstatement eligibility, and debarment. A non-selection or cancellation of eligibility for a specific position based on an objection to an eligible or a pass over of a preference eligible under 5 CFR 332.406 is not a suitability action. (5 CFR 731.501, 731.203, 731.101(a));

(10) *Various Actions Involving the Senior Executive Service.* Removal or suspension for more than 14 days (5 U.S.C. 7543(d) and 5 CFR 752.605); Reduction-in-force action affecting a career appointee (5 U.S.C. 3595); or Furlough of a career appointee (5 CFR 359.805); and

(11) *Miscellaneous Restoration and Reemployment Matters.*

(i) Failure to afford reemployment priority rights pursuant to a Reemployment Priority List following separation by reduction in force (5 CFR 330.214);

(ii) Full recovery from a compensable injury after more than 1 year, because of the employment of another person (5 CFR 302.501);

(iii) Failure to reinstate a former employee after service under the Foreign Assistance Act of 1961 (5 CFR 352.508);

(iv) Failure to re-employ a former employee after movement between executive agencies during an emergency (5 CFR 352.209);

(v) Failure to re-employ a former employee after detail or transfer to an international organization (5 CFR 352.313);

(vi) Failure to re-employ a former employee after service under the Indian Self-Determination Act (5 CFR 352.707); or

(vii) Failure to re-employ a former employee after service under the Taiwan Relations Act (5 CFR 352.807).

* * * * *

■ 5. In § 1201.4 revise paragraphs (a) and (j) and add new paragraph (o) to read as follows:

§ 1201.4 General definitions.

(a) *Judge.* Any person authorized by the Board to hold a hearing or to decide a case without a hearing, including the Board or any member of the Board, or an administrative law judge appointed under 5 U.S.C. 3105 or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge.

* * * * *

(j) *Date of service.* ''Date of service'' has the same meaning as ''date of filing'' under paragraph (l) of this section.

* * * * *

(o) *Grievance.* A complaint by an employee or labor organization under a negotiated grievance procedure covered by 5 U.S.C. 7121.

■ 6. In § 1201.14 revise paragraphs (c) and (m)(1) to read as follows:

§ 1201.14 Electronic Filing Procedures.

* * * * *

(c) *Matters excluded from electronic filing.* Electronic filing may not be used to:

(1) File a request to hear a case as a class appeal or any opposition thereto (§ 1201.27);

(2) Serve a subpoena (§ 1201.83);

(3) File a pleading with the Special Panel (§ 1201.137);

(4) File a pleading that contains Sensitive Security Information (SSI) (49 CFR parts 15 and 1520);

(5) File a pleading that contains classified information (32 CFR part 2001); or

(6) File a request to participate as an amicus curiae or file a brief as amicus curiae pursuant to § 1201.34 of this part.

* * * * *

(m) * * *

(1) As provided in § 1201.4(l) of this Part, the date of filing for pleadings filed via e-Appeal Online is the date of electronic submission. All pleadings filed via e-Appeal Online are time stamped with Eastern Time, but the timeliness of a pleading will be determined based on the time zone from which the pleading was submitted. For example, a pleading filed at 11 p.m. Pacific Time on August 20 will be stamped by e-Appeal Online as being filed at 2 a.m. Eastern Time on August 21. However, if the pleading was required to be filed with the Washington Regional Office (in the Eastern Time Zone) on August 20, it would be considered timely, as it was submitted prior to midnight Pacific Time on August 20.

* * * * *

■ 7. In § 1201.21 revise paragraphs (d) introductory text, (d)(2), (d)(3) and add new paragraphs (d)(4), (e) and (f) to read as follows:

§ 1201.21 Notice of appeal rights.

* * * * *

(d) Notice of any right the employee has to file a grievance or seek corrective action under subchapters II and III of 5 U.S.C. chapter 12, including:

* * * * *

(2) Whether both an appeal to the Board and a grievance may be filed on the same matter and, if so, the circumstances under which proceeding with one will preclude proceeding with the other, and specific notice that filing a grievance will not extend the time limit for filing an appeal with the Board;

(3) Whether there is any right to request Board review of a final decision on a grievance in accordance with § 1201.155 of this part; and

(4) The effect of any election under 5 U.S.C. 7121(g), including the effect that seeking corrective action under subchapters II and III of 5 U.S.C. chapter 12 will have on the employee's appeal rights before the Board.

(e) Notice of any right the employee has to file a complaint with the Equal Employment Opportunity Commission or to grieve allegations of unlawful discrimination, consistent with the provisions of 5 U.S.C. 7121(d) and 29 CFR 1614.301 and 1614.302.

(f) The name or title and contact information for the agency official to whom the Board should send the Acknowledgment Order and copy of the appeal in the event the employee files an appeal with the Board. Contact information should include the official's mailing address, email address, telephone and fax numbers.

■ 8. In § 1201.22, add paragraph (b)(3) to read as follows:

§ 1201.22 Filing an appeal and responses to appeals.

* * * * *

(b) * * *

(3) An appellant is responsible for keeping the agency informed of his or her current home address for purposes of receiving the agency's decision, and correspondence which is properly addressed and sent to the appellant's address via postal or commercial delivery is presumed to have been duly delivered to the addressee. While such a presumption may be overcome under the circumstances of a particular case, an appellant may not avoid service of a properly addressed and mailed decision by intentional or negligent conduct which frustrates actual service. The appellant may also be deemed to have received the agency's decision if it was received by a designated representative or a person of suitable age and discretion residing with the appellant. The following examples illustrate the application of this rule:

Example A: An appellant who fails to pick up mail delivered to his or her post office box may be deemed to have received the agency decision.

Example B: An appellant who did not receive his or her mail while in the hospital may overcome the presumption of actual receipt.

Example C: An appellant may be deemed to have received an agency decision received by his or her roommate.

* * * * *

■ 9. Revise § 1201.23 to read as follows:

§ 1201.23 Computation of time.

In computing the number of days allowed for complying with any deadline, the first day counted is the day after the event from which the time period begins to run. If the date that ordinarily would be the last day for filing falls on a Saturday, Sunday, or Federal holiday, the filing period will include the first workday after that date. Unless a different deadline is specified by the Board or its designee, 5 days are added to a party's deadline for responding to a document served on the party by mail.

Example 1: If an employee receives a decision notice that is effective on July 1, the 30-day period for filing an appeal starts to run on July 2. The filing ordinarily would be timely only if it is made by July 31. If July 31 is a Saturday, however, the last day for filing would be Monday, August 2.

Example 2: The judge orders the appellant to file a response to a jurisdictional order no later than October 15, 2012, and that the agency's response is due 10 days after the filing of the appellant's pleading. If the appellant serves the agency with a pleading via regular mail on October 15, the agency's deadline for filing a response will be October 30, not October 25.

■ 10. In § 1201.24, revise paragraphs (a)(7) and (d) to read as follows:

§ 1201.24 Content of an appeal; right to hearing.

(a) * * *

(7) Where applicable, a copy of the notice of proposed action, the agency decision being appealed and, if available, the SF–50 or similar notice of

personnel action. No other attachments should be included with the appeal, as the agency will be submitting the documents required by 1201.25 of this part, and there will be several opportunities to submit evidence and argument after the appeal is filed. An appellant should not miss the deadline for filing merely because he or she does not currently have all of the documents specified in this section.

* * * * *

(d) *Right to hearing.* An appellant generally has a right to a hearing on the merits if the appeal has been timely filed and the Board has jurisdiction over the appeal.

* * * * *

■ 11. Revise § 1201.28 to read as follows:

§ 1201.28 Case suspension procedures.

(a) *Suspension period.* The judge may issue an order suspending the processing of an appeal for up to 30 days. The judge may grant a second order suspending the processing of an appeal for up to an additional 30 days.

(b) *Early termination of suspension period.* The administrative judge may terminate the suspension period upon joint request of the parties or where the parties request the judge's assistance and the judge's involvement is likely to be extensive.

(c) *Termination of suspension period.* If the final day of any suspension period falls on a day on which the Board is closed for business, adjudication shall resume as of the first business day following the expiration of the period.

(d) *Mediation.* Whenever an appeal is accepted into the Board's Mediation Appeals Program (MAP), the processing of the appeal and all deadlines are suspended until the mediator returns the case to the judge. This provision does not apply where the parties enter into other forms of alternative dispute resolution.

■ 12. Add § 1201.29 as follows:

§ 1201.29 Dismissal without prejudice.

(a) *In general.* Dismissal without prejudice is a procedural option that allows for the dismissal and subsequent refiling of an appeal.

(b) *Procedure.* Dismissal without prejudice may be granted on the judge's own motion or upon request by either party. The decision whether to dismiss an appeal without prejudice is committed to the sound discretion of the judge, and may be granted when the interests of fairness, due process, and administrative efficiency outweigh any prejudice to either party.

(c) *Refiling.* Except in certain USERRA appeals under Part 1208 involving the use of military leave, a decision dismissing an appeal without prejudice will include a date certain by which the appeal must be refiled. The judge will determine whether the appeal must be refiled by the appellant or whether it will be automatically refiled by the judge as of a date certain. When a dismissal without prejudice is issued over the objection of the appellant, the appeal will be automatically refiled as of a date certain.

(d) *Waiver.* When a dismissed appeal must be refiled by the appellant, requests for waiver of a late filing based upon good cause will be liberally construed.

■ 13. In § 1201.31, revise paragraphs (b) and (d) as follows:

§ 1201.31 Representatives.

* * * * *

(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation or 15 days after a party becomes aware of the conflict. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.

* * * * *

(d) As set forth in paragraphs (d) and (e) of § 1201.43 of this part, a judge may exclude a representative from all or any portion of the proceeding before him or her for contumacious conduct or conduct prejudicial to the administration of justice.

* * * * *

■ 14. In § 1201.33, revise paragraph (a) to read as follows:

§ 1201.33 Federal witnesses.

(a) Every Federal agency or corporation, including nonparties, must make its employees or personnel available to furnish sworn statements or to appear at a deposition or hearing when ordered by the judge to do so. When providing those statements or appearing at a deposition or at the hearing, Federal employee witnesses will be in official duty status (i.e., entitled to pay and benefits including travel and per diem, where appropriate). When a desired witness is employed by an agency who is not a party to the Board proceeding, the requesting party may avail itself of the provisions of sections 1201.81 to 1201.85 of this part regarding subpoenas to ensure the attendance of the witness. In addition, the Board and the parties will implement this provision, to the maximum extent possible, to avoid conflict with other regulations governing the production of Federal employees in matters in litigation.

* * * * *

■ 15. In § 1201.34, revise paragraph (e) to read as follows:

§ 1201.34 Intervenors and amicus curiae.

* * * * *

(e) *Amicus curiae.* (1) An amicus curiae is a person or organization who, although not a party to an appeal, gives advice or suggestions by filing a brief with the judge or the Board regarding an appeal. Any person or organization, including those who do not qualify as intervenors, may request permission to file an amicus brief. The Board may solicit amicus briefs on its own motion.

(2) A request to file an amicus curiae brief must include a statement of the person's or organization's interest in the appeal and how the brief will be relevant to the issues involved.

(3) The request may be granted, in the discretion of the judge or the Board, if the person or organization has a legitimate interest in the proceedings, and such participation will not unduly delay the outcome and may contribute materially to the proper disposition thereof.

(4) The amicus curiae shall submit its brief within the time limits set by the judge or the Board and must comply with any further orders by the judge or the Board.

(5) An amicus curiae is not a party to the proceeding and may not participate in any way in the conduct of the hearing, including the presentation of evidence or the examination of witnesses. The Board, in its discretion, may invite an amicus curiae to participate in oral argument in proceedings in which oral argument is scheduled.

■ 16. In § 1201.36, revise paragraph (a)(2) to read as follows:

§ 1201.36 Consolidating and joining appeals.

(a) * * *

(2) Joinder occurs when one person has filed two or more appeals and they

are united for consideration. For example, a judge might join an appeal challenging a 30-day suspension with a pending appeal challenging a subsequent removal if the same appellant filed both appeals.

* * * * *

■ 17. In § 1201.41, revise the first sentence of paragraph (b) as follows:

§ 1201.41 Judges.

* * * * *

(b) *Authority.* Judges will conduct fair and impartial hearings and will issue timely and clear decisions based on statutes and legal precedents. * * *

* * * * *

■ 18. In § 1201.42, revise paragraph (a) to read as follows:

§ 1201.42 Disqualifying a Judge.

(a) If a judge considers himself or herself disqualified, he or she will withdraw from the case, state on the record the reasons for doing so, and another judge will be promptly assigned.

* * * * *

■ 19. In § 1201.43, revise the introductory paragraph and add new paragraphs (d) and (e) to read as follows:

§ 1201.43 Sanctions.

The judge may impose sanctions upon the parties as necessary to serve the ends of justice. This authority covers, but is not limited to, the circumstances set forth in paragraphs (a), (b), (c), (d), and (e) of this section. Before imposing a sanction, the judge shall provide appropriate prior warning, allow a response to the actual or proposed sanction when feasible, and document the reasons for any resulting sanction in the record.

* * * * *

(d) *Exclusion of a representative or other person.* A judge may exclude or limit the participation of a representative or other person in the case for contumacious conduct or conduct prejudicial to the administration of justice. When the judge excludes a party's representative, the judge will afford the party a reasonable time to obtain another representative before proceeding with the case.

(e) *Cancellation, suspension, or termination of hearing.* A judge may cancel a scheduled hearing, or suspend or terminate a hearing in progress, for contumacious conduct or conduct prejudicial to the administration of justice on the part of the appellant or the appellant's representative. If the judge suspends a hearing, the parties must be given notice as to when the hearing will resume. If the judge cancels or terminates a hearing, the judge must set a reasonable time during which the record will be kept open for receipt of written submissions.

■ 20. In § 1201.51, revise paragraph (d) to read as follows:

§ 1201.51 Scheduling the hearing.

* * * * *

(d) The Board has established certain approved hearing locations, which are listed on the Board's public Web site (*www.mspb.gov*). The judge will advise parties of these hearing sites as appropriate. Parties, for good cause, may file motions requesting a different hearing location. Rulings on those motions will be based on a showing that a different location will be more advantageous to all parties and to the Board.

■ 21. Revise § 1201.52 to read as follows:

§ 1201.52 Public hearings.

(a) *Closing the hearing.* Hearings are generally open to the public; however, the judge may order a hearing or any part of a hearing closed when doing so would be in the best interests of a party, a witness, the public, or any other person affected by the proceeding. Any order closing the hearing will set out the reasons for the judge's decision. Any objections to the order will be made a part of the record.

(b) *Electronic devices.* Absent express approval from the judge, no two-way communications devices may be operated and/or powered on in the hearing room; all cell phones, text devices, and all other two-way communications devices shall be powered off in the hearing room. Further, no cameras, recording devices, and/or transmitting devices may be operated, operational, and/or powered on in the hearing room without the consent of the judge.

■ 22. Revise § 1201.53 to read as follows:

§ 1201.53 Record of proceedings.

(a) *Recordings.* A recording of the hearing is generally prepared by a court reporter, under the judge's guidance. Such a recording is included with the Board's copy of the appeal file and serves as the official hearing record. Judges may prepare recordings in some hearings, such as those conducted telephonically.

(b) *Transcripts.* A ''transcript'' refers not only to printed copies of the hearing testimony, but also to electronic versions of such documents. Along with recordings, a transcript prepared by the court reporter is accepted by the Board as the official hearing record. Any party may request that the court reporter prepare a full or partial transcript, at the requesting party's expense. Judges do not prepare transcripts.

(c) *Copies.* Copies of recordings or existing transcripts will be provided upon request to parties free of charge. Such requests should be made in writing to the adjudicating regional or field office, or to the Clerk of the Board, as appropriate. Nonparties may request a copy of a hearing recording or existing transcript under the Freedom of Information Act (FOIA) and Part 1204 of the Board's regulations. A nonparty may request a copy by writing to the appropriate Regional Director, the Chief Administrative Judge of the appropriate MSPB Field Office, or to the Clerk of the Board at MSPB headquarters in Washington, DC, as appropriate. Nonparties may also make FOIA requests online at *https://foia.mspb.gov.*

(d) *Corrections to transcript.* Any discrepancy between the transcript and the recording shall be resolved by the judge or the Clerk of the Board, as appropriate. Corrections to the official transcript may be made on motion by a party or on the judge's own motion or by the Clerk of the Board, as appropriate. Motions for corrections must be filed within 10 days after the receipt of a transcript. Corrections of the official transcript will be made only when substantive errors are found by the judge or by the Clerk of the Board, as appropriate.

(e) *Official record.* Hearing exhibits and pleadings that have been accepted into the record, the official hearing record, if a hearing is held, and all orders and decisions of the judge and the Board, make up the official record of the case. Other than the Board's decisions, the official record is not available for public inspection and copying. The official record is, however, subject to requests under both the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552a) pursuant to the procedures contained in 5 CFR parts 1204 and 1205.

■ 23. In § 1201.58, revise paragraph (c) and add paragraph (d) to read as follows:

§ 1201.58 Closing the record.

* * * * *

(c) Once the record closes, additional evidence or argument will ordinarily not be accepted unless:

(1) The party submitting it shows that the evidence or argument was not readily available before the record closed; or

(2) It is in rebuttal to new evidence or argument submitted by the other party just before the record closed.

(d) The judge will include in the record any supplemental citations received from the parties or approved corrections of the transcript, if one has been prepared.

§ 1201.62 [Removed]

■ 24. Remove § 1201.62.

■ 25. Amend § 1201.71 by adding two new sentences at the end of the section to read as follows:

§ 1201.71 Purpose of discovery.

* * * Discovery requests and responses thereto are not to be filed in the first instance with the Board. They are only filed with the Board in connection with a motion to compel discovery under 1201.73(c) of this part, with a motion to subpoena discovery under 1201.73(d) of this part, or as substantive evidence to be considered in the appeal.

■ 26. Revise § 1201.73 to read as follows:

§ 1201.73 Discovery procedures.

(a) *Initiating discovery.* A party seeking discovery must start the process by serving a request for discovery on the representative of the party or nonparty, or, if there is no representative, on the party or nonparty themselves. The request for discovery must state the time limit for responding, as prescribed in 1201.73(d) of this part, and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to the official or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request and must assist the officer or employee as necessary in providing relevant information that is available to the agency.

(b) *Responses to discovery requests.* A party or nonparty must answer a discovery request within the time provided under paragraph (d)(2) of this section, either by furnishing to the requesting party the information requested or agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for the objection. Parties and nonparties may respond to discovery requests by electronic mail if authorized by the requesting party.

(c) *Motions to compel or issue a subpoena.* (1) If a party fails or refuses to respond in full to a discovery request, the requesting party may file a motion to compel discovery. If a nonparty fails or refuses to respond in full to a discovery request, the requesting party may file a motion for the issuance of a subpoena directed to the individual or entity from which the discovery is sought under the procedures described in 1201.81 of this part. The requesting party must serve a copy of the motion on the other party or nonparty. Before filing any motion to compel or issue a subpoena, the moving party shall discuss the anticipated motion with the opposing party or nonparty, and all those involved shall make a good faith effort to resolve the discovery dispute and narrow the areas of disagreement. The motion shall include:

(i) A copy of the original request and a statement showing that the information sought is discoverable under section 1201.72;

(ii) A copy of the response to the request (including the objections to discovery) or, where appropriate, a statement that no response has been received, along with an affidavit or sworn statement under 28 U.S.C. 1746 supporting the statement (See appendix IV to part 1201); and

(iii) A statement that the moving party has discussed or attempted to discuss the anticipated motion with the nonmoving party or nonparty and made a good faith effort to resolve the discovery dispute and narrow the areas of disagreement.

(2) The party or nonparty from whom discovery was sought may respond to the motion to compel or the motion to issue a subpoena within the time limits stated in paragraph (d)(3) of this section.

(d) *Time limits.* (1) Unless otherwise directed by the judge, parties must serve their initial discovery requests within 30 days after the date on which the judge issues an order to the respondent agency to produce the agency file and response.

(2) A party or nonparty must serve a response to a discovery request promptly, but not later than 20 days after the date of service of the request or order of the judge. Any discovery requests following the initial request must be served within 10 days of the date of service of the prior response, unless the parties are otherwise directed by the judge. Deposition witnesses must give their testimony at the time and place stated in the request for deposition or in the subpoena, unless the parties agree on another time or place.

(3) Any motion for an order to compel or issue a subpoena must be filed with the judge within 10 days of the date of service of objections or, if no response is received, within 10 days after the time limit for response has expired. Any pleading in opposition to a motion to compel or subpoena discovery must be filed with the judge within 10 days of the date of service of the motion.

(4) Discovery must be completed within the time period designated by the judge or, if no such period is designated, no later than the prehearing or close of record conference.

(e) *Limits on the number of discovery requests.* (1) Absent prior approval by the judge, interrogatories served by parties upon another party or a nonparty may not exceed 25 in number, including all discrete subparts.

(2) Absent prior approval by the judge or agreement by the parties, each party may not take more than 10 depositions.

(3) Requests to exceed the limitations set forth in paragraphs (e)(1) and (e)(2) of this section may be granted at the discretion of the judge. In considering such requests, the judge shall consider the factors identified in § 1201.72(d) of this part.

■ 27. In 1201.81, revise paragraph (c) to read as follows:

§ 1201.81 Requests for subpoenas.

* * * * *

(c) *Relevance.* The request must be supported by a showing that the evidence sought is directly material to the issues involved in the appeal.

* * * * *

■ 28. In § 1201.93, revise paragraph (c) to read as follows:

§ 1201.93 Procedures.

* * * * *

(c) *Stay of Appeal.* The judge has the authority to proceed with or to stay the processing of the appeal while an interlocutory appeal is pending with the Board. The passage of time during any stay granted under this section is not deemed, or accounted for, as a case suspension under § 1201.28 of this part. If the judge does not stay the appeal, the Board may do so while an interlocutory appeal is pending with it.

■ 29. In § 1201.101, revise paragraph (b)(2) to read as follows:

§ 1201.101 Explanation and definitions.

* * * * *

(b) * * *

(2) *Decision-making official* means any judge, officer, or other employee of the Board designated to hear and decide cases except when such judge, officer, or other employee of the Board is serving as a mediator or settlement judge who is not the adjudicating judge.

■ 30. In § 1201.111, revise paragraph (a) to read as follows:

§ 1201.111 Initial decision by judge.

(a) The judge will prepare an initial decision after the record closes and will serve that decision on all parties to the appeal, including named parties, permissive intervenors, and intervenors of right. The Board satisfies its legal obligation under 5 U.S.C. 7701(b)(1) by making electronic copies of initial decisions available to the Office of Personnel Management.

* * * * *

■ 31. In § 1201.112, revise paragraph (a)(4) to read as follows:

§ 1201.112 Jurisdiction of judge.

(a) * * *

(4) Vacate an initial decision to accept into the record a settlement agreement that is filed prior to the deadline for filing a petition for review but is not received until after the date when the initial decision becomes final under 1201.113 of this part.

* * * * *

■ 32. In § 1201.113, revise the introductory text, paragraph (a) and add paragraph (f) to read as follows:

§ 1201.113 Finality of decision.

The initial decision of the judge will become the Board's final decision 35 days after issuance. Initial decisions are not precedential.

(a) *Exceptions.* The initial decision will not become the Board's final decision if within the time limit for filing specified in 1201.114 of this part, any party files a petition for review or, if no petition for review is filed, files a request that the initial decision be vacated for the purpose of accepting a settlement agreement into the record.

* * * * *

(f) When the Board, by final decision or order, finds there is reason to believe a current Federal employee may have committed a prohibited personnel practice described at 5 U.S.C. 2302(b)(8), the Board will refer the matter to the Special Counsel to investigate and take appropriate action under 5 U.S.C. 1215.

* * * * *

■ 33. Revise § 1201.114 as follows:

§ 1201.114 Petition and cross petition for review—content and procedure.

(a) *Pleadings allowed.* Pleadings allowed on review include a petition for review, a cross petition for review, a response to a petition for review, a response to a cross petition for review, and a reply to a response to a petition for review.

(1) A petition for review is a pleading in which a party contends that an initial decision was incorrectly decided in whole or in part.

(2) A cross petition for review has the same meaning as a petition for review but is used to describe a pleading that is filed by a party when another party has already filed a timely petition for review.

(3) A response to a petition for review and a cross petition for review may be contained in a single pleading.

(4) A reply to a response to a petition for review is limited to the factual and legal issues raised by another party in the response to the petition for review. It may not raise new allegations of error.

(5) No pleading other than the ones described in this paragraph will be accepted unless the party files a motion with and obtains leave from the Clerk of the Board. The motion must describe the nature of and need for the pleading.

(b) *Contents of petition or cross petition for review.* A petition or cross petition for review states a party's objections to the initial decision, including all of the party's legal and factual arguments, and must be supported by references to applicable laws or regulations and by specific references to the record. Any petition or cross petition for review that contains new evidence or argument must include an explanation of why the evidence or argument was not presented before the record below closed (see § 1201.58 of this part). A petition or cross petition for review should not include documents that were part of the record below, as the entire administrative record will be available to the Board.

(c) *Who may file.* Any party to the proceeding, the Director of the Office of Personnel Management (OPM), or the Special Counsel (under 5 U.S.C. 1212(c)) may file a petition or cross petition for review. The Director of OPM may request review only if he or she believes that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under OPM's jurisdiction. 5 U.S.C. 7701(e)(2). All submissions to the Board must contain the signature of the party or of the party's designated representative.

(d) *Place for filing.* All pleadings described in paragraph (a) and all motions and pleadings associated with them must be filed with the Clerk of the Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419, by commercial or personal delivery, by facsimile, by mail, or by electronic filing in accordance with 1201.14 of this part.

(e) *Time for filing.* Any petition for review must be filed within 35 days after the date of issuance of the initial decision or, if the petitioner shows that the initial decision was received more than 5 days after the date of issuance, within 30 days after the date the petitioner received the initial decision. For purposes of this section, the date that the petitioner receives the initial decision is determined according to the standard set forth at § 1201.22(b)(3) of this part, pertaining to an appellant's receipt of a final agency decision. If the petitioner is represented, the 30-day time period begins to run upon receipt of the initial decision by either the representative or the petitioner, whichever comes first. A cross petition for review must be filed within 25 days of the date of service of the petition for review. Any response to a petition or cross petition for review must be filed within 25 days after the date of service of the petition or cross petition. Any reply to a response to a petition for review must be filed within 10 days after the date of service of the response to the petition for review.

(f) *Extension of time to file.* The Board will grant a motion for extension of time to file a pleading described in paragraph (a) only if the party submitting the motion shows good cause. Motions for extensions must be filed with the Clerk of the Board on or before the date on which the petition or other pleading is due. The Board, in its discretion, may grant or deny those motions without providing the other parties the opportunity to comment on them. A motion for an extension must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include a specific and detailed description of the circumstances alleged to constitute good cause, and it should be accompanied by any available documentation or other evidence supporting the matters asserted.

(g) *Late filings.* Any pleading described in paragraph (a) of this section that is filed late must be accompanied by a motion that shows good cause for the untimely filing, unless the Board has specifically granted an extension of time under paragraph (f) of this section, or unless a motion for extension is pending before the Board. The motion must be accompanied by an affidavit or sworn statement under 28 U.S.C. 1746. (See Appendix IV.) The affidavit or sworn statement must include: The reasons for failing to request an extension before the deadline for the submission, and a specific and detailed description of the circumstances causing the late filing, accompanied by supporting documentation or other evidence. Any response to the motion may be included

in the response to the petition for review, the cross petition for review, or the response to the cross petition for review. The response will not extend the time provided by paragraph (e) of this section to file a cross petition for review or to respond to the petition or cross petition. In the absence of a motion, the Board may, in its discretion, determine on the basis of the existing record whether there was good cause for the untimely filing, or it may provide the party that submitted the document with an opportunity to show why it should not be dismissed or excluded as untimely.

(h) *Length limitations.* A petition for review, a cross petition for review, or a response to a petition for review, whether computer generated, typed, or handwritten, is limited to 30 pages or 7500 words, whichever is less. A reply to a response to a petition for review is limited to 15 pages or 3750 words, whichever is less. Computer generated and typed pleadings must use no less than 12 point typeface and 1-inch margins and must be double spaced and only use one side of a page. The length limitation is exclusive of any table of contents, table of authorities, attachments, and certificate of service. A request for leave to file a pleading that exceeds the limitations prescribed in this paragraph must be received by the Clerk of the Board at least 3 days before the filing deadline. Such requests must give the reasons for a waiver as well as the desired length of the pleading and are granted only in exceptional circumstances. The page and word limits set forth above are maximum limits. Parties are not expected or required to submit pleadings of the maximum length. Typically, a well-written petition for review is between 5 and 10 pages long.

(i) *Intervention.* (1) *By Director of OPM.* The Director of OPM may intervene in a case before the Board under the standards stated in 5 U.S.C. 7701(d). The notice of intervention is timely if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Director requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Director's brief within 15 days of the date of service of that brief. The Director must serve the notice of intervention and the brief on all parties.

(2) *By Special Counsel.* (i) Under 5 U.S.C. 1212(c), the Special Counsel may intervene as a matter of right, except as provided in paragraph (i)(2)(ii) of this section. The notice of intervention is timely filed if it is filed with the Clerk of the Board within 45 days of the date the petition for review was filed. If the Special Counsel requests additional time for filing a brief on intervention, the Board may, in its discretion, grant the request. A party may file a response to the Special Counsel's brief within 15 days of the date of service. The Special Counsel must serve the notice of intervention and the brief on all parties.

(ii) The Special Counsel may not intervene in an action brought by an individual under 5 U.S.C. 1221, or in an appeal brought by an individual under 5 U.S.C. 7701, without the consent of that individual. The Special Counsel must present evidence that the individual has consented to the intervention at the time the motion to intervene is filed.

(3) *Permissive intervenors.* Any person, organization, or agency, by motion made in a petition for review, may ask for permission to intervene. The motion must state in detail the reasons why the person, organization, or agency should be permitted to intervene. A motion for permission to intervene will be granted if the requester shows that he or she will be affected directly by the outcome of the proceeding. Any person alleged to have committed a prohibited personnel practice under 5 U.S.C. 2302(b) may ask for permission to intervene.

(j) *Service.* A party submitting a pleading must serve a copy of it on each party and on each representative, as required by paragraph (b)(2) of § 1201.26.

(k) *Closing the record.* The record closes on expiration of the period for filing the reply to the response to the petition for review or on expiration of the period for filing a response to the cross petition for review, whichever is later, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

(l) *Rejection for failure to comply.* The Clerk of the Board may reject material submitted for filing that does not substantially conform to the procedural requirements of this subpart by issuing a rejection letter advising the parties of the nature of the nonconformity and the requirements and deadline for resubmission. Any deadlines affected by the rejection will be addressed in the rejection letter.

■ 34. Revise § 1201.115 to read as follows:

§ 1201.115 Criteria for granting petition or cross petition for review.

The Board normally will consider only issues raised in a timely filed petition or cross petition for review. Situations in which the Board may grant a petition or cross petition for review include, but are not limited to, a showing that:

(a) The initial decision contains erroneous findings of material fact.

(1) Any alleged factual error must be material, meaning of sufficient weight to warrant an outcome different from that of the initial decision.

(2) A petitioner who alleges that the judge made erroneous findings of material fact must explain why the challenged factual determination is incorrect and identify specific evidence in the record that demonstrates the error. In reviewing a claim of an erroneous finding of fact, the Board will give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing.

(b) The initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case. The petitioner must explain how the error affected the outcome of the case.

(c) The judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case.

(d) New and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. To constitute new evidence, the information contained in the documents, not just the documents themselves, must have been unavailable despite due diligence when the record closed.

(e) Notwithstanding the above provisions in this section, the Board reserves the authority to consider any issue in an appeal before it.

■ 35. Revise § 1201.116 to read as follows:

§ 1201.116 Compliance with orders for interim relief.

(a) *Certification of compliance.* If the appellant was the prevailing party in the initial decision and the decision granted the appellant interim relief, any petition or cross petition for review filed by the agency must be accompanied by a certification that the agency has complied with the interim relief order either by providing the required interim

relief or by satisfying the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(b) *Challenge to certification.* If the appellant challenges the agency's certification of compliance with the interim relief order, the Board will issue an order affording the agency the opportunity to submit evidence of its compliance. The appellant may respond to the agency's submission of evidence within 10 days after the date of service of the submission.

(c) *Allegation of noncompliance in petition or cross petition for review.* If an appellant or an intervenor files a petition or cross petition for review of an initial decision ordering interim relief and such petition includes a challenge to the agency's compliance with the interim relief order, upon order of the Board the agency must submit evidence that it has provided the interim relief required or that it has satisfied the requirements of 5 U.S.C. 7701(b)(2)(A)(ii) and (B).

(d) *Request for dismissal for noncompliance with interim relief order.* If the agency files a petition or cross petition for review and has not provided the required interim relief, the appellant may request dismissal of the agency's petition. Any such request must be filed with the Clerk of the Board within 25 days of the date of service of the agency's petition. A copy of the response must be served on the agency at the same time it is filed with the Board. The agency may respond with evidence and argument to the appellant's request to dismiss within 15 days of the date of service of the request. If the appellant files a motion to dismiss beyond the time limit, the Board will dismiss the motion as untimely unless the appellant shows that it is based on information not readily available before the close of the time limit.

(e) *Effect of failure to show compliance with interim relief order.* Failure by an agency to provide the certification required by paragraph (a) of this section with its petition or cross petition for review, or to provide evidence of compliance in response to a Board order in accordance with paragraphs (b), (c), or (d) of this section, may result in the dismissal of the agency's petition or cross petition for review.

(f) *Back pay and attorney fees.* Nothing in this section shall be construed to require any payment of back pay for the period preceding the date of the judge's initial decision or attorney fees before the decision of the Board becomes final.

(g) *Allegations of noncompliance after a final decision is issued.* If the initial decision granted the appellant interim relief, but the appellant is not the prevailing party in the final Board order disposing of a petition for review, and the appellant believes that the agency has not provided full interim relief, the appellant may file an enforcement petition with the regional office under 1201.182 of this part. The appellant must file this petition within 20 days of learning of the agency's failure to provide full interim relief. If the appellant prevails in the final Board order disposing of a petition for review, then any interim relief enforcement motion filed will be treated as a motion for enforcement of the final decision. Petitions under this subsection will be processed under 1201.183 of this part.

■ 36. In § 1201.117, revise paragraph (a)(1) to read as follows:

§ 1201.117 Board decisions; procedures for review or reopening.

(a) * * *

(1) Issue a decision that decides the case;

* * * * *

■ 37. Revise § 1201.118 to read as follows:

§ 1201.118 Board reopening of final decisions.

Regardless of any other provision of this part, the Board may at any time reopen any appeal in which it has issued a final order or in which an initial decision has become the Board's final decision by operation of law. The Board will exercise its discretion to reopen an appeal only in unusual or extraordinary circumstances and generally within a short period of time after the decision becomes final.

§ 1201.119 [Amended]

■ 38. In § 1201.119(a), (b), and (d), remove the words ''final order'' and add, in their place, the words ''final decision''.

■ 39. In § 1201.122, revise paragraph (b) and remove paragraphs (d) and (e) to read as follows:

§ 1201.122 Filing complaint; serving documents on parties.

(a) * * *

(b) *Initial filing and service.* The Special Counsel must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The Special Counsel must serve a copy of the complaint on each party and the party's representative, as shown on the certificate of service.

* * * * *

■ 40. In § 1201.128, revise paragraph (b) and remove paragraphs (d) and (e) to read as follows:

§ 1201.128 Filing complaint; serving documents on parties.

* * * * *

(b) *Initial filing and service.* The Special Counsel must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative, and each person on whose behalf the corrective action is brought.

* * * * *

■ 41. In § 1201.134, revise paragraph (d) and remove paragraphs (f) and (g) to read as follows:

§ 1201.134 Deciding official; filing stay request; serving documents on parties.

* * * * *

(d) *Initial filing and service.* The Special Counsel must file a copy of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the respondent agency or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The Special Counsel must serve a copy of the request on the agency or its representative, as shown on the certificate of service.

* * * * *

■ 42. In § 1201.137, revise paragraph (c) and remove paragraphs (e) and (f) to read as follows:

§ 1201.137 Covered actions; filing complaint; serving documents on parties.

* * * * *

(c) *Initial filing and service.* The agency must file a copy of the complaint, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing each party or the party's representative. The certificate of service must show the last known address, telephone number, and facsimile number of each party or representative. The agency must serve a copy of the complaint on each party and the party's representative, as shown on the certificate of service.

* * * * *

■ 43. Revise § 1201.142 to read as follows:

§ 1201.142 Actions filed by administrative law judges.

An administrative law judge who alleges a constructive removal or other action by an agency in violation of 5 U.S.C. 7521 may file a complaint with the Board under this subpart. The filing and service requirements of § 1201.137 of this part apply. Such complaints shall be adjudicated in the same manner as agency complaints under this subpart.

■ 44. In § 1201.143, revise paragraph (c) and remove paragraphs (e) and (f) to read as follows:

§ 1201.143 Right to hearing; filing complaint; serving documents on parties.

* * * * *

(c) *Initial filing and service.* Except when filed electronically under 1201.14, the appointee must file two copies of the request, together with numbered and tabbed exhibits or attachments, if any, and a certificate of service listing the agency proposing the appointee's removal or the agency's representative. The certificate of service must show the last known address, telephone number, and facsimile number of the agency or its representative. The appointee must serve a copy of the request on the agency or its representative, as shown on the certificate of service.

* * * * *

■ 45. In § 1201.153, revise paragraph (a)(2) to read as follows:

§ 1201.153 Contents of appeal.

(a) * * *

(2) The appeal must state whether the appellant has filed a grievance under a negotiated grievance procedure or a formal discrimination complaint with any agency regarding the matter being appealed to the Board. If he or she has done so, the appeal must state the date on which the appellant filed the complaint or grievance, and it must describe any action that the agency took in response to the complaint or grievance.

* * * * *

■ 46. In § 1201.154, revise the section heading and introductory paragraph, and remove paragraph (d) and (e) to read as follows:

§ 1201.154 Time for filing appeal.

For purposes of this section, the date an appellant receives the agency's decision is determined according to the standard set forth at 1201.22(b)(3) of this part. Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

* * * * *

■ 47. Revise § 1201.155 to read as follows:

§ 1201.155 Requests for review of arbitrators' decisions.

(a) *Source and applicability.* (1) Under paragraph (d) of 5 U.S.C. 7121, an employee who believes he or she has been subjected to discrimination within the meaning of 5 U.S.C. 2302(b)(1), and who may raise the matter under either a statutory procedure such as 5 U.S.C. 7701 or under a negotiated grievance procedure, must make an election between the two procedures. The election of the negotiated grievance procedure ''in no manner prejudices'' the employee's right to request Board review of the final decision pursuant to 5 U.S.C. 7702. Subsection (a)(1) of section 7702 provides that, ''[n]otwithstanding any other provision of law,'' when an employee who has been subjected to an action that is appealable to the Board and who alleges that the action was the result of discrimination within the meaning of 5 U.S.C. 2302(b)(1), the Board will decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701.

(2) This section does not apply to employees of the Postal Service or to other employees excluded from the coverage of the Federal labor management laws at chapter 71 of title 5, United States Code.

(b) *When filed.* The appellant's request for Board review must be filed within 35 days after the date of issuance of the decision or, if the appellant shows that he or she received the decision more than 5 days after the date of issuance, within 30 days after the date the appellant received the decision.

(c) *Scope of Board Review.* If the negotiated grievance procedure permits allegations of discrimination, the Board will review only those claims of discrimination that were raised in the negotiated grievance procedure. If the negotiated grievance procedure does not permit allegations of discrimination to be raised, the appellant may raise such claims before the Board.

(d) *Contents.* The appellant must file the request with the Clerk of the Board, Merit Systems Protection Board, 1615 M Street NW., Washington, DC 20419. The request for review must contain:

(1) A statement of the grounds on which review is requested;

(2) References to evidence of record or rulings related to the issues before the Board;

(3) Arguments in support of the stated grounds that refer specifically to relevant documents and that include relevant citations of authority; and

(4) Legible copies of the final grievance or arbitration decision, the agency decision to take the action, and other relevant documents. Those documents may include a transcript or recording of the hearing.

(e) *Development of the Record.* The Board, in its discretion, may develop the record as to a claim of prohibited discrimination by ordering the parties to submit additional evidence or forwarding the request for review to a judge to conduct a hearing.

(f) *Closing of the Record.* The record will close upon expiration of the period for filing the response to the request for review, or to the brief on intervention, if any, or on any other date the Board sets for this purpose. Once the record closes, no additional evidence or argument will be accepted unless the party submitting it shows that the evidence was not readily available before the record closed.

■ 48. Revise § 1201.181 to read as follows:

§ 1201.181 Authority and explanation.

(a) *Authority.* Under 5 U.S.C. 1204(a)(2), the Board has the authority to order any Federal agency or employee to comply with decisions and orders issued under its jurisdiction and the authority to enforce compliance with its orders and decisions. The Board's decisions and orders, when appropriate, will contain a notice of the Board's enforcement authority.

(b) *Requirements for parties.* The parties are expected to cooperate fully with each other so that compliance with the Board's orders and decisions can be accomplished promptly and in accordance with the laws, rules, and regulations that apply to individual cases. Agencies must promptly inform an appellant of actions taken to comply and must inform the appellant when it believes compliance is complete. Appellants must provide agencies with all information necessary for compliance and should monitor the agency's progress towards compliance.

■ 49. In § 1201.182, revise paragraphs (a) and (b) as follows:

§ 1201.182 Petition for enforcement.

(a) *Appellate jurisdiction.* Any party may petition the Board for enforcement of a final decision or order issued under the Board's appellate jurisdiction, or for enforcement of the terms of a settlement agreement that has been entered into the record for the purpose of enforcement in an order or decision under the Board's appellate jurisdiction. The petition must

be filed promptly with the regional or field office that issued the initial decision; a copy of it must be served on the other party or that party's representative; and it must describe specifically the reasons the petitioning party believes there is noncompliance. The petition also must include the date and results of any communications regarding compliance. Any petition for enforcement that is filed more than 30 days after the date of service of the agency's notice that it has complied must contain a statement and evidence showing good cause for the delay and a request for an extension of time for filing the petition.

(b) *Original jurisdiction.* Any party seeking enforcement of a final Board decision or order issued under its original jurisdiction or enforcement of the terms of settlement agreement entered into the record for the purpose of enforcement in an order or decision issued under its original jurisdiction must file a petition for enforcement with the Clerk of the Board and must serve a copy of that petition on the other party or that party's representative. The petition must describe specifically the reasons why the petitioning party believes there is noncompliance.

* * * * *

■ 50. In § 1201.183, revise paragraphs (a)(2), (a)(5) through (a)(7), (b), (c), (d), and add paragraphs (a)(8), (e), and (f) as follows:

§ 1201.183 Procedures for processing petitions for enforcement.

(a) * * *

(2) If the agency is the alleged noncomplying party, it shall submit the name, title, grade, and address of the agency official charged with complying with the Board's order, and inform such official in writing of the potential sanction for noncompliance as set forth in 5 U.S.C. 1204(a)(2) and (e)(2)(A), even if the agency asserts it has fully complied. The agency must advise the Board of any change to the identity or location of this official during the pendency of any compliance proceeding. In the absence of this information, the Board will presume that the highest ranking appropriate agency official who is not appointed by the President by and with the consent of the Senate is charged with compliance.

* * * * *

(5) If the judge finds that the alleged noncomplying party has not taken all actions required to be in full compliance with the final decision, the judge will issue an initial decision resolving all issues raised in the petition for enforcement and identifying the specific actions the noncomplying party must take to be in compliance with the Board's final decision. A copy of the initial decision will be served on the responsible agency official.

(6) If an initial decision described under paragraph (a)(5) of this section is issued, the party found to be in noncompliance must do the following:

(i) To the extent that the party decides to take the actions required by the initial decision, the party must submit to the Clerk of the Board, within the time limit for filing a petition for review under § 1201.114(e) of this part, a statement that the party has taken the actions identified in the initial decision, along with evidence establishing that the party has taken those actions. The narrative statement must explain in detail why the evidence of compliance satisfies the requirements set forth in the initial decision.

(ii) To the extent that the party decides not to take all of the actions required by the initial decision, the party must file a petition for review under the provisions of §§ 1201.114 and 1201.115 of this part.

(iii) The responses required by the preceding two paragraphs may be filed separately or as a single pleading.

(7) If the agency is the party found to be in noncompliance, it must advise the Board, as part of any submission under this paragraph, of any change in the identity or location of the official responsible for compliance previously provided pursuant to paragraph (a)(2) of this section.

(8) The complying party may file evidence and argument in response to any submission described in paragraph (a)(6) of this section by filing opposing evidence and argument with the Clerk of the Board within 20 days of the date such submission is filed.

(b) *Final Decision of noncompliance.* If a party found to be in noncompliance under paragraph (a)(5) of this section does not file a timely pleading with the Clerk of the Board as required by paragraph (a)(6) of this section, the findings of noncompliance become final and the case will be processed under the enforcement provisions of paragraph (c)(1) of this section.

(c) *Consideration by the Board.* (1) Following review of the initial decision and the written submissions of the parties, the Board will render a final decision on the issues of compliance. Upon finding that the agency is in noncompliance, the Board may, when appropriate, require the agency and the responsible agency official to appear before the Board to show why sanctions should not be imposed under 5 U.S.C. 1204(a)(2) and 1204(e)(2)(A). The Board also may require the agency and the responsible agency official to make this showing in writing, or to make it both personally and in writing. The responsible agency official has the right to respond in writing or to appear at any argument concerning the withholding of that official's pay.

(2) The Board's final decision on the issues of compliance is subject to judicial review under 1201.120 of this part.

(3) The Board's final decision on the issues of compliance is subject to judicial review under § 1201.120 of this part.

(d) *Burdens of proof.* If an appellant files a petition for enforcement seeking compliance with a Board order, the agency generally has the burden to prove its compliance with the Board order by a preponderance of the evidence. However, if any party files a petition for enforcement seeking compliance with the terms of a settlement agreement, that party has the burden of proving the other party's breach of the settlement agreement by a preponderance of the evidence.

(e) *Certification to the Comptroller General.* When appropriate, the Board may certify to the Comptroller General of the United States, under 5 U.S.C. 1204(e)(2)(A), that no payment is to be made to a certain Federal employee. This order may apply to any Federal employee, other than a Presidential appointee subject to confirmation by the Senate, who is found to be in noncompliance with the Board's order.

(f) *Effect of Special Counsel's action or failure to act.* Failure by the Special Counsel to file a complaint under 5 U.S.C. 1215(a)(1)(C) and subpart D of this part will not preclude the Board from taking action under this subpart.

■ 51. Revise the heading of Subpart H of part 1201 to read as follows:

Subpart H—Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable) and Damages (Consequential, Liquidated, and Compensatory)

* * * * *

■ 52. In § 1201.201, revise paragraph (a) and add a new paragraph (e) as follows:

§ 1201.201 Statement of purpose.

(a) This subpart governs Board proceedings for awards of attorney fees (plus costs, expert witness fees, and litigation expenses, where applicable), consequential damages, compensatory damages, and liquidated damages.

* * * * *

(e) An award equal to back pay shall be awarded as liquidated damages under 5 U.S.C. 3330c when the Board or a court determines an agency willfully violated an appellant's veterans' preference rights.

■ 53. In § 1201.202, redesignate paragraph (d) as paragraph (e), and add new paragraph (d) to read as follows:

§ 1201.202 Authority for awards.

* * * * *

(d) *Awards of liquidated damages.* The Board may award an amount equal to back pay as liquidated damages under 5 U.S.C. 3330c when it determines that an agency willfully violated an appellant's veterans' preference rights.

* * * * *

■ 54. In § 1201.204:

■ a. Remove the words ''consequential damages or compensatory damages'' wherever they appear, and add in their place, the words ''consequential, liquidated, or compensatory damages'', and;

■ b. Revise paragraph (h) introductory text to read as follows:

§ 1201.204 Proceedings for consequential, liquidated, and compensatory damages.

* * * * *

(h) *Request for damages first made in proceeding before the Board.* Where a request for consequential, liquidated, or compensatory damages is first made on petition for review of a judge's initial decision on the merits and the Board waives the time limit for making the request in accordance with paragraph (a)(2) of this section, or where the request is made in a case where the only MSPB proceeding is before the Board, including, for compensatory damages only, a request to review an arbitration decision under 5 U.S.C. 7121(d), the Board may:

* * * * *

Appendix III to Part 1201 [Removed and Reserved]

■ 56. Remove and reserve Appendix III to Part 1201.

PART 1203—PROCEDURES FOR REVIEW OF RULES AND REGULATIONS OF THE OFFICE OF PERSONNEL MANAGEMENT

■ 57. The authority citation for 5 CFR part 1203 continues to read as follows:

Authority: 5 U.S.C. 1204(a), 1204(f), and 1204(h).

■ 58. In § 1203.2, revise paragraph (e) to read as follows:

§ 1203.2 Definitions.

* * * * *

(e) Prohibited personnel practices are the impermissible actions described in 5 U.S.C. 2302(b)(1) through 2302(b)(12).

* * * * *

PART 1208—PRACTICES AND PROCEDURES FOR APPEALS UNDER THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT AND THE VETERANS EMPLOYMENT OPPORTUNITIES ACT

■ 59. The authority citation for 5 CFR part 1208 continues to read as follows:

Authority: 5 U.S.C. 1204(h), 3330a, 3330b; 38 U.S.C. 4331.

■ 60. Revise § 1208.3 to read as follows:

§ 1208.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A (Jurisdiction and Definitions), B (Procedures for Appellate Cases), C (Petitions for Review of Initial Decisions), and F (Enforcement of Final Decisions and Orders) of 5 CFR part 1201 to appeals governed by this part. The Board will apply the provisions of subpart H (Attorney Fees (Plus Costs, Expert Witness Fees, and Litigation Expenses, Where Applicable) and Damages (Consequential, Liquidated, and Compensatory)) of 5 CFR part 1201 regarding awards of attorney fees and liquidated damages to appeals governed by this part.

■ 61. Revise § 1208.21 to read as follows:

§ 1208.21 VEOA exhaustion requirement.

(a) *General rule.* Before an appellant may file a VEOA appeal with the Board, the appellant must first file a complaint under 5 U.S.C. 3330a(a) with the Secretary of Labor within 60 days after the date of the alleged violation. In addition, either the Secretary must have sent the appellant written notification that efforts to resolve the complaint were unsuccessful or, if the Secretary has not issued such notification and at least 60 days have elapsed from the date the complaint was filed, the appellant must have provided written notification to the Secretary of the appellant's intention to file an appeal with the Board.

(b) *Equitable tolling; extension of filing deadline.* In extraordinary circumstances, the appellant's 60-day deadline for filing a complaint with the Secretary is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

■ 62. In § 1208.22, add a new paragraph (c) to read as follows:

§ 1208.22 Time of filing.

* * * * *

(c) *Equitable tolling; extension of filing deadline.* In extraordinary circumstances, the appellant's 60-day deadline for filing an appeal with the MSPB is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

■ 63. In § 1208.23, revise paragraphs (a)(5) and (a)(6) to read as follows:

§ 1208.23 Content of a VEOA appeal; request for hearing.

(a) * * *

(5) Evidence identifying the specific veterans' preference claims that the appellant raised before the Secretary; and

(6)(i) Evidence that the Secretary has notified the appellant in accordance with 5 U.S.C. 3330a(c)(2) that the Secretary's efforts have not resolved the complaint (a copy of the Secretary's notice satisfies this requirement); or

(ii) Evidence that the appellant has provided written notice to the Secretary of the appellant's intent to appeal to the Board, as required by 5 U.S.C. 3330a(d)(2) (a copy of the appellant's written notice to the Secretary satisfies this requirement).

* * * * *

PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING

■ 64. The authority citation for 5 CFR part 1208 continues to read as follows:

Authority: 5 U.S.C. 1204, 1221, 2302(b)(8), and 7701.

■ 65. Revise § 1209.2 to read as follows:

§ 1209.2 Jurisdiction.

(a) Under 5 U.S.C. 1221(a), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

(b) The Board exercises jurisdiction over:

(1) *Individual right of action (IRA) appeals.* These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

Example 1: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Mr. X believes that the agency has rated him ''minimally satisfactory'' because he reported that his supervisor embezzled public funds in violation of Federal law and regulation. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an IRA appeal.

Example 2: As above, Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as ''minimally satisfactory.'' Mr. X believes that the agency has rated him ''minimally satisfactory'' because he previously filed a Board appeal of the agency's action suspending him without pay for 15 days and because he testified on behalf of a co-worker in an EEO proceeding. The Board would not have jurisdiction over the performance evaluation as an IRA appeal because the appellant has not made an allegation of a violation of 5 U.S.C. 2302(b)(8), i.e., a claim of retaliation for a protected whistleblowing disclosure. Retaliation for filing a Board appeal would constitute a different prohibited personnel practice, 5 U.S.C. 2302(b)(9), retaliation for having exercised an appeal, complaint, or grievance right granted by any law, rule, or regulation. Similarly, retaliation for protected EEO activity is a prohibited personnel practice under subsection (b)(9), not under subsection (b)(8).

Example 3: Citing alleged misconduct, an agency proposes Employee Y's removal. While that removal action is pending, Y files a complaint with OSC alleging that the proposed removal was initiated in retaliation for her having disclosed that an agency official embezzled public funds in violation of Federal law and regulation. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. Employee Y may file an IRA appeal with respect to the proposed removal.

(2) *Otherwise appealable action appeals.* These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3(a).) An individual who has been subjected to an otherwise appealable action must make an election of remedies as described in 5 U.S.C. 7121(g) and paragraphs (c) and (d) of this section.

Example 4: Same as Example 3 above. While the OSC complaint with respect to the proposed removal is pending, the agency effects the removal action. OSC subsequently issues a letter notifying Y that it has terminated its investigation of the alleged retaliation with respect to the proposed removal. With respect to the effected removal, Employee Y can elect to appeal that action directly to the Board or to proceed with a complaint to OSC. If she chooses the latter option, she may file an IRA appeal when OSC has terminated its investigation, but the only issue that will be adjudicated in that appeal is whether she proves that her protected disclosure was a contributing factor in the removal action and, if so, whether the agency can prove by clear and convincing evidence that it would have removed Y in the absence of the protected disclosure. If she instead files a direct appeal, the agency must prove its misconduct charges, nexus, and the reasonableness of the penalty, and Y can raise any affirmative defenses she might have.

(c) *Issues before the Board in IRA appeals.* In an individual right of action appeal, the only merits issues before the Board are those listed in 5 U.S.C. 1221(e), i.e., whether the appellant has demonstrated that one or more whistleblowing disclosures was a contributing factor in one or more covered personnel actions and, if so, whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure(s). The appellant may not raise affirmative defenses other than reprisal for whistleblowing activities, such as claims of discrimination or harmful procedural error. In an IRA appeal that concerns an adverse action under 5 U.S.C. 7512, the agency need not prove its charges, nexus, or the reasonableness of the penalty, as a requirement under 5 U.S.C. 7513(a), i.e., that its action is taken ''only for such cause as will promote the efficiency of the service.'' However, the Board may consider the strength of the agency's evidence in support of its adverse action in determining whether the agency has demonstrated by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected disclosure(s).

(d) *Elections under 5 U.S.C. 7121(g).*

(1) Under 5 U.S.C. 7121(g)(3), an employee who believes he or she was subjected to a covered personnel action in retaliation for protected whistleblowing ''may elect not more than one'' of 3 remedies: An appeal to the Board under 5 U.S.C. 7701; a negotiated grievance under 5 U.S.C. 7121(d); or corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with the Special Counsel (5 U.S.C. 1214), which can be followed by an IRA appeal filed with the Board (5 U.S.C. 1221). Under 5 U.S.C. 7121(g)(4), an election is deemed to have been made based on which of the 3 actions the individual files first.

(2) In the case of an otherwise appealable action as described in paragraph (b)(2) of this section, an employee who files a complaint with OSC prior to filing an appeal with the Board has elected corrective action under subchapters II and III of 5 U.S.C. chapter 12, i.e., a complaint filed with OSC, which can be followed by an IRA appeal with the Board. As described in paragraph (c) of this section, the IRA appeal in such a case is limited to resolving the claim(s) of reprisal for whistleblowing activities.

■ 66. In § 1209.4, revise paragraph (b) as follows:

§ 1209.4 Definitions.

* * * * *

(b) *Whistleblowing* is the making of a protected disclosure, that is, a disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

* * * * *

■ 67. In § 1209.5, revise paragraphs (a) and (b) as follows:

§ 1209.5 Time of filing.

(a) *General rule.* The appellant must seek corrective action from the Special Counsel before appealing to the Board unless the action being appealed is otherwise appealable directly to the Board and the appellant has elected a direct appeal. (See § 1209.2(d) regarding election of remedies under 5 U.S.C. 7121(g)). Where the appellant has sought corrective action, the time limit for filing an appeal with the Board is

governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed:

(1) No later than 65 days after the date of issuance of the Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or,

(2) At any time after the expiration of 120 days, if the Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action.

(b) *Equitable tolling; extension of filing deadline.* The appellant's deadline for filing an individual right of action appeal with the Board after receiving written notification from the Special Counsel that it is terminating its investigation of his or her allegations is subject to the doctrine of equitable tolling, which permits the Board to extend the deadline where the appellant, despite having diligently pursued his or her rights, was unable to make a timely filing. Examples include cases involving deception or in which the appellant filed a defective pleading during the statutory period.

* * * * *

■ 68. In § 1209.6, revise paragraph (b) to read as follows:

§ 1209.6 Content of appeal; right to hearing.

* * * * *

(b) *Right to hearing.* An appellant generally has a right to a hearing if the appeal has been timely filed and the Board has jurisdiction over the appeal.

* * * * *

William D. Spencer,

Clerk of the Board.

[FR Doc. 2012–24130 Filed 10–11–12; 8:45 am]

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Part IV

Federal Reserve System

12 CFR Part 252

Company-Run Stress Test Requirements; Final Rules

FEDERAL RESERVE SYSTEM

12 CFR Part 252

[Regulation YY; Docket No. 1438]

RIN 7100–AD–86

Supervisory and Company-Run Stress Test Requirements for Covered Companies

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act) requires the Board to conduct annual stress tests of bank holding companies with total consolidated assets of $50 billion or more and nonbank financial companies the Financial Stability Oversight Council (Council) designates for supervision by the Board (nonbank covered companies, and together, with bank holding companies with total consolidated assets of $50 billion or more, covered companies) and also requires the Board to issue regulations that require covered companies to conduct stress tests semi-annually. The Board is adopting this final rule to implement the stress test requirements for covered companies established in the Dodd-Frank Act. This final rule does not apply to any banking organization with total consolidated assets of less than $50 billion. Furthermore, implementation of the stress testing requirements for bank holding companies that did not participate in the Supervisory Capital Assessment Program is delayed until September 2013.

DATES: The rule is effective on November 15, 2012.

FOR FURTHER INFORMATION CONTACT: Tim Clark, Senior Associate Director, (202) 452–5264, Lisa Ryu, Assistant Director, (202) 263–4833, Constance Horsley, Manager, (202) 452–5239, or David Palmer, Senior Supervisory Financial Analyst, (202) 452–2904, Division of Banking Supervision and Regulation; Laurie Schaffer, Associate General Counsel, (202) 452–2272, Benjamin W. McDonough, Senior Counsel, (202) 452–2036, or Christine E. Graham, Senior Attorney, (202) 452–3005, Legal Division.

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I. Background

The Board has long held the view that a banking organization, such as a bank holding company or insured depository institution, should operate with capital levels well above its minimum regulatory capital ratios and commensurate with its risk profile.[1] A banking organization should also have internal processes for assessing its capital adequacy that reflect a full understanding of its risks and ensure that it holds capital commensurate with those risks.[2] Moreover, a banking organization that is subject to the Board's advanced approaches risk-based capital requirements must satisfy specific requirements relating to their internal capital adequacy processes in order to use the advanced approaches to calculate its minimum risk-based capital requirements.[3] Stress testing is one tool that helps both bank supervisors and a banking organization measure the sufficiency of capital available to support the banking organization's operations throughout periods of stress.[4] The Board and the other federal banking agencies previously have highlighted the use of stress testing as a means to better understand the range of a banking organization's potential risk exposures.[5]

In particular, as part of its effort to stabilize the U.S. financial system during the recent financial crisis, the Board, along with other federal financial regulatory agencies and the Federal Reserve system, conducted stress tests of large, complex bank holding companies through the Supervisory Capital Assessment Program (SCAP). The SCAP was a forward-looking exercise designed to estimate revenue, losses, and capital needs under an adverse economic and financial market scenario. By looking at the broad capital needs of the financial system and the specific needs of individual companies, these stress tests provided valuable information to market participants, reduced uncertainty about the financial condition of the participating bank holding companies under a scenario that was more adverse than that which was anticipated to occur at the time, and had an overall stabilizing effect.

Building on the SCAP and other supervisory work coming out of the crisis, the Board initiated the annual Comprehensive Capital Analysis and Review (CCAR) in late 2010 to assess the capital adequacy and the internal capital planning processes of large, complex bank holding companies and to incorporate stress testing as part of the Board's regular supervisory program for assessing capital adequacy and capital planning practices at large bank holding companies. The CCAR represents a substantial strengthening of previous approaches to assessing capital adequacy and promotes thorough and robust processes at large banking organizations for measuring capital needs and for managing and allocating capital resources. The CCAR focuses on the risk measurement and management

[1] *See* 12 CFR part 225, Appendix A; *see also* Supervision and Regulation Letter SR 99–18, Assessing Capital Adequacy in Relation to Risk at Large Banking Organizations and Others with Complex Risk Profiles (July 1, 1999), *available at http://www.federalreserve.gov/boarddocs/srletters/1999/SR9918.HTM* (hereinafter SR 99–18).

[2] *See* Supervision and Regulation Letter SR 09–4, Applying Supervisory Guidance and Regulations on the Payment of Dividends, Stock Redemptions, and Stock Repurchases at Bank Holding Companies (Mar. 27, 2009), *available at http://www.federalreserve.gov/boarddocs/srletters/2009/SR0904.htm* (hereinafter SR 09–4).

[3] *See* 12 CFR part 225, Appendix G, section 22(a); *see also,* Supervisory Guidance: Supervisory Review Process of Capital Adequacy (Pillar 2) Related to the Implementation of the Basel II Advanced Capital Framework, 73 FR 44620 (July 31, 2008).

[4] A full assessment of a company's capital adequacy must take into account a range of risk factors, including those that are specific to a particular industry or company.

[5] *See, e.g.,* Supervisory Guidance on Stress Testing for Banking Organizations With More Than $10 Billion in Total Consolidated Assets, 77 FR 29458 (May 17, 2012); Supervision and Regulation Letter SR 10–6, Interagency Policy Statement on Funding and Liquidity Risk Management (March 17, 2010), available at *http://www.federalreserve.gov/boarddocs/srletters/2010/sr1006.htm;* Supervision and Regulation Letter SR 10–1, Interagency Advisory on Interest Rate Risk (January 11, 2010), available at *http://www.federalreserve.gov/boarddocs/srletters/2010/sr1001.htm;* SR 09–4, supra note 2; Supervision and Regulation Letter SR 07–1, Interagency Guidance on Concentrations in Commercial Real Estate (Jan. 4, 2007), *available at http://www.federalreserve.gov/boarddocs/srletters/2007/SR0701.htm;* Supervision and Regulation Letter SR 12–7, Supervisory Guidance on Stress Testing for Banking Organizations With More Than $10 Billion in Total Consolidated Assets (May 14, 2012), available at *http://www.federalreserve.gov/bankinforeg/srletters/sr1207.htm;* SR 99–18, supra note1; Supervisory Guidance: Supervisory Review Process of Capital Adequacy (Pillar 2) Related to the Implementation of the Basel II Advanced Capital Framework, 73 FR 44620 (July 31, 2008); *The Supervisory Capital Assessment Program: SCAP Overview of Results* (May 7, 2009), *available at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090507a1.pdf;* and *Comprehensive Capital Analysis and Review: Objectives and Overview* (Mar. 18, 2011), available at *http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20110318a1.pdf.*

practices supporting organizations' capital adequacy assessments, including their ability to deliver credible inputs to their loss estimation techniques, as well as the governance processes around capital planning practices. On November 22, 2011, the Board issued an amendment (capital plan rule) to its Regulation Y to require all U.S. bank holding companies with total consolidated assets of $50 billion or more to submit annual capital plans to the Board to allow the Board to assess whether they have robust, forward-looking capital planning processes and have sufficient capital to continue operations throughout times of economic and financial stress.[6]

In the wake of the financial crisis, Congress enacted the Dodd-Frank Act, which requires the Board to implement enhanced prudential supervisory standards, including requirements for stress tests, for covered companies to mitigate the threat to financial stability posed by these institutions.[7] Section 165(i)(1) of the Dodd-Frank Act requires the Board to conduct an annual stress test of each covered company to evaluate whether the covered company has sufficient capital, on a total consolidated basis, to absorb losses as a result of adverse economic conditions (supervisory stress tests). The Act requires that the supervisory stress test provide for at least three different sets of conditions—baseline, adverse, and severely adverse conditions—under which the Board would conduct its evaluation. The Act also requires the Board to publish a summary of the supervisory stress test results.[8]

In addition, section 165(i)(2) of the Dodd-Frank Act requires the Board to issue regulations that require covered companies to conduct stress tests semi-annually and require financial companies with total consolidated assets of more than $10 billion that are not covered companies and for which the Board is the primary federal financial regulatory agency to conduct stress tests on an annual basis (collectively, company-run stress tests).[9] The Act requires that the Board issue regulations that: (i) Define the term ''stress test''; (ii) establish methodologies for the conduct of the company-run stress tests that provide for at least three different sets of conditions, including baseline, adverse, and severely adverse conditions; (iii) establish the form and content of the report that companies subject to the regulation must submit to the Board; and (iv) require companies to publish a summary of the results of the required stress tests.[10]

On January 5, 2012, the Board invited public comment on a notice of proposed rulemaking (proposal or NPR) that would implement the enhanced prudential standards required to be established under section 165 of the Dodd-Frank Act and the early remediation requirements established under Section 166 of the Act, including proposed rules regarding supervisory and company-run stress tests.[11] Under the proposed rules, the Board would conduct an annual supervisory stress test of covered companies under three sets of scenarios, using data as of September 30 of each year as reported by covered companies, and publish a summary of the results of the supervisory stress tests in early April of the following year. In addition, the proposed rule required each covered company to conduct two company-run stress tests each year: An ''annual'' company-run stress test using data as of September 30 of each year and the three scenarios provided by the Board, and an additional company-run stress test using data as of March 31 of each year and three scenarios developed by the company. The proposed rule required each covered company to publish the summary of the results of its company-run stress tests within 90 days of submitting the results to the Board.

Together, the supervisory stress tests and the company-run stress tests are intended to provide supervisors with forward-looking information to help identify downside risks and the potential effect of adverse conditions on capital adequacy at covered companies. The stress tests will estimate the covered company's net income and other factors affecting capital and how each covered company's capital resources would be affected under the scenarios and will produce pro forma projections of capital levels and regulatory capital ratios in each quarter of the planning horizon, under each scenario. The publication of summary results from these stress tests will enhance public information about covered companies' financial condition and the ability of those companies to absorb losses as a result of adverse economic and financial conditions. The Board will use the results of the supervisory stress tests and company-run stress tests in its supervisory evaluation of a covered company's capital adequacy and capital planning practices. In addition, the stress tests will also provide a means to assess capital adequacy across companies more fully and support the Board's financial stability efforts.

The Dodd-Frank Act mandates that the OCC and the FDIC adopt rules implementing stress testing requirements for the depository institutions that they supervise, and the OCC and FDIC invited public comment on proposed rules in January of 2012.[12]

The Board is finalizing the stress testing frameworks in two separate rules. First, the Board is issuing this final rule, which implements the supervisory and company-run stress testing requirements for covered companies (final rule).

Second, the Board is concurrently issuing a final rule implementing annual company-run stress test requirements for bank holding companies, savings and loan holding companies, and state member banks with consolidated assets greater than $10 billion that are not otherwise covered by this rule.

The Board is issuing this final rule implementing the stress testing requirements in advance of the other enhanced prudential standards and early remediation requirements in order to address the timing of when the stress testing requirements will apply to various banking organizations and to require large bank holding companies to publicly disclose the results of their company-run stress tests conducted in the fall of 2012.

II. Overview of Comments

The Board received approximately 100 comments on its NPR on enhanced prudential standards and early remediation requirements. Approximately 40 of these comments pertained to the proposed stress testing requirements. Commenters ranged from individual banking organizations to trade and industry groups and public interest groups. In general, commenters

[6] *See* Capital Plans, 76 FR 74631 (Dec. 1, 2011) (codified at 12 CFR 225.8).

[7] *See* 12 U.S.C. 5365(a). As defined above, a ''covered company'' includes any bank holding company with total consolidated assets of $50 billion or more and each nonbank financial company that the Council has designated for supervision by the Board.

[8] *See* 12 U.S.C. 5365(i)(1).

[9] 12 U.S.C. 5365(i)(2). In this final rule, the Board is implementing the requirements for covered companies only. The requirements applicable to other banking organizations with total consolidated assets of more than $10 billion and for which the Board is the primary federal financial regulatory agency are contained in a concurrently issued final rule being published in this issue of the **Federal Register**.

[10] *See* 12 U.S.C. 5365(i)(2)(C).

[11] Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies, 77 FR 594 (Jan. 5, 2012).

[12] Annual Stress Test, 77 FR 3408 (Jan. 24, 2012) (OCC); Annual Stress Test, 77 FR 3166 (Jan. 17, 2012) (FDIC).

expressed support for stress testing as a valuable tool for identifying and managing both micro- and macro-prudential risk. However, several commenters recommended changes to, or clarification of, certain provisions of the proposed rule, including its timeline for implementation, reporting requirements, and disclosure requirements. Commenters also urged greater interagency coordination regarding stress tests and requested more information on the scenario design process and the models and methodologies that the Board intends to use in the supervisory stress tests.

A. Delayed Compliance Date

Commenters suggested that covered companies that have not previously been subject to stress testing requirements need more time to develop systems and procedures to be able to conduct the stress tests and collect the information that the Board may require in connection with these tests. In response to these comments and to reduce burden on these institutions, the final rule provides that firms that have not previously participated in SCAP will begin conducting stress tests in the fall of 2013, and non-bank covered companies will begin conducting stress tests in the calendar year after the year in which the company first becomes subject to the Board's minimum regulatory capital requirements. Similarly, the rule requires any bank holding company that becomes a covered company after the effective date of this rule to comply with the requirements beginning in the fall of the calendar year that follows the year the company becomes a covered company, unless that time is extended by the Board in writing.[13]

B. Tailoring

The proposed rule would have applied consistent annual company-run stress test requirements, including the compliance date and the disclosure requirements, to all banking organizations with total consolidated assets of more than $10 billion and nonbank financial companies.[14] The Board sought public comment on whether the stress testing requirements should be tailored, particularly for financial companies that are not large bank holding companies.

Several commenters expressed concern that the NPR would have applied stress testing requirements previously applicable only to large bank holding companies, such as those conducted under the CCAR, to smaller, less complex banking organizations with smaller systemic footprints and to nonbank financial companies. Furthermore, commenters indicated that there are substantial differences between bank holding companies and nonbank financial companies, and that the Board should tailor the proposed prudential standards to account for these differences.

The Board recognizes that the population of covered companies is diverse and that certain covered companies may pose more material risk to U.S. financial stability than others. Furthermore, section 165 of the Dodd-Frank Act directs the Board to implement enhanced prudential standards that increase in stringency with the systemic footprint of each company.[15] As a result, the Board expects to use a tailored approach in implementing the stress test requirements for covered companies, using their systemic footprint as the basis for tailoring. For example, the Board is delaying the compliance date for covered companies that did not participate in SCAP. In addition, the Board expects to require a subset of large, complex covered companies to include additional components in their adverse and severely adverse scenarios or to apply additional scenarios beyond the macroeconomic scenarios applied to all covered companies.

With respect to nonbank financial companies, several commenters requested that the Board either further tailor the requirements for nonbank covered companies in the final rule or issue a separate rule for these companies. For example, some commenters requested that the Board develop standards that were ''insurance-centric'' rather than ''bank-centric,'' noting that stress test scenarios relevant for bank holding companies would ignore salient risks to insurers, such as the possibility of a natural disaster.[16] The Board may, by order or regulation, tailor the application of the enhanced standards to nonbank covered companies on an individual basis or by category, as appropriate. As noted in the proposal, the Board expects to take into account differences among bank holding companies and nonbank covered companies supervised by the Board when applying enhanced supervisory standards, including stress testing requirements. Following designation by the Council, the Board will assess the business model, capital structure, and risk profile of a designated nonbank financial company to determine how the enhanced prudential standards, including the stress test requirements in this final rule, and the early remediation requirements should apply.

Finally, the Board plans to issue supervisory guidance to provide more detail describing supervisory expectations for company-run stress tests. This guidance will be tailored based on the size and complexity of a covered company.

C. Coordination

Many commenters emphasized the need for the federal banking agencies to coordinate stress testing requirements for parent holding companies and depository institution subsidiaries and more generally in regard to stress testing frameworks. Commenters recommended that the Board, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) coordinate in implementing the Dodd-Frank Act stress testing requirements in order to minimize regulatory burden. Commenters asked that the agencies eliminate duplicative requirements and use an interagency forum, like the Federal Financial Institutions Examination Council, to develop common forms, policies, procedures, assumptions, methodologies, and application of results.

The Board has coordinated closely with the FDIC and the OCC to help to ensure that the company-run stress testing regulations are consistent and comparable across depository institutions and depository institution holding companies and to address any burden that may be associated with having multiple entities within one organizational structure having to meet stress testing requirements. The Board anticipates that it will continue to consult with the FDIC and OCC in the

[13] In extending a time period under the final rule, the Board will consider the activities, level of complexity, risk profile, scope of operations, and the regulatory capital of the covered company, and any other relevant factors.

[14] Under the proposal, savings and loan holding companies would not have been subject to the proposed requirements, including timing of required submissions to the Board, until savings and loan holding companies were subject to minimum risk-based capital and leverage requirements.

[15] *See* 12 U.S.C. 5365(a)(1).

[16] A number of commenters on the NPR expressed concerns about the application of the proposed standards to nonbank covered companies. Several of these commenters raised a concern that the NPR does not afford nonbank financial companies a meaningful opportunity to comment on how the Board should tailor the standards to nonbank financial companies. Commenters indicated that there are substantial differences between bank holding companies and nonbank financial companies, and that the Board should tailor the proposed prudential standards to account for these differences on a case-by-case basis following the rulemaking process.

implementation of the final rule, and in particular, in the development of stress scenarios. The Board plans to develop scenarios each year in close consultation with the FDIC and the OCC, so that, to the greatest extent possible, a common set of scenarios can be used for the supervisory stress tests and the annual company-run stress tests across various banking entities within the same organizational structure.

D. Consolidated Publication and Group-Wide Systems and Models

In addition to requesting better coordination, commenters inquired as to whether a company-run stress test conducted by a parent holding company would satisfy the stress testing requirements applicable to that holding company's subsidiary depository institutions. Commenters recommended that in order to reduce burden the Board develop and require the use of a single set of scenarios for a bank holding company and any depository institution subsidiary of the bank holding company, if the Board imposed separate stress testing requirements on both the bank holding company and bank.

In order to reduce burden on banking organizations, the final rule provides that a subsidiary depository institution will disclose its stress testing results as part of the results disclosed by its bank holding company parent. Disclosure by the bank holding company of its stress test results and those of any subsidiary state member bank will generally satisfy any disclosure requirements applicable to the state member bank subsidiary.

Moreover, a state member bank that is controlled by a bank holding company may rely on the systems and models of its parent bank holding company if its systems and models fully capture the state member bank's risks. For example, under those circumstances, the bank holding company and state member bank may use the same data collection processes and methods and models for projecting and calculating potential losses, pre-provision net revenues, provision for loan and lease losses, and pro forma capital positions over the stress testing planning horizon.

III. Description of the Final Rule

A. Scope of Application

This final rule applies to any bank holding company (other than a foreign banking organization) that has $50 billion or more in average total consolidated assets [17] and to any nonbank financial company that the Council has determined under section 113 of the Dodd-Frank Act must be supervised by the Board and for which such determination is in effect.

Average total consolidated assets for bank holding companies is based on the average of the total consolidated assets as reported on the bank holding company's four most recent Consolidated Financial Statement for Bank Holding Companies (FR Y–9C). If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, average total consolidated assets will be based on the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters. In either case, average total consolidated assets are measured on the as-of date of the relevant regulatory report.

Once the average total consolidated assets of a bank holding company exceed $50 billion, the company will remain subject to the final rule's requirements unless and until the total consolidated assets of the company are less than $50 billion, as reported on four FR Y–9C reports consecutively filed. Average total consolidated assets are measured on the as-of date of the FR Y–9C.

The final rule does not apply to foreign banking organizations. The Board expects to issue for public comment a separate rulemaking on the application of enhanced prudential standards and early remediation requirements established under the Dodd-Frank Act, including enhanced capital and stress testing requirements, to foreign banking organizations at a later date. A U.S.-domiciled bank holding company subsidiary of a foreign banking organization that has total consolidated assets of $50 billion or more is subject to the requirements of this final rule. [18]

B. Effective Date

Under the proposal, the stress testing requirements would have become effective upon adoption of a final rule. A bank holding company that was a covered company as of the effective date of the rule would have been required to immediately comply with its requirements. A bank holding company became a covered company after adoption of the rule but more than 90 days before September 30 of a given year would have been subject to the supervisory and company-run stress test requirements starting that year. With respect to the mid-cycle company-run stress test, bank holding companies that met the proposal's asset threshold more than 90 days before March 31 of a given year would need to satisfy the requirements of the mid-cycle stress tests that year (e.g., reporting and publication requirements). Nonbank financial companies designated for supervision by the Council more than 180 days before September 30 of a given year would have been required to comply with the stress test requirements starting that year.

Commenters indicated that the Board should give companies that have not participated in CCAR additional time before subjecting such companies to stress test requirements. Commenters argued that delaying implementation for these companies is necessary to allow sufficient time to develop the systems and procedures to collect the information requested by the Board in connection with these tests. In response to these comments, the Board is delaying the compliance date of stress test requirements under the final rule for certain bank holding companies that have not previously participated in stress testing through SCAP or CCAR. Under the final rule, a bank holding company that participated in SCAP, or successor to such bank holding company, is required to comply with the supervisory and company-run stress test requirements beginning on November 15, 2012, unless that time is extended by the Board in writing.[19] All other bank holding companies that are covered companies will be required to comply with the supervisory and company-run stress test requirements beginning in the fall of 2013, unless that time is extended by the Board in writing.[20]

Commenters similarly expressed concern that bank holding companies and nonbank financial companies that

[17] The final rule applies only to U.S.-domiciled bank holding companies that are covered companies, including, for example, the U.S.-domiciled bank holding company subsidiary of a foreign banking organization, but does not apply to any foreign banking organization.

[18] A U.S.-domiciled bank holding company subsidiary of a foreign banking organization that is currently relying on Supervision and Regulation Letter SR 01–01 issued by the Board (as in effect on May 19, 2010) is not required to comply with the final rule's requirements until July 21, 2015.

[19] The bank holding companies that participated in SCAP were: American Express Company, Bank of America Corporation, BB&T Corporation, Bank of New York Mellon Corporation, Capital One Financial Corp., Citigroup, Inc., Fifth Third Bancorp, GMAC LLC (now Ally Financial Inc.), Goldman Sachs Group Inc., JPMorgan Chase & Co., KeyCorp, MetLife Inc., Morgan Stanley, PNC Financial Services Group, Regions Financial Corporation, State Street Corp., SunTrust Banks, Inc., US Bancorp, and Wells Fargo & Company.

[20] Covered companies are required to submit FR Y–14 data as of September 30, 2012. In addition, all bank holding companies with total consolidated assets of $50 billion or more remain subject to the requirements of the Board's capital plan rule (12 CFR 225.8).

become covered companies after the effective date of the final rule would not have sufficient time to build the systems, contract with outside vendors, recruit experienced personnel, and develop stress testing models that are unique to their organization under the proposed compliance date. In addition, the Federal Advisory Council recommended that the Board phase in disclosure requirements to minimize risk, build precedent, and allow banks and supervisors to gain experience, expertise, and mutual understanding of stress testing models.

In response to these comments, the Board extended the compliance date applicable to bank holding companies that become covered companies after the effective date of the rule. Under the final rule, such a bank holding company will be required to conduct its first stress tests beginning in the fall of the calendar year after the company becomes a covered company, unless that time is extended by the Board in writing.

The Board also is extending the compliance date applicable to nonbank covered companies to provide that all nonbank covered companies will be required to conduct their first stress test in the calendar year after the year in which the nonbank covered company becomes subject to the Board's minimum regulatory capital requirements, unless the Board accelerates or extends the compliance date. The extended timeline for nonbank financial companies supervised by the Board will allow those companies and the Board to build and adapt stress testing systems and processes for application to specific nonbank businesses.

C. Overview of Stress Test Requirements Applicable to Both Supervisory and Company-Run Stress Tests

The Board designed the final rule in a manner to integrate the supervisory stress tests and company-run stress tests with the Board's capital plan rule in order to achieve a streamlined regime that minimizes regulatory burden. The following discussion describes three of these integrated aspects: Timing, reporting, and scenario design.

1. Timing of the Stress Testing Requirements

Under the proposal, the Board would have required an as-of date of September 30 of information to be submitted to the Board, provided covered companies with scenarios for the supervisory and annual company-run stress tests by mid-November of each year, required the filing of regulatory reports by January 5, and provided for publication of summary results of the annual company-run stress test and supervisory stress tests in early April. For the mid-cycle company-run stress test, the Board proposed to require regulatory reports by July 5 and publication of summary results by early October.

Several commenters provided suggestions on the proposed timeline for the supervisory and company-run stress tests. Comments included those relating to the as-of date for data to be submitted by covered companies, the date for submitting results to the Board, and the dates when public disclosures of stress test results are to be made. For instance, some commenters suggested that the Board should use data collected at as-of dates other than September 30, such as June 30 or December 31, and make corresponding changes to the timing of public disclosure in order to reduce burden on companies during the year-end period. One commenter suggested having a floating submission date, allowing organizations to submit their results at the point in the year when it is most convenient. Some commenters also requested that the Board release the scenarios earlier to provide banking organizations more time to prepare the required reports for the stress tests.

In order to integrate the supervisory and company-run stress tests with the capital plan rule, the final rule generally maintains the timing for the supervisory and company-run stress tests set forth in the proposal. The capital plan rule requires bank holding companies to submit their capital plan to the Board by January 5 using a September 30 as-of date in order to provide the Board sufficient time to review the bank holding company's capital plan and to provide its assessment to the bank holding company within the first quarter, minimizing the potential to disrupt the bank holding company's ability to make capital distributions in subsequent quarters of that year. Accordingly, the final rule maintains a September 30 as-of date and the January 5th date for submission of the report to the Board in order to align the requirements and reduce any undue burden for covered companies.[21] Correspondingly, the final rule maintains the March 31 as-of date for the mid-cycle company-run stress tests.

Commenters requested that the Board release the scenarios earlier in the annual stress test cycle to provide covered companies more time to prepare the reports for supervisory stress tests and company-run stress tests. Under the final rule, the Board will provide descriptions of the baseline, adverse, and severely adverse scenarios generally applicable to covered companies no later than November 15 of each year, and provide any additional components or scenarios by December 1. The Board believes that providing scenarios earlier than November could result in the scenarios being stale, particularly in a rapidly changing economic environment, and that it is important to incorporate economic or financial market data that are as current as possible while providing sufficient time for covered companies to incorporate the scenarios in their annual company-run stress tests.

Commenters also noted that the proposed public disclosure deadlines (early April for annual supervisory and company-run stress tests and early October for mid-cycle company-run stress tests) would interfere with so-called ''quiet periods'' that some publicly-traded banking organizations enforce in the lead up to earnings announcements. These quiet periods are designed to limit communications that could disseminate proprietary company information prior to earnings announcements.

In light of these comments, the Board adjusted the disclosure date to avoid interfering with firms' quiet periods. Under the final rule, covered companies are required to disclose the results of their annual company-run stress tests between March 15 and March 31 and to disclose the results of their mid-cycle company-run stress tests between September 15 and September 30.

Table 1 describes the annual supervisory and company-run stress test cycles, including the anticipated general timeframes for each step in 2013.

[21] As described below in section III.E.1 of this **SUPPLEMENTARY INFORMATION**, the Board may require a covered company with significant trading activity, as determined by the Board and specified in the Capital Assessments and Stress Testing information collection (FR Y–14), to include a trading and counterparty scenario in its stress test. The data used in this scenario will be as of a date between October 1 and December 1 of that calendar year selected by the Board, and the Board will communicate the as-of date and a description of the component to the company no later than December 1 of the calendar year.

Table 1
Process Overview of Annual Stress Tests and Capital Plan Cycle for 2013 under this Final Rule

Timeframe	Supervisory stress test steps	Company-run stress test Steps	Capital Plan Steps
By November 15	Board publishes scenarios for upcoming annual cycle		
By January 5		Covered companies submit required regulatory report to the Board on their stress tests.	Capital plan submitted (including results of company-run stress tests)
By March 31	Board communicates results to each covered company		
By March 31	Board publishes summary results of the supervisory stress test	Covered companies disclose summary results of the annual company-run stress test[22]	Board responds to capital plan
By July 5		Covered companies submit required regulatory report to the Board on their mid-cycle stress test	
September 15 through September 30		Covered companies make required public disclosures on their mid-cycle stress test	

2. Reporting

To the greatest extent possible, the final rule's reporting framework has been designed to minimize burden on the covered company and to avoid duplication, particularly in light of other reporting requirements that may be imposed by the Board. Accordingly, the final rule will require each covered company to file a single set of regulatory reports with the Board by January 5 that contains information that will support the Board's supervisory stress tests as well as report the results of the company-run stress tests.[23] In a separate **Federal Register** notice, the Board has invited comment on these reports, the Capital Assessments and Stress Testing information collection (FR Y–14Q, FR Y–14M, and FR Y–14A, together, FR Y–14). For purposes of the mid-cycle company-run stress test, a covered company will file a regulatory report with the Board by July 5. The Board expects that this report will be identical to or modeled on the FR Y–14A, and will seek public comment on it.

In addition, the Board may require a covered company to submit any other information on a consolidated basis that the Board deems necessary in order to ensure that the Board has sufficient information to conduct supervisory stress test; and project a company's losses, pre-provision net revenue, provision for loan and lease losses, pro forma capital levels, regulatory capital ratios, and tier 1 common ratio under the scenarios it provides. In addition, the Board may obtain supplemental information from covered companies, as needed, through the supervisory process.

The confidentiality of any information submitted to the Board for the supervisory and company-run stress tests will be determined in accordance with the Board's rules regarding availability of information.[24]

3. Scenarios

The proposal provided that the Board would publish a minimum of three different sets of economic and financial conditions, including baseline, adverse, and severely adverse scenarios, under which the Board would conduct its annual analyses and companies would conduct their annual company-run stress tests. The Board would update, make additions to, or otherwise revise

[22] Covered companies must disclose their results in the period between March 15 and March 31.

[23] The FR Y–14 contains information that the Board has determined is necessary in order for the Board to derive the relevant pro forma estimates of the covered company over the planning horizon for purposes of both this rule and the Board's capital plan rule. The Board expects to apply the FR Y–14 to a nonbank financial company supervised by the Board upon such a company's designation.

[24] *See generally* 12 CFR part 261; *see also* 5 U.S.C. 552(b).

these scenarios as appropriate, and would publish any such changes to the scenarios in advance of conducting each year's stress test.

Commenters suggested that significant changes in scenarios from year to year could cause a banking organization's stress testing results to dramatically change. To ameliorate this volatility, commenters suggest that the federal banking agencies have a uniform approach for identifying stress scenarios or establish a ''quantitative severity limit'' in the final rule to ensure that scenarios do not drastically change from year to year. Commenters pointed out that consistency in annual scenario development will make comparability of stress test results between institutions and across time periods more accurate, increase market confidence in the results of stress tests, and make for more dependable capital planning by banking organizations. Commenters also requested the opportunity to provide input on the scenarios.

The Board believes that it is important to have a consistent and transparent framework to support scenario design. To further this goal, the final rule clarifies the definition of ''scenarios'' and includes definitions of baseline, adverse, and severely adverse scenarios. Scenarios are defined as those sets of conditions that affect the U.S. economy or the financial condition of a covered company that the Board, or with respect to the mid-cycle stress test, the covered company, annually determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

The baseline scenario is defined as a set of conditions that affect the U.S. economy or the financial condition of a covered company and that reflect the consensus views of the economic and financial outlook. The adverse scenario is defined as a set of conditions that affect the U.S. economy or the financial condition of a covered company that are more adverse than those associated with the baseline scenario and may include trading or other additional components. The severely adverse scenario is defined as a set of conditions that affect the U.S. economy or the financial condition of a covered company and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

In general, the baseline scenario will reflect the consensus views of the macroeconomic outlook expressed by professional forecasters, government agencies, and other public-sector organizations as of the beginning of the annual stress-test cycle. The Board expects that the severely adverse scenario will, at a minimum, include the paths of economic variables that are generally consistent with the paths observed during severe post-war U.S. recessions. Each year the Board expects to take into account of salient risks that affect the U.S. economy or the financial condition of a covered company that may not be observed in a typical severe recession. The Board expects that the adverse scenario will, at a minimum, include the paths of economic variables that are generally consistent with mild to moderate recessions. The Board may vary the approach it uses for the adverse scenario each year so that the results of the scenario provide the most value to supervisors, given the current conditions of the economy and the banking industry. Some of the approaches the Board may consider using include, but are not limited to, a less severe version of the severely adverse scenario or specifically capturing, in the adverse scenario, risks that the Board believes should be understood better or should be monitored.

The scenarios will consist of a set of conditions that affect the U.S. economy or the financial condition of a covered company over the stress test planning horizon. These conditions will include projections for a range of macroeconomic and financial indicators, such as real Gross Domestic Product (GDP), the unemployment rate, equity and property prices, and various other key financial variables, and will be updated each year to reflect changes in the outlook for economic and financial conditions. The paths of these economic variables could reflect risks to the economic and financial outlook that are especially salient but were not prevalent in recessions of the past.

Depending on the systemic footprint and scope of operations and activities of a company, the Board may use, and require that company to use, additional components in the adverse and severely adverse scenarios or additional or more complex scenarios that are designed to capture salient risks to specific lines of business. For example, the Board recognizes that certain trading positions and trading-related exposures are highly sensitive to adverse market events, potentially leading to large short-term volatility in covered companies' earnings. To address this risk, the Board may require covered companies with significant trading activities to include market price and rate ''shocks'' in their adverse and severely adverse scenarios as specified by the Board, that are consistent with historical or other adverse market events. In addition, the scenarios, in some cases, may also include stress factors that may not be directly correlated to macroeconomic or financial assumptions but nevertheless can materially affect covered companies' risks, such as factors that affect operational risks. The process by which the Board may require a covered company to include additional components in its adverse and severely adverse scenarios or to use additional scenarios is described under section III.E.2 of this **SUPPLEMENTARY INFORMATION**. The Board plans to publish for comment a policy statement that describes its framework for developing scenarios.

Some commenters suggested that the Board adopt a tailored approach to scenarios to better capture idiosyncratic characteristics of each company. For example, commenters representing the insurance industry suggested that any stress testing regime applicable to insurance companies incorporate shocks relating to the exogenous factors that actually impact a particular company, such as a shock to the insurance company's insurance policy portfolio arising from a natural disaster, and de-emphasize shocks arising from traditional banking activities.

In the Board's view, a generally uniform set of scenarios is necessary to provide a basis for comparison across companies. However, the Board expects that each company's stress testing practices will be tailored to its business model and lines of business, and that the company may not use all of the variables provided in the scenario, if those variables are not appropriate to the firm's line of business, or may add additional variables, as appropriate.[25] In addition, the Board expects banking organizations to consider other scenarios that are more idiosyncratic to their operations and associated risks as part of their ongoing internal analyses of capital adequacy and include company-specific vulnerabilities in their scenarios when complying with the Board's requirements for mid-cycle company-run stress test as described in section 252.145.

D. Annual Supervisory Stress Tests Conducted by the Board

The following discussion describes the Board's methodologies for the conduct of the stress tests, the process the Board intends to use to

[25] The Board expects banking organizations will ensure that the paths of such additional variables are consistent with the scenarios the Board provided. For example, the path of any local economic variable should be consistent with the path of a national economic variable that the Board provides.

communicate the results to the company, the post-assessment actions that a company is expected to take in response to the supervisory stress tests, and the Board's publication of the stress test results.

1. Methodology for Estimating Losses and Revenues

In the NPR, the Board proposed that it would use the analytical techniques it determines to be appropriate to identify, measure, and monitor risks of covered companies that may affect the financial stability of the United States. The Board also outlined in the proposal the general framework it would use to analyze the projected losses, pre-provision net revenue, provision for loan and lease losses, and pro forma, post-stress capital levels and regulatory capital ratios in conducting a stress test for covered companies.

The Board received numerous comments requesting greater clarity with respect to the application of the supervisory stress test models. For example, commenters requested that the Board increase the transparency of the Board's analysis, modeling techniques, and assumptions used to analyze the banks by stress tests in the final rule. Commenters further recommended that these models and applications should be subject to a final public consultative process prior to implementation and that the Board should provide a detailed description of models in the form of consultative ''white papers.''

The Board is currently considering how to provide more transparency with respect to its models while not reducing incentives on the part of covered companies to develop better internal stress test models that factor in their idiosyncratic risks and to consider the results of such models in their capital planning process. At a minimum, the Board plans to publish an overview of its stress testing methodologies each year. In addition, the Board expects to communicate the extent and timing of disclosure of information about supervisory models at a later date.

The Board has established an independent, internal model validation group to review supervisory models and their implementation, which is intended to foster continuing improvements in supervisory modeling practices. In addition, the Board formed the Model Validation Council earlier this year, composed of independent, external experts who provide input to the Board's internal model validation process used to assess the effectiveness of the models used in the supervisory stress tests.[26] The Model Validation Council is intended to improve the quality of the Board's model validation process, and, thereby, strengthen confidence in the Board's stress tests.

As described in the proposal, the anticipated framework to be used in supervisory stress tests has a number of elements. The Board will calculate each covered company's projected losses, pre-provision net revenue, provision for loan and lease losses and other factors affecting capital using a series of models and estimation techniques that relate the economic and financial variables in the baseline, adverse, and severely adverse scenarios to the company's losses and revenues. The Board has developed a series of models to estimate losses on various types of loans and securities held by the covered company, using data submitted by that company. These models may be adjusted over time. The Board will use a separate methodology or a combination of methodologies—potentially including covered companies' internal models, if appropriate—to estimate projected losses related to covered companies' trading portfolio or counterparty credit-risk exposures in the event of an adverse market shock, taking into account the complexity and idiosyncrasies of each covered company's positions. The methodology may also incorporate an approach to estimate potential losses from stress factors specifically affecting the covered companies' other risks. Finally, the framework will include a set of methodologies to assess the effect of losses, pre-provision net revenue, provision for loan and lease losses, and other factors on pro forma capital levels and ratios.

In response to commenters' requests for more clarity regarding the Board's assumptions used to calculate a covered company's stress test results, the Board is providing additional detail on the assumptions it intends to use to describe how a company's capital positions would change over time. To help ensure that the publicly disclosed results of supervisory stress tests are comparable across institutions and reflect the effect of common macroeconomic scenarios on net income and capital but not company-specific assumptions about capital distributions, the Board is applying a consistent approach to assumptions across companies.

For the first quarter of the planning horizon, the Board will take into account the company's actual capital actions as of the end of the calendar quarter. For each of the second through ninth quarters of the planning horizon, the Board will include the following items in the projections of capital: (i) Common stock dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year (that is, the first quarter of the planning horizon and the preceding three calendar quarters); (ii) payments on any other instrument that is eligible for inclusion in the numerator of a regulatory capital ratio equal to the stated dividend, interest, or principal due on such instrument during the quarter; and (iii) an assumption of no redemption or repurchase of any capital instrument that is eligible for inclusion in the numerator of a regulatory capital ratio.

These assumptions are the same assumptions that covered companies are required to use in conducting their company-run stress tests, as described below in section III.E.3 of this **SUPPLEMENTARY INFORMATION**. Adopting a consistent, standardized approach across covered companies and across the supervisory and company-run stress tests will provide for improved comparability across companies and between the supervisory and company-run stress tests.

Another element of the supervisory-stress test framework is a set of assumptions or models to describe how a covered company's balance sheet would change over time.[27] Information about planned future acquisitions and divestitures by the companies will also be incorporated. These projections will then be analyzed to assess their combined effect on the covered company's capital position, including projected capital levels and capital ratios, at the end of each quarter in the planning horizon. The framework will incorporate all regulatory capital measures and the tier 1 common ratio. These projections used in the supervisory stress tests also will incorporate, as appropriate, any significant changes in or the significant effects of accounting requirements during the planning period.

[26] The Board published a press release on the Model Validation Council on April 20, 2012. *See* Press Release, Board of Governors of the Federal Reserve System, Federal Reserve Board announces the formation of the Model Validation Council (Apr. 20, 2012) *available at http://www.federalreserve.gov/newsevents/press/bcreg/20120420a.htm.*

[27] At times, the Board may assume in its supervisory stress tests that the covered company's balance sheet would change over time, following the paths projected by the company.

2. Description of Supervisory Assessment

The Board, through its annual analyses, will evaluate each covered company as to whether the covered company has the capital, on a total consolidated basis, necessary to continue operating under economic and financial market conditions as contained in the designated scenarios. This evaluation will include, but will not be limited to, a review of the covered company's estimated losses, pre-provision net revenue, provision for loan and lease losses, and the extent of their effect on the company's capital levels and ratios, including pro forma regulatory capital ratios and the tier 1 common ratio.

3. Communication of Results to Covered Companies

Under the Dodd-Frank Act, the Board is required to disclose a summary of the results of its annual analyses.[28] In the NPR, the Board proposed that, prior to publishing a summary of the results of its annual analyses, the Board would convey to each covered company the results of the Board's analyses of that company and explain to the company any information that the Board expected to make public.

Numerous commenters requested that the final rule include a formal appeals process to dispute the Board's findings prior to public release of stress test results. According to these commenters, banking organizations should have the opportunity to defend the results of their internal models against the results of supervisory stress tests, and explain any major differences in assumptions or potential drivers of divergent results between the two to the Board in a confidential manner prior to publication.

The final rule does not provide for a process whereby a company would be able to appeal the results of its supervisory stress test. The Board's supervisory stress tests reflect the Board's independent estimates of revenue, losses, and capital under various scenarios, using consistent models and assumptions across all companies. Covered companies are separately required to disclose the results of their own stress tests, which will provide the company's own assessment of its capital adequacy under stress conditions that are consistent with those included in the Board's supervisory stress test.

The Board expects to communicate the results of its supervisory stress tests to a company before it publicly discloses a summary of such results.

4. Post-Assessment Actions by Covered Companies

Under the final rule, subsequent to receiving the results of the Board's annual analyses, each covered company must take the results of such analysis conducted by the Board into account in making changes, as appropriate, to the company's capital plan and capital structure (including the level and composition of capital) and its exposures, concentrations, and risk positions; and any plans of the company for recovery or resolution. In addition, each covered company must make such updates to its resolution plan (required to be submitted annually to the Board and FDIC pursuant to the Board's Regulation QQ (12 CFR part 243) and the FDIC's Part 381 (12 CFR part 381)) as the Board, based on the results of its analyses of the company, determines appropriate.

5. Publication of Results by the Board

In the NPR, the Board proposed that, within a reasonable period of time after completing the annual analyses of covered companies (but no later than by mid-April of each calendar year), the Board would disclose a summary of the results of such analyses. The Board also said that it expected to disclose quarter-end results over the specified planning horizon that included estimated losses on a variety of lines of business, estimated allowance for loan and lease losses, and estimated pro forma regulatory and other capital ratios.

In response, nearly all commenters advocated that the Board use more limited disclosures requirements for the supervisory and company-run stress tests, suggesting that the disclosures proposed in the NPR go beyond what is mandated in the Act. In particular, nearly all commenters strongly recommended against the disclosure of the results under the baseline scenario. Commenters indicated the baseline scenario results would be perceived as earnings guidance, which may compel the banking organization to prioritize short-term results over more appropriate longer-term risk management and sustained long term results. Commenters also indicated that disclosure of baseline results may force the premature disclosure of future plans by the institution, create confusion among investors and the public, and give rise to liability under securities laws.

Several commenters also suggested that the Board disclose the results using the template used to disclose the CCAR results, which they likened to publication of only the severely adverse results. Commenters expressed the view that the CCAR disclosure regime was appropriately balanced by providing useful information to market participants while simultaneously ensuring that disclosure of stress tests results does not result in providing earnings guidance.

As noted above, the Board believes that public disclosure is a key component of stress test requirements mandated by the Act, and helps to provide valuable information to market participants, enhance transparency, and promote market discipline. However, the Board understands the concern that the disclosure of results (particularly baseline results) could be viewed as earnings guidance to the market. Thus, for the stress test conducted in 2012, the Board expects that, similar to the public disclosure following CCAR in early 2012, the Board will disclose results under the severely adverse scenario for each company that will include estimates of the following information:

- Pre-provision net revenue and other revenue;
- Provision for loan and lease losses, realized losses or gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains;[29]
- Net income before taxes;
- Loan losses (dollar amount and as a percentage of average portfolio balance) in aggregate and by subportfolio, including: Domestic closed-end first-lien mortgages; domestic junior lien mortgages and home equity lines of credit; commercial and industrial loans; commercial real estate loans; credit card exposures; other consumer loans; and all other loans; and
- Pro forma regulatory and other capital ratios (including the tier 1 common ratio, as defined in the capital plan rule, and any other capital ratios specified by the Board).

The Board expects that the results relating to pre-provision net revenue and other revenue; provision for loan and lease losses, realized losses/gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains; net income before taxes; loan losses in the aggregate and by subportfolio will include the cumulative total over the planning horizon, and the regulatory and other capital ratios will include at least the actual capital ratio

[28] 12 U.S.C. 5365(i)(1)(B)(v).

[29] Other losses and gains include, but are not limited to projected losses on loans that are held-for-sale and held-for-investment measured under the fair value option, and goodwill impairment.

as of September 30, 2012, and the minimum and ending capital ratios over the planning horizon. In addition, the Board may include additional elements under the severely adverse scenario, as it deems appropriate. The Board will disclose these summary results no later than March 31 of a calendar year.

As the Board implements the Dodd-Frank stress testing requirements, it intends to evaluate whether public disclosure of the results of the adverse and baseline would assist in informing the company and market participants about the condition of the banking organization. The Board expects to revisit the scope of the disclosure from time to time, and may disclose the results under the adverse and baseline scenario in the future.

In response to commenters' concerns that market participants may misunderstand the published results of the Board's analyses, the Board emphasizes that there are certain factors to bear in mind when interpreting these published results. For example, the outputs of the analyses might not align with those produced by other parties conducting similar exercises, even if a similar set of scenarios were used, due to differences in methodologies and assumptions used to produce those outputs. In addition, the outputs under the severely adverse scenarios should not be viewed as forecasts or expected outcomes or as a measure of any covered company's solvency. Instead, those outputs are the estimates from forward-looking exercises that consider possible outcomes based on a set of hypothetical scenarios.

E. Annual and Mid-Cycle Stress Tests Conducted by the Covered Companies

1. Overview

The final rule requires each covered company to conduct an annual stress test by January 5 of each calendar year and a mid-cycle stress test by July 5 of each calendar year. A stress test is defined as a process to assess the potential impact of scenarios on the consolidated earnings, losses, and capital of a covered company over the planning horizon, taking into account its current condition, risks, exposures, strategies, and activities.

A covered company is required to run its annual stress test using financial data as of September 30 of the preceding calendar year and its mid-cycle stress test using financial data as of March 31 of the preceding calendar year. The following discussion describes the scenarios, methodology, and practices that a company will use in conducting the annual and mid-cycle stress tests and disclosure requirements applicable to the company.

2. Scenarios

For the annual stress test, covered companies will use the same scenarios as the Board will use for its supervisory stress analysis. The scenarios will include a minimum of three different sets of economic and financial conditions, including baseline, adverse, and severely adverse scenarios, which covered companies will be required to use to conduct their annual company-run stress tests. The Board will publish baseline, adverse, and severely adverse scenarios by no later than November 15 of each year, except with respect to additional components or scenarios described below.

As discussed in section III.C.3 of the **SUPPLEMENTARY INFORMATION**, the Board may require a covered company with significant trading activity, as determined by the Board and reflected on the FR Y–14, to include a global market shock component in its adverse and severely adverse scenario that measures potential stress losses from trading activities and counterparty exposures in its stress test.[30] The data used in this component for purposes of the annual company-run stress test will have an as-of date between October 1 and December 1 of that calendar year selected by the Board and the as-of date will be communicated to the company no later than December 1 of the calendar year.

In addition, depending on the systemic footprint and scope of operations and activities of a covered company, the Board may require the company to use additional components in its adverse and severely adverse or to use additional or more complex scenarios that are designed to capture salient risks stemming from specific lines of business.[31] Scenarios may also include stress factors, such as operational risk, that materially affect the financial condition of a covered company but are not directly correlated to macroeconomic or financial assumptions.

The Board will notify a covered company in writing no later than September 30 that it will be required to include additional components in its adverse and severely adverse scenarios or additional scenarios in its stress test. The notification will include the basis for requiring the company to include the additional components or additional scenarios in its stress test. Within 14 calendar days of receipt of a notification, a covered company may request in writing that the Board reconsider the requirement that the company include additional components or additional scenarios in its stress test, including an explanation as to why the reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the covered company's request. The Board will provide a covered company with a description of any additional components or additional scenarios, including the trading component described above, by December 1.

Under the final rule, the Board will not provide scenarios to covered companies for the mid-cycle company-run stress tests. Rather, for the mid-cycle company-run stress test, a covered company will be required to develop and use a minimum of three sets of its own scenarios—a baseline, adverse, and severely adverse scenario. The Board anticipates that covered companies may use a variety of quantitative and qualitative approaches to develop the scenarios. The adverse and severely adverse scenarios used in mid-cycle stress tests should reflect a company's unique vulnerabilities to factors that affect its firm-wide activities and risk exposures, including macroeconomic, market-wide, and firm-specific events. The Board expects the companies to consider their own risk profiles and operations in designing specific elements of the adverse and severely adverse scenarios. If appropriate, the Board will publish additional guidance to covered companies describing the considerations they should take into account in developing the scenarios for the mid-cycle company-run stress tests.

The Board may require a covered company to include additional components or scenarios in its stress test based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy. The notice and response procedures are parallel to those applicable in the annual company-run stress test.

3. Methodologies and Practices

Under the final rule, a covered company will be required to use the applicable scenarios discussed above in conducting its stress tests to calculate, for each quarter-end within the

[30] As of September 30, 2012, companies subject to the global market shock scenario included those bank holding companies with total consolidated assets of $500 billion or more that are subject to the market-risk measure set forth in Appendix E of the Board's Regulation Y (12 CFR Part 225, Appendix E).

[31] In making this assessment, the Board will consider the financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy of the company.

planning horizon, potential losses, pre-provision net revenue, provision for loan and lease losses, and capital levels over the planning horizon. Each covered company will also be required to calculate, for each quarter in the planning horizon, the potential effect of the specific scenarios on its regulatory capital ratios and tier 1 common ratio.

Several commenters asked that the Board generally adopt the disclosure approach it used in CCAR 2012, which provided for a uniform set of assumptions of capital actions across bank holding companies. In response to these commenters and to enable comparisons across firms and between the company-run and supervisory stress tests, the final rule requires a covered company to make the following assumptions regarding its capital actions over the planning horizon. For the first quarter of the planning horizon, the covered company must take into account its actual capital actions as of the end of the calendar quarter. For each of the second through ninth quarters of the planning horizon, the covered company must include the following items in the projections of capital: (i) Common stock dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year (that is, the first quarter of the planning horizon and the preceding three calendar quarters); (ii) payments on any other instrument that is eligible for inclusion in the numerator of a regulatory capital ratio equal to the stated dividend, interest, or principal due on such instrument during the quarter; and (iii) an assumption of no redemption or repurchase of any capital instrument that is eligible for inclusion in the numerator of a regulatory capital ratio. The Board is requiring companies to adopt a standard approach to developing these assumptions to ensure that the publicly disclosed results of company-run stress tests are comparable across institutions and reflect the effect of common macroeconomic scenarios on net income and capital but not company-specific assumptions about capital distributions.

The proposed rule would have required a covered company to establish and maintain a system of controls, oversight, and documentation, including policies and procedures, designed to ensure that the stress testing processes were effective. It also would have required the board of directors and senior management of the covered company to annually review the controls, oversight, and documentation established pursuant to the final rule.

Several commenters asked for clarification on the roles of the board of directors and senior management in establishing and reviewing these controls. In response to these commenters, the final rule clarifies that the senior management is responsible for establishing and maintaining a system of controls, oversight, and documentation, including policies and procedures, designed to ensure that the stress testing processes used by the company are effective in meeting the requirements of the final rule. The board of directors, or an appropriate committee thereof, is responsible for approving and reviewing the policies and procedures of the stress testing processes as frequently as economic conditions or the condition of the company may warrant, but no less than annually. The board of directors and senior management of the company must receive a summary of the results of the stress test.

The company's policies and procedures must, at a minimum, outline the company's stress testing practices and methodologies, and processes for validating and updating the company's stress testing practices and methodologies consistent with applicable laws, regulations, and supervisory guidance. Each covered company must also include in its policies information describing its processes for scenario development for the mid-cycle stress test required under the final rule.

The final rule also requires that the board of directors and senior management of each covered company to consider the results of the stress tests when developing and maintaining the covered company's capital plan and capital planning processes and any plans for recovery and resolution, and assessing the exposures, concentration, and risk positions, including under times of stress, in light of the bank's risk profile.

4. Publication of Results by the Company

Under the proposal, consistent with the requirements of the Dodd-Frank Act, a covered company would have been required to disclose a summary of the results of its company-run stress tests within 75 days of submitting its required report to the Board.

Consistent with comments on the supervisory stress testing disclosure, nearly all commenters suggested that companies should not be required to disclose information relating to their baseline results or on a quarter-by-quarter basis, and that the Board adopt the template used in reporting the CCAR results.

As noted above, the Board believes that public disclosure is a key component of stress test requirements mandated by the Act, and helps to provide valuable information to market participants, enhance transparency, and facilitate market discipline. However, the Board also understands the concern that the disclosure of results (particularly baseline results) could be viewed as earnings guidance to the market. Thus, the final rule requires banking organizations to disclose only the severely adverse results. As companies begin conducting company-run stress tests, submitting the results of all scenarios to the Board, and disclosing a summary of their results under the severely adverse scenario, the Board expects to evaluate whether public disclosure of the results of the adverse and baseline scenarios would assist the public in understanding the condition of the banking organization. Thus, the Board expects to revisit the scope of required public disclosure from time to time, and may determine to require disclosure of the results under the adverse and baseline scenarios in the future.

At a minimum, the publication of summary results by a covered company must include with respect to the severely adverse scenario:

(i) A description of the types of risks included in the stress test;

(ii) A general description of the methodologies used in the stress test, including those employed to estimate losses, revenues, provision for loan and lease losses, and changes in capital positions over the planning horizon;

(iii) Results of company-run stress tests, including, but not limited to estimated:

- Pre-provision net revenue and other revenue;
- Provision for loan and lease losses, realized losses/gains on available-for-sale and held-to-maturity securities), trading and counterparty losses, and other losses/gains; [32]
- Net income before taxes;
- Loan losses (dollar amount and as a percentage of average portfolio balance) in the aggregate and by subportfolio, including: Domestic closed-end first-lien mortgages; domestic junior lien mortgages and home equity lines of credit; commercial and industrial loans; commercial real estate loans; credit card exposures; other

[32] Other losses and gains include, but are not limited to projected losses on loans that are held-for-sale and held-for-investment measured under the fair value option, and goodwill impairment.

consumer loans; and all other loans; [33] and

• Pro forma regulatory capital ratios and the tier 1 common ratio; and

(iv) An explanation of the most significant causes for the changes in regulatory capital ratios and tier 1 common ratio.

The results disclosed by covered companies must include the cumulative total for (1) pre-provision net revenue and other revenue; (2) provision for loan and lease losses, realized losses/gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains; (3) net income before taxes; and (4) loan losses in the aggregate and by subportfolio over the planning horizon. The disclosure of pro forma capital ratios must include at least the actual beginning ratios (as of September 30 for annual stress tests and as of March 31 for mid-cycle stress tests), the ending ratios, and the minimum ratios over the planning horizon.

Several commenters suggested that regulatory agencies coordinate disclosure requirements for multiple banking organizations within a single parent company as the release of conflicting test results could confuse market participants. Additionally, commenters recommended more limited disclosure requirements for depository institution subsidiaries.

In response to these comments, the final rule requires bank holding companies that are covered companies to include in their public disclosure a summary of any company-run stress test conducted by a depository institution subsidiary that is required to disclose a summary of stress test results under applicable regulations.[34] The public disclosures with respect to a depository institution subsidiary must include changes in pro forma regulatory capital ratios of the depository institution subsidiary over the planning horizon, including an explanation of the most significant causes for the changes in those ratios. For subsidiary state member banks, the Board expects that this disclosure will include a general description of methodologies used to estimate capital actions over the planning horizon. As described in the concurrently issued final rule applicable to state member banks with total consolidated assets of more than $10 billion, disclosure by a bank holding company of the results of its state member bank subsidiary's stress test will satisfy public disclosure requirements applicable to that subsidiary under section 165(i)(2) of the Dodd-Frank Act, unless the Board determines that the disclosures at the holding company level do not adequately capture the potential impact of the scenarios on the capital of the state member bank.

IV. Administrative Law Matters

A. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471, 12 U.S.C. 4809) requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board invited comment on whether the proposed rule was written plainly and clearly, or whether there were ways the Board could make the rule easier to understand. The Board received no comments on these matters and believes that the final rule is written plainly and clearly.

B. Paperwork Reduction Act Analysis

Request for Comment on Final Information Collection

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control number will be assigned. The Board reviewed the final rule under the authority delegated to the Board by OMB.

The final rule contains requirements subject to the PRA. The recordkeeping requirements are found in section 252.146(c)(1) [35] (formerly section 252.145(b)(1) in the proposed rule) and the disclosure requirements are found in section 252.148. These information collection requirements will implement sections 165(i)(1) and (2) of the Dodd-Frank Act for covered companies, as mentioned in the Abstract below.

The reporting requirements found in section 252.137(b) have been addressed in the Resolution Plans Required Regulation (Reg QQ; OMB No. 7100–0346).[36] The reporting requirements found in sections 252.135(a), 252.144, 252.146(a), and 252.147(a)(1) have been incorporated into the Capital Assessments and Stress Testing (FR Y–14; OMB No. 7100–0341). The reporting requirements found in sections 252.145 and 252.147(a)(2) will be addressed as separate **Federal Register** notice for the FR Y–14 at a later date. The recordkeeping requirements found in section 252.137(a)(1) have been incorporated into the Capital Plans Regulation (Reg Y–13; OMB No. 7100–0342).

The Board received general comments regarding the burden of the proposed rule. In response to these comments and to reduce burden, only covered companies that are bank holding companies and that participated in SCAP will be required to conduct a stress test under the final rule this year. Other bank holding companies that are covered companies with $50 billion or more in total consolidated assets will not begin conducting stress tests under the final rule until fall 2013.

The Board has an ongoing interest in your comments.

Comments are invited on:

(a) Whether the proposed collections of information are necessary for the proper performance of the Federal Reserve's functions, including whether the information has practical utility;

(b) The accuracy of the Federal Reserve's estimate of the burden of the proposed information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section. A copy of the comments may also be submitted to the OMB desk officer for the Agencies: By mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235,

[33] In the proposed rule, the Board noted that it expected covered companies to disclose the loan loss results of their company-run stress tests in the aggregate and by subportfolio. In response to commenters' requests for clarity on disclosure expectations, the final rule specifies the subportfolios for which a company will be required to disclose loan losses.

[34] *See, e.g.,* 12 CFR 252.157(b)(2).

[35] Some of the recordkeeping requirements for Subpart G—Company-Run Stress Test Requirements for Covered Companies have been addressed in the proposed Recordkeeping and Disclosure Provisions Associated with Stress Testing Guidance (FR 4202). *See* the **Federal Register** notice published on June 15, 2011 (76 FR 35072). Only new recordkeeping requirements are being addressed with this proposed rulemaking

[36] *See* the **Federal Register** notice published on November 1, 2011 (76 FR 67323).

Washington, DC 20503 or by facsimile to 202–395–5806, Attention, Commission and Federal Banking Agency Desk Officer.

Title of Information Collection: Recordkeeping and Disclosure Requirements Associated with Regulation YY (Subparts F and G).

Frequency of Response: Annual and semiannual.

Affected Public: Businesses or other for-profit.

Respondents: U.S. bank holding companies and nonbank financial companies.

Abstract: Section 165 of the Dodd-Frank Act implements the enhanced prudential standards. The enhanced standards include risk-based capital and leverage requirements, liquidity standards, requirements for overall risk management (including establishing a risk committee), single-counterparty credit limits, stress test requirements, and debt-to-equity limits for companies that the Council has determined pose a grave threat to financial stability.

Section 252.146(c)(1) requires that each covered company must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress testing processes are effective in meeting the requirements in Subpart G. These policies and procedures must, at a minimum, describe the covered company's stress testing practices and methodologies, and processes for validating and updating the covered institution's stress test practices and methodologies consistent with applicable laws, regulations, and supervisory guidance. Policies of covered companies must describe processes for scenario development for the mid-cycle stress test required under section 252.145.

Section 252.148 requires a covered company to publish a summary of the results of the stress test required under section 252.144 in the period beginning on March 15 and ending on March 31, unless that time is extended by the Board in writing. A covered company must also publish a summary of the results of the stress test required under section 252.145 in the period beginning on September 15 and ending on September 30, unless that time is extended by the Board in writing. The information disclosed by each covered company, at a minimum, include the following information regarding the severely adverse scenario: (1) A description of the types of risks being included in the stress test; (2) a general description of the methodologies used in the stress test, including those employed to estimate losses, revenues, provision for loan and lease losses, and changes in capital positions over the planning horizon; (3) estimates of pre-provision net revenue and other revenue; provisions for loan and lease losses, realized losses/gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains; net income before taxes; loan losses (dollar amount and as a percentage of average portfolio balance) in the aggregate and by subportfolio, including: Domestic first-lien mortgages; domestic junior lien and home equity lines of credit; commercial and industrial loans; commercial real estate loans; credit cards; other consumer loans; and all other loans; and regulatory capital ratios and the tier 1 common ratio; (4) an explanation of the most significant causes for the changes in regulatory capital ratios and tier 1 common ratio; and (5) with respect to a stress test conducted by an insured depository institution subsidiary of the covered company pursuant to subpart H of this part 252, changes in regulatory capital ratios of the depository institution subsidiary over the planning horizon, including an explanation of the most significant causes for the changes in regulatory capital ratios.

Estimated Paperwork Burden

Estimated Burden per Response:

Section 252.146(c)(1) recordkeeping—40 hours (Initial setup 280 hours for U.S. bank holding companies $50 billion and over in total consolidated assets).

Section 252.148 disclosure—80 hours (Initial setup 200 hours).

Number of respondents: 34 U.S. bank holding companies with total consolidated assets of $50 billion or more.

Total estimated annual burden: 29,920 hours (23,120 hours for initial setup and 6,800 hours for ongoing compliance).

C. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), requires each federal agency to prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a substantial number of small entities.[37] The Board believes that the final rule will not have a significant economic impact on a substantial number of small entities, but nonetheless is conducting the RFA analysis for this final rule.

In accordance with section 165(i)(1) and (2) of the Dodd-Frank Act, the Board is adopting the final rule as Regulation YY and adding new Part 252 (12 CFR part 252) to establish the requirements that a covered company provide data to support the Board's annual supervisory stress test and conduct company-run stress tests semi-annually.[38] The reasons and justification for the final rule are described in the **SUPPLEMENTARY INFORMATION.**

Under regulations issued by the Small Business Administration (SBA), a ''small entity'' includes those firms within the ''Finance and Insurance'' sector with asset sizes that vary from $7 million or less in assets to $175 million or less in assets.[39] The Board believes that the Finance and Insurance sector constitutes a reasonable universe of firms for these purposes because such firms generally engage in actives that are financial in nature. Consequently, bank holding companies or nonbank financial companies with assets sizes of $175 million or less are small entities for purposes of the RFA.

As discussed in the **SUPPLEMENTARY INFORMATION**, the final rule applies to a ''covered company,'' which includes only bank holding companies with $50 billion or more in total consolidated assets, and nonbank financial companies that the Council has determined under section 113 of the Dodd-Frank Act must be supervised by the Board and for which such determination is in effect. Bank holding companies that are subject to the final rule therefore substantially exceed the $175 million asset threshold at which a banking entity is considered a ''small entity'' under SBA regulations. The final rule will apply to a nonbank financial company supervised by the Board regardless of such a company's asset size. Although the asset size of nonbank financial companies may not be the determinative factor of whether such companies may pose systemic risks and would be designated by the Council for supervision by the Board, it is an important consideration.[40] It is therefore unlikely that a financial firm that is at or below the $175 million asset threshold would be designated by the Council under section 113 of the Dodd-Frank Act because material financial distress at such firms, or the nature,

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

[38] *See* 12 U.S.C. 5365(i)(1) and (2).

[39] 13 CFR 121.201.

[40] *See* Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies, 77 FR 21637 (April 11, 2012) (to be codified at 12 CFR part 1310).

scope, size, scale, concentration, interconnectedness, or mix of it activities, are not likely to pose a threat to the financial stability of the United States.

As noted above, because the final rule is not likely to apply to any company with assets of $175 million or less, the final rule is not expected to apply to any small entity for purposes of the RFA. Moreover, as discussed in the **SUPPLEMENTARY INFORMATION**, the Dodd-Frank Act requires the Board to adopt rules implementing the provisions of section 165(i)(2) of the Dodd-Frank Act. The Board does not believe that the final rule would have a significant economic impact on a substantial number of small entities or that the final rule duplicates, overlaps, or conflicts with any other Federal rules.

List of Subjects in 12 CFR Part 252

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Nonbank Financial Companies Supervised by the Board, Reporting and recordkeeping requirements, Securities, Stress Testing.

Authority and Issuance

For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System adds 12 CFR part 252 to read as follows:

PART 252—ENHANCED PRUDENTIAL STANDARDS (REGULATION YY)

Sec.

Subparts A—E [Reserved]

Subpart F—Supervisory Stress Test Requirements for Covered Companies

252.131 Authority and purpose.
252.132 Definitions.
252.133 Applicability.
252.134 Annual analysis conducted by the Board.
252.135 Data and information required to be submitted in support of the Board's analyses.
252.136 Review of the Board's analysis; publication of summary results.
252.137 Use requirement.

Subpart G—Company-Run Stress Test Requirements for Covered Companies

252.141 Authority and purpose.
252.142 Definitions.
252.143 Applicability.
252.144 Annual stress test.
252.145 Mid-cycle stress test.
252.146 Methodologies and practices.
252.147 Reports of stress test results.
252.148 Disclosure of stress test results.

Subpart H [Reserved]

Subpart I [Reserved]

Authority: 12 U.S.C. 321–338a, 1467a(g), 1818, 1831p–1, 1844(b), 1844(c), 5361, 5365, 5366.

Subparts A—E [Reserved]

Subpart F—Supervisory Stress Test Requirements for Covered Companies

§ 252.131 Authority and purpose.

(a) *Authority.* 12 U.S.C. 321–338a, 1467a(g), 1818, 1831p–1, 1844(b), 1844(c), 5361, 5365, 5366.

(b) *Purpose.* This subpart implements section 165(i)(1) of the Dodd-Frank Act (12 U.S.C. 5365(i)(1)), which requires the Board to conduct annual analyses of nonbank financial companies supervised by the Board and bank holding companies with $50 billion or more in total consolidated assets to evaluate whether such companies have the capital, on a total consolidated basis, necessary to absorb losses as a result of adverse economic conditions.

§ 252.132 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered company that are more adverse than those associated with the baseline scenario and may include trading or other additional components.

(b) *Average total consolidated assets* means the average of the total consolidated assets as reported by a bank holding company on its Consolidated Financial Statements for Bank Holding Companies (FR Y–9C) for the four most recent consecutive quarters. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters. Average total consolidated assets are measured on the as-of date of the most recent FR Y–9C used in the calculation of the average.

(c) *Bank holding company* has the same meaning as in section 225.2(c) of the Board's Regulation Y (12 CFR 225.2(c)).

(d) *Baseline scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that reflect the consensus views of the economic and financial outlook.

(e) *Covered company* means:

(1) A bank holding company (other than a foreign banking organization) with average total consolidated assets of $50 billion or more; and

(2) A nonbank financial company supervised by the Board.

(f) *Depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(g) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)).

(h) *Nonbank financial company supervised by the Board* means a nonbank financial company that the Financial Stability Oversight Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect.

(i) *Planning horizon* means the period of at least nine quarters, beginning on the first day of a stress test cycle (on October 1) over which the relevant projections extend.

(j) *Pre-provision net revenue* means the sum of net interest income and non-interest income less expenses before adjusting for loss provisions.

(k) *Provision for loan and lease losses* means the provision for loan and lease losses as reported by the covered company on the FR Y–9C.

(l) *Regulatory capital ratio* means a capital ratio for which the Board established minimum requirements by regulation or order, including a company's leverage ratio and tier 1 and total risk-based capital ratios as calculated under the Board's regulations, including appendices A, D, E, and G to 12 CFR part 225 or any successor regulation.

(m) *Scenarios* are those sets of conditions that affect the U.S. economy or the financial condition of a covered company that the Board annually determines are appropriate for use in the supervisory stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

(n) *Severely adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

(o) *Stress test cycle* means the period between October 1 of a calendar year and September 30 of the following calendar year. For the purposes of the stress test cycle commencing in 2012, such cycle will begin on November 15, 2012.

(p) *Subsidiary* has the same meaning as in section 225.2(o) of the Board's Regulation Y (12 CFR 225.2).

(q) *Tier 1 common ratio* has the same meaning as in section 225.8(c)(9) of the Board's Regulation Y (12 CFR 225.8(c)(9)).

§ 252.133 Applicability.

(a) *Compliance date for bank holding companies that are covered companies as of November 15, 2012.* (1) *In general.* Except as provided in paragraph (a)(2) or (a)(3) of this section, a bank holding company that is a covered company as of November 15, 2012, must comply with the requirements of this subpart beginning with the stress test cycle that commences on October 1, 2013, unless that time is extended by the Board in writing.

(2) *2009 Supervisory Capital Assessment Program.* A bank holding company that participated in the 2009 Supervisory Capital Assessment Program, or a successor to such a bank holding company, must comply with the requirements of this subpart beginning with the stress test cycle that commences on November 15, 2012, unless that time is extended by the Board in writing.

(3) *SR Letter 01–01.* A U.S.-domiciled bank holding company that is a covered company as of November 15, 2012, and is a subsidiary of a foreign banking organization that is currently relying on Supervision and Regulation Letter SR 01–01 issued by the Board (as in effect on May 19, 2010) must comply with the requirements of this subpart beginning with the stress test cycle that commences on October 1, 2015, unless that time is extended by the Board in writing.

(b) *Compliance date for institutions that become covered companies after November 15, 2012.* (1) *Bank holding companies.* A bank holding company that becomes a covered company after November 15, 2012, must comply with the requirements of this subpart beginning with the stress test cycle that commences in the calendar year after the year in which the bank holding company becomes a covered company, unless that time is extended by the Board in writing.

(2) *Nonbank financial companies supervised by the Board.* A company that becomes a nonbank financial company supervised by the Board must comply with the requirements of this subpart beginning with the stress test cycle that commences in the calendar year after the year in which the company first becomes subject to the Board's minimum regulatory capital requirements, unless the Board accelerates or extends the compliance date.

(c) *Ongoing application.* A bank holding company that is a covered company will remain subject to the requirements of this subpart unless and until its total consolidated assets fall below $50 billion for each of four consecutive quarters, as reported on the FR Y–9C. The calculation will be effective on the as-of date of the fourth consecutive FR Y–9C.

§ 252.134 Annual analysis conducted by the Board.

(a) *In general.* (1) On an annual basis, the Board will conduct an analysis of each covered company's capital, on a total consolidated basis, taking into account all relevant exposures and activities of that covered company, to evaluate the ability of the covered company to absorb losses in specified economic and financial conditions.

(2) The analysis will include an assessment of the projected losses, net income, and pro forma capital levels and regulatory capital ratios, tier 1 common ratio, and other capital ratios for the covered company and use such analytical techniques that the Board determines are appropriate to identify, measure, and monitor risks of the covered company that may affect the financial stability of the United States.

(3) In conducting the analyses, the Board will coordinate with the appropriate primary financial regulatory agencies and the Federal Insurance Office, as appropriate.

(b) *Economic and financial scenarios related to the Board's analysis.* The Board will conduct its analysis under this section using a minimum of three different scenarios, including a baseline scenario, adverse scenario, and severely adverse scenario. The Board will notify covered companies of the scenarios that the Board will apply to conduct the analysis for each stress test cycle by no later than November 15 of each year, except with respect to trading or any other components of the scenarios and any additional scenarios that the Board will apply to conduct the analysis, which will be communicated by no later than December 1.

§ 252.135 Data and information required to be submitted in support of the Board's analyses.

(a) *Regular submissions.* Each covered company must submit to the Board such data, on a consolidated basis, that the Board determines is necessary in order for the Board to derive the relevant pro forma estimates of the covered company over the planning horizon under the scenarios described in § 252.134(b).

(b) *Additional submissions required by the Board.* The Board may require a covered company to submit any other information on a consolidated basis that the Board deems necessary in order to:

(1) Ensure that the Board has sufficient information to conduct its analysis under this subpart; and

(2) Project a company's pre-provision net revenue, losses, provision for loan and lease losses, and net income; and, pro forma capital levels, regulatory capital ratios, tier 1 common ratio, and any other capital ratio specified by the Board under the scenarios described in section 252.134(b).

(c) *Confidential treatment of information submitted.* The confidentiality of information submitted to the Board under this subpart and related materials shall be determined in accordance with the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261).

§ 252.136 Review of the Board's analysis; publication of summary results.

(a) *Review of results.* Based on the results of the analysis conducted under this subpart, the Board will conduct an evaluation to determine whether the covered company has the capital, on a total consolidated basis, necessary to absorb losses and continue its operation by maintaining ready access to funding, meeting its obligations to creditors and other counterparties, and continuing to serve as a credit intermediary under baseline, adverse and severely adverse scenarios, and any additional scenarios.

(b) *Communication of results to covered companies.* The Board will convey to a covered company a summary of the results of the Board's analyses of such covered company within a reasonable period of time, but no later than March 31.

(c) *Publication of results by the Board.* By March 31 of each calendar year, the Board will disclose a summary of the results of the Board's analyses of a covered company.

§ 252.137 Use requirement.

(a) *In general.* The board of directors and senior management of each covered company must consider the results of the analysis conducted by the Board under this subpart, as appropriate:

(1) As part of the covered company's capital plan and capital planning process, including when making changes to the covered company's capital structure (including the level and composition of capital);

(2) When assessing the covered company's exposures, concentrations, and risk positions; and

(3) In the development or implementation of any plans of the covered company for recovery or resolution.

(b) *Resolution plan updates.* Each covered company must update its resolution plan as the Board determines appropriate, based on the results of the Board's analyses of the covered company under this subpart.

Subpart G—Company-Run Stress Test Requirements for Covered Companies

§ 252.141 Authority and purpose.

(a) *Authority.* 12 U.S.C. 321–338a, 1467a(g), 1818, 1831p–1, 1844(b), 1844(c), 5361, 5365, 5366.

(b) *Purpose.* This subpart implements section 165(i)(2) of the Dodd-Frank Act (12 U.S.C. 5365(i)(2)), which requires a covered company to conduct annual and semi-annual stress tests. This subpart also establishes definitions of stress test and related terms, methodologies for conducting stress tests, and reporting and disclosure requirements.

§ 252.142 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered company that are more adverse than those associated with the baseline scenario and may include trading or other additional components.

(b) *Average total consolidated assets* means the average of the total consolidated assets as reported by a bank holding company on its Consolidated Financial Statements for Bank Holding Companies (FR Y–9C) for the four most recent consecutive quarters. If the bank holding company has not filed the FR Y–9C for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the company's FR Y–9C, for the most recent quarter or consecutive quarters. Average total consolidated assets are measured on the as of date of the most recent FR Y–9C used in the calculation of the average.

(c) *Bank holding company* has the same meaning as in section 225.2(c) of the Board's Regulation Y (12 CFR 225.2(c)).

(d) *Baseline scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that reflect the consensus views of the economic and financial outlook.

(e) *Capital action* has the same meaning as in section 225.8(c)(1) of the Board's Regulation Y (12 CFR 225.8(c)(1)).

(g) *Covered company* means:

(1) A bank holding company (other than a foreign banking organization) with average total consolidated assets of $50 billion or more; and

(2) A nonbank financial company supervised by the Board.

(h) *Depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(i) *Foreign banking organization* has the same meaning as in section 211.21(o) of the Board's Regulation K (12 CFR 211.21(o)).

(j) *Nonbank financial company supervised by the Board* means a nonbank financial company that the Financial Stability Oversight Council has determined under section 113 of the Dodd-Frank Act (12 U.S.C. 5323) shall be supervised by the Board and for which such determination is still in effect.

(k) *Planning horizon* means the period of at least nine quarters, beginning on the first day of a stress test cycle (on October 1 or April 1, as appropriate) over which the relevant projections extend.

(l) *Pre-provision net revenue* means the sum of net interest income and non-interest income less expenses before adjusting for loss provisions.

(m) *Provision for loan and lease losses* means the provision for loan and lease losses as reported by the covered company on the FR Y–9C.

(n) *Regulatory capital ratio* means a capital ratio for which the Board established minimum requirements by regulation or order, including a company's leverage ratio and tier 1 and total risk-based capital ratios as calculated under the Board's regulations, including appendices A, D, E, and G to 12 CFR part 225, and appendices A, B, E, and F to part 208 or any successor regulation.

(o) *Scenarios* are those sets of conditions that affect the U.S. economy or the financial condition of a covered company that the Board, or with respect to the mid-cycle stress test required under section 252.145 of this subpart, the covered company, annually determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

(p) *Severely adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a covered company and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

(q) *Stress test* means a process to assess the potential impact of scenarios on the consolidated earnings, losses, and capital of a covered company over the planning horizon, taking into account its current condition, risks, exposures, strategies, and activities.

(r) *Stress test cycle* means the period between October 1 of a calendar year and September 30 of the following calendar year. For the purposes of the stress test cycle commencing in 2012, such cycle will begin on November 15, 2012.

(s) *Subsidiary* has the same meaning as in section 225.2(o) the Board's Regulation Y (12 CFR 225.2).

(t) *Tier 1 common ratio* has the same meaning as in section 225.8(c)(9) of the Board's Regulation Y (12 CFR 225.8(c)(9)).

§ 252.143 Applicability.

(a) *Compliance date for bank holding companies that are covered companies as of November 15, 2012*—(1) *In general.* Except as provided in paragraph (a)(2) or (a)(3) of this section, a bank holding company that is a covered company as of November 15, 2012, must comply with the requirements of this subpart beginning with the stress test cycle commencing on October 1, 2013, unless that time is extended by the Board in writing.

(2) *2009 Supervisory Capital Assessment Program.* A bank holding company that participated in the 2009 Supervisory Capital Assessment Program, or a successor to such a bank holding company, must comply with the requirements of this subpart beginning with the stress test cycle commencing on November 15, 2012, unless that time is extended by the Board in writing.

(3) *SR Letter 01–01.* A U.S.-domiciled bank holding company that is a covered company as of November 15, 2012, and is a subsidiary of a foreign banking organization that is currently relying on Supervision and Regulation Letter SR 01–01 issued by the Board (as in effect on May 19, 2010) must comply with the requirements of this subpart beginning with the stress test cycle commencing on October 1, 2015, unless that time is extended by the Board in writing.

(b) *Compliance date for institutions that become covered companies after November 15, 2012*—(1) *Bank holding companies.* A bank holding company that becomes a covered company after November 15, 2012, must comply with the requirements of this subpart beginning with the stress test cycle that commences in the calendar year after the year in which the bank holding company becomes a covered company,

unless that time is extended by the Board in writing.

(2) *Nonbank financial companies supervised by the Board.* A company that becomes a nonbank financial company supervised by the Board must comply with the requirements of this subpart beginning with the stress test cycle that commences in the calendar year after the year in which company first becomes subject to the Board's minimum regulatory capital requirements, unless the Board accelerates or extends the compliance date.

(c) *Ongoing application.* A bank holding company that is a covered company will remain subject to the requirements of this subpart unless and until its total consolidated assets fall below $50 billion for each of four consecutive quarters, as reported on the FR Y–9C. The calculation will be effective on the as-of date of the fourth consecutive FR Y–9C.

§ 252.144 Annual stress test.

(a) *In general.* A covered company must conduct an annual stress test by January 5 during each stress test cycle based on data as of September 30 of the preceding calendar year, unless the time or the as of date is extended by the Board in writing.

(b) *Scenarios provided by the Board.* (1) *In general.* In conducting a stress test under this section, a covered company must use the scenarios provided by the Board. Except as provided in paragraphs (b)(2) and (3) of this section, the Board will provide a description of the scenarios to each covered company no later than November 15 of that calendar year.

(2) *Additional components.* (i) The Board may require a covered company with significant trading activity, as determined by the Board and specified in the Capital Assessments and Stress Testing report (FR Y–14), to include a trading and counterparty component in its adverse and severely adverse scenarios in the stress test required by this section. The data used in this component will be as of a date between October 1 and December 1 of that calendar year selected by the Board, and the Board will communicate the as-of date and a description of the component to the company no later than December 1 of the calendar year.

(ii) The Board may require a covered company to include one or more additional components in its adverse and severely adverse scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(3) *Additional scenarios.* The Board may require a covered company to use one or more additional scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(4) *Notice and response.* If the Board requires a covered company to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2)(ii) of this section or to use one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing no later than September 30. The notification will include a general description of the additional component(s) or additional scenario(s) and the basis for requiring the company to include the additional component(s) or additional scenario(s). Within 14 calendar days of receipt of a notification under this paragraph, the covered company may request in writing that the Board reconsider the requirement that the company include the additional component(s) or additional scenario(s), including an explanation as to why the reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request. The Board will provide the covered company with a description of any additional component(s) or additional scenario(s) by December 1.

§ 252.145 Mid-cycle stress test.

(a) *Mid-cycle stress test requirement.* In addition to the stress test required under section 252.144 of this subpart, a covered company must conduct a stress test by July 5 during each stress test cycle based on data as of March 31 of that calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) *Scenarios related to mid-cycle stress tests*—(1) *In general.* A covered company must develop and employ a minimum of three scenarios, including a baseline scenario, adverse scenario, and severely adverse scenario, that are appropriate for its own risk profile and operations, in conducting the stress test required by this section.

(2) *Additional components.* The Board may require a covered company to include one or more additional components in its adverse and severely adverse scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(3) *Additional scenarios.* The Board may require a covered company to use one or more additional scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(4) *Notice and response.* If the Board requires a covered company to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2) of this section or one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing no later than March 31. The notification will include a general description of the additional component(s) or additional scenario(s) and the basis for requiring the company to include the additional component(s) or additional scenario(s). Within 14 calendar days of receipt of a notification under this paragraph, the covered company may request in writing that the Board reconsider the requirement that the company include the additional component(s) or additional scenario(s), including an explanation as to why the reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request. The Board will provide the covered company with a description of any additional component(s) or additional scenario(s) by June 1.

§ 252.146 Methodologies and practices.

(a) *Potential impact on capital.* In conducting a stress test under §§ 252.144 and 252.145, for each quarter of the planning horizon, a covered company must estimate the following for each scenario required to be used:

(1) Losses, pre-provision net revenue, provision for loan and lease losses, and net income; and

(2) The potential impact on pro forma regulatory capital levels and pro forma capital ratios (including regulatory capital ratios, the tier 1 common ratio, and any other capital ratios specified by the Board), incorporating the effects of any capital actions over the planning horizon and maintenance of an allowance for loan losses appropriate for credit exposures throughout the planning horizon.

(b) *Assumptions regarding capital actions.* In conducting a stress test under §§ 252.144 and 252.145, a covered company is required to make the following assumptions regarding its capital actions over the planning horizon—

(1) For the first quarter of the planning horizon, the covered company must take into account its actual capital actions as of the end of that quarter; and

(2) For each of the second through ninth quarters of the planning horizon, the covered company must include in the projections of capital:

(i) Common stock dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year (that is, the first quarter of the planning horizon and the preceding three calendar quarters);

(ii) Payments on any other instrument that is eligible for inclusion in the numerator of a regulatory capital ratio equal to the stated dividend, interest, or principal due on such instrument during the quarter; and

(iii) An assumption of no redemption or repurchase of any capital instrument that is eligible for inclusion in the numerator of a regulatory capital ratio.

(c) *Controls and oversight of stress testing processes*—(1) *In general.* The senior management of a covered company must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress testing processes are effective in meeting the requirements in this subpart. These policies and procedures must, at a minimum, describe the covered company's stress testing practices and methodologies, and processes for validating and updating the company's stress test practices and methodologies consistent with applicable laws, regulations, and supervisory guidance. Policies of covered companies must also describe processes for scenario development for the mid-cycle stress test required under § 252.145.

(2) *Oversight of stress testing processes.* The board of directors, or a committee thereof, of a covered company must approve and review the policies and procedures of the stress testing processes as frequently as economic conditions or the condition of the covered company may warrant, but no less than annually. The board of directors and senior management of the covered company must receive a summary of the results of any stress test conducted under this subpart.

(3) *Role of stress testing results.* The board of directors and senior management of each covered company must consider the results of the analysis it conducts under this subpart, as appropriate:

(i) As part of the covered company's capital plan and capital planning process, including when making changes to the covered company's capital structure (including the level and composition of capital);

(ii) When assessing the covered company's exposures, concentrations, and risk positions; and

(iii) In the development or implementation of any plans of the covered company for recovery or resolution.

§ 252.147 Reports of stress test results.

(a) *Reports to the Board of stress test results.* (1) A covered company must report the results of the stress test required under section 252.144 to the Board by January 5 of each calendar year in the manner and form prescribed by the Board, unless that time is extended by the Board in writing.

(2) A covered company must report the results of the stress test required under section 252.145 to the Board by July 5 of each calendar year in the manner and form prescribed by the Board, unless that time is extended by the Board in writing.

(b) *Confidential treatment of information submitted.* The confidentiality of information submitted to the Board under this subpart and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261).

§ 252.148 Disclosure of stress test results.

(a) *Public disclosure of results*—(1) *In general.* (i) A covered company must disclose a summary of the results of the stress test required under section 252.144 in the period beginning on March 15 and ending on March 31, unless that time is extended by the Board in writing.

(ii) A covered company must disclose a summary of the results of the stress test required under section 252.145 in the period beginning on September 15 and ending on September 30, unless that time is extended by the Board in writing.

(2) *Disclosure method.* The summary required under this section may be disclosed on the Web site of a covered company, or in any other forum that is reasonably accessible to the public.

(b) *Summary of results.* A covered company must disclose, at a minimum, the following information regarding the severely adverse scenario:

(1) A description of the types of risks included in the stress test;

(2) A general description of the methodologies used in the stress test, including those employed to estimate losses, revenues, provision for loan and lease losses, and changes in capital positions over the planning horizon;

(3) Estimates of—

(i) Pre-provision net revenue and other revenue;

(ii) Provision for loan and lease losses, realized losses or gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains;

(iii) Net income before taxes;

(iv) Loan losses (dollar amount and as a percentage of average portfolio balance) in the aggregate and by subportfolio, including: domestic closed-end first-lien mortgages; domestic junior lien mortgages and home equity lines of credit; commercial and industrial loans; commercial real estate loans; credit card exposures; other consumer loans; and all other loans; and

(v) Pro forma regulatory capital ratios and the tier 1 common ratio and any other capital ratios specified by the Board;

(4) An explanation of the most significant causes for the changes in regulatory capital ratios and the tier 1 common ratio; and

(5) With respect to a stress test conducted pursuant to section 165(i)(2) of the Dodd-Frank Act by an insured depository institution that is a subsidiary of the covered company and that is required to disclose a summary of its stress tests results under applicable regulations, changes in regulatory capital ratios and any other capital ratios specified by the Board of the depository institution subsidiary over the planning horizon, including an explanation of the most significant causes for the changes in regulatory capital ratios.

(c) *Content of results.* (1) The following disclosures required under paragraph (b) of this section must be on a cumulative basis over the planning horizon:

(i) Pre-provision net revenue and other revenue;

(ii) Provision for loan and lease losses, realized losses/gains on available-for-sale and held-to-maturity securities, trading and counterparty losses, and other losses or gains;

(iii) Net income before taxes; and

(iv) Loan losses in the aggregate and by subportfolio.

(2) The disclosure of pro forma regulatory capital ratios, the tier 1 common ratio, and any other capital ratios specified by the Board that is required under paragraph (b) of this section must include the beginning value, ending value, and minimum value of each ratio over the planning horizon.

Subpart H [Reserved]

Subpart I [Reserved]

By order of the Board of Governors of the Federal Reserve System, October 5, 2012.

Robert deV. Frierson,

Secretary of the Board.

[FR Doc. 2012–24987 Filed 10–11–12; 8:45 am]

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FEDERAL RESERVE SYSTEM

12 CFR Part 252

[Regulation YY; Docket No. 1438]

RIN 7100–AD–86

Annual Company-Run Stress Test Requirements for Banking Organizations With Total Consolidated Assets Over $10 Billion Other Than Covered Companies

AGENCY: Board of Governors of the Federal Reserve System (Board).

ACTION: Final rule.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act) requires the Board to issue regulations that require financial companies with total consolidated assets of more than $10 billion and for which the Board is the primary federal financial regulatory agency to conduct stress tests on an annual basis. The Board is adopting this final rule to implement the company-run stress test requirements in the Dodd-Frank Act regarding company-run stress tests for bank holding companies with total consolidated assets greater than $10 billion but less than $50 billion and state member banks and savings and loan holding companies with total consolidated assets greater than $10 billion. This final rule does not apply to any banking organization with total consolidated assets of less than $10 billion. Furthermore, implementation of the stress testing requirements for bank holding companies, savings and loan holding companies, and state member banks with total consolidated assets of greater than $10 billion but less than $50 billion is delayed until September 2013.

DATES: This rule is effective November 15, 2012.

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I. Background

The Board has long held the view that a banking organization, such as a bank holding company or insured depository institution, should operate with capital levels well above its minimum regulatory capital ratios and commensurate with its risk profile.[1] A banking organization should also have internal processes for assessing its capital adequacy that reflect a full understanding of its risks and ensure that it holds capital commensurate with those risks.[2] Moreover, a banking organization that is subject to the Board's advanced approaches risk-based capital requirements must satisfy specific requirements relating to their internal capital adequacy processes in order to use the advanced approaches to calculate its minimum risk-based capital requirements.[3] Stress testing is one tool that helps both bank supervisors and a banking organization measure the sufficiency of capital available to support the banking organization's operations throughout periods of stress.[4] The Board and the other federal banking agencies previously have highlighted the use of stress testing as a means to better understand the range of a banking organization's potential risk exposures.[5]

In particular, as part of its effort to stabilize the U.S. financial system during the recent financial crisis, the Board, along with other federal financial regulatory agencies and the Federal Reserve system, conducted stress tests of large, complex bank holding companies through the Supervisory Capital Assessment Program (SCAP). The SCAP was a forward-looking exercise designed to estimate revenue, losses, and capital needs under an adverse economic and financial market scenario. By looking at the broad capital needs of the financial system and the specific needs of individual companies, these stress tests provided valuable information to market participants, reduced uncertainty about the financial condition of the participating bank holding companies under a scenario that was more adverse than that which was anticipated to occur at the time, and had an overall stabilizing effect.

Building on the SCAP and other supervisory work coming out of the crisis, the Board initiated the annual Comprehensive Capital Analysis and Review (CCAR) in late 2010 to assess the capital adequacy and the internal capital planning processes of large, complex bank holding companies and to incorporate stress testing as part of the Board's regular supervisory program for

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[1] *See* 12 CFR part 225, Appendix A; *see also* Supervision and Regulation Letter SR 99–18, Assessing Capital Adequacy in Relation to Risk at Large Banking Organizations and Others with Complex Risk Profiles (July 1, 1999), *available at http://www.federalreserve.gov/boarddocs/srletters/1999/SR9918.HTM* (hereinafter SR 99–18).

[2] *See* Supervision and Regulation Letter SR 09–4, Applying Supervisory Guidance and Regulations on the Payment of Dividends, Stock Redemptions, and Stock Repurchases at Bank Holding Companies (Mar. 27, 2009), *available at http://www.federalreserve.gov/boarddocs/srletters/2009/SR0904.htm* (hereinafter SR 09–4).

[3] *See* 12 CFR part 225, Appendix G, section 22(a); *see also,* Supervisory Guidance: Supervisory Review Process of Capital Adequacy (Pillar 2) Related to the Implementation of the Basel II Advanced Capital Framework, 73 FR 44620 (July 31, 2008).

[4] A full assessment of a company's capital adequacy must take into account a range of risk factors, including those that are specific to a particular industry or company.

[5] *See, e.g.,* Supervisory Guidance on Stress Testing for Banking Organizations With More Than $10 Billion in Total Consolidated Assets, 77 FR 29458 (May 17, 2011); Supervision and Regulation Letter SR 10–6, Interagency Policy Statement on Funding and Liquidity Risk Management (Mar. 17, 2010), *available at http://www.federalreserve.gov/boarddocs/srletters/2010/sr1006.htm;* Supervision and Regulation Letter SR 10–1, Interagency Advisory on Interest Rate Risk (Jan. 11, 2010), *available at http://www.federalreserve.gov/boarddocs/srletters/2010/sr1001.htm;* SR 09–4, *supra* note2note2170; Supervision and Regulation Letter SR 07–1, Interagency Guidance on Concentrations in Commercial Real Estate (Jan. 4, 2007), available at *http://www.federalreserve.gov/boarddocs/srletters/2007/SR0701.htm;* SR 99–18, *supra* note 11boarddocs/srletters/2007/SR0701.htm; Supervision and Regulation Letter SR 12–7, Supervisory Guidance on Stress Testing for Banking Organizations with More Than $10 Billion in Total Consolidated Assets, 77 FR 29458 (May 14, 2012), available at *http://www.federalreserve.gov/bankinforeg/srletters/sr1207.htm;* SR 99–18, supra note 169; Supervisory Guidance: Supervisory Review Process of Capital Adequacy (Pillar 2) Related to the Implementation of the Basel II Advanced Capital Framework, 73 FR 44620 (Jul. 31, 2008); *The Supervisory Capital Assessment Program:* SCAP *Overview of Results* (May 7, 2009), available at *http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20090507a1.pdf;* and *Comprehensive Capital Analysis and Review: Objectives and Overview* (Mar. 18, 2011), *available at http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20110318a1.pdf.*

assessing capital adequacy and capital planning practices at large bank holding companies. The CCAR represents a substantial strengthening of previous approaches to assessing capital adequacy and promotes thorough and robust processes at large banking organizations for measuring capital needs and for managing and allocating capital resources. The CCAR focuses on the risk measurement and management practices supporting organizations' capital adequacy assessments, including their ability to deliver credible inputs to their loss estimation techniques, as well as the governance processes around capital planning practices.

In the wake of the financial crisis, Congress enacted the Dodd-Frank Act, which requires the Board to issue regulations that require bank holding companies with total consolidated assets of $50 billion or more (large bank holding companies) and nonbank financial companies that the Financial Stability Oversight Committee has designated to be supervised by the Board (together, covered companies) to conduct stress tests semi-annually, and requires other financial companies with total consolidated assets of more than $10 billion and for which the Board is the primary federal financial regulatory agency to conduct stress tests on an annual basis (company-run stress tests).[6] The Act requires that the Board issue regulations that: (i) Define the term ''stress test''; (ii) establish methodologies for the conduct of the company-run stress tests that provide for at least three different sets of conditions, including baseline, adverse, and severely adverse conditions; (iii) establish the form and content of the report that companies subject to the regulation must submit to the Board; and (iv) require companies to publish a summary of the results of the required stress tests.[7]

On January 5, 2012, the Board invited public comment on a notice of proposed rulemaking (proposal or NPR) that would implement the enhanced prudential standards required to be established under section 165 of the Dodd-Frank Act and the early remediation requirements established under Section 166 of the Act, including proposed rules regarding company-run stress tests.[8] The proposed rules would have required each bank holding company, state member bank, and savings and loan holding company with more than $10 billion in total consolidated assets to conduct an annual company-run stress test using data as of September 30 of each year and the three scenarios provided by the Board. In addition, each state member bank, bank holding company, and savings and loan holding company would be required to disclose a summary of the results of its company-run stress tests within 90 days of submitting the results to the Board.

The Dodd-Frank Act mandates that the OCC and the FDIC adopt rules implementing stress testing requirements for the depository institutions that they supervise, and the OCC and FDIC invited public comment on proposed rules in January of 2012.[9]

The Board is finalizing the stress testing frameworks in two separate rules. First, the Board is issuing this final rule, which implements the company-run stress testing requirements applicable to bank holding companies with total consolidated assets greater than $10 billion but less than $50 billion and savings and loan holding companies and state member banks with total consolidated assets greater than $10 billion. Second, the Board is concurrently issuing a final rule implementing the supervisory and semi-annual company-run stress testing requirements applicable to large bank holding companies and nonbank financial companies supervised by the Board.

II. Overview of Comments

The Board received approximately 100 comments on its NPR on enhanced prudential standards and early remediation requirements. Approximately 40 of these comments pertained to the proposed stress testing requirements. Commenters ranged from individual banking organizations to trade and industry groups and public interest groups. In general, commenters expressed support for stress testing as a valuable tool for identifying and managing both micro- and macro-prudential risk. However, several commenters recommended changes to, or clarification of, certain provisions of the proposed rule, including its timeline for implementation, reporting requirements, and disclosure requirements. Commenters also urged greater interagency coordination regarding stress tests.

A. Delayed Compliance Date

Commenters suggested that companies with total consolidated assets less than $50 billion that have not previously been subject to stress-testing requirements need more time to develop the systems and procedures to be able to conduct company-run stress tests and to collect the information that the Board may require in connection with these tests. In response to these comments and to reduce burden on these institutions, the final rule requires most bank holding companies, savings and loan holding companies, and state member banks to conduct their first stress test in the fall of 2013. In addition, the final rule requires bank holding companies, savings and loan holding companies, and state member banks with less than $50 billion in total consolidated assets to begin publicly disclosing their stress test results in 2015 with respect to the stress test conducted in the fall of 2014.[10] Banking organizations that become subject to the rule's requirements after November 15, 2012 must comply with the requirements beginning in the fall of the calendar year that follows the year the company meets the asset threshold, unless that time is extended by the Board in writing.[11] For example, a company that becomes subject to the rule on March 31, 2013 must conduct its first stress test in the fall of 2014 and report the results in 2015.

B. Tailoring

The proposed rule would have applied consistent annual company-run stress test requirements, including the compliance date and the disclosure requirements, to all banking organizations with total consolidated assets of more than $10 billion.[12] The Board sought public comment on whether the stress testing requirements should be tailored, particularly for

[6] In this final rule, the Board is implementing the requirements for bank holding companies with total consolidated assets of greater than $10 billion but less than $50 billion and savings and loan holding companies and state member banks with total consolidated assets of greater than $10 billion. The requirements applicable bank holding companies with $50 billion or more in total consolidated assets are contained in a concurrently issued final rule being published in today's issue of the **Federal Register**.

[7] *See* 12 U.S.C. 5365(i)(2)(C).

[8] Enhanced Prudential Standards and Early Remediation Requirements for Covered Companies, 77 FR 594 (Jan. 5, 2012).

[9] Annual Stress Test, 77 FR 3408 (Jan. 24, 2012) (OCC); Annual Stress Test, 77 FR 3166 (Jan. 17, 2012) (FDIC).

[10] A ''stress test cycle'' is defined as the period between October 1 of a calendar year and September 30 of the following calendar year.

[11] In extending a time period under the final rule, the Board will consider the activities, level of complexity, risk profile, scope of operations, and the regulatory capital of the company, and any other relevant factors.

[12] Under the proposal, savings and loan holding companies would not have been subject to the proposed requirements, including timing of required submissions to the Board, until savings and loan holding companies were subject to minimum risk-based capital and leverage requirements.

financial companies that are not large bank holding companies.

Several commenters expressed concern that the NPR that would have applied stress testing requirements previously applicable only to large bank holding companies, such as those conducted under the CCAR, to smaller, less complex banking organizations with smaller systemic footprints.

The Board recognizes that bank holding companies, savings and loan holdings companies, and state member banks with total consolidated assets less than $50 billion are generally less complex and pose more limited risk to U.S. financial stability than larger banking organizations. As a result, the Board has modified the requirements in the final rule for these institutions, and expects to use a tailored approach in implementation.

The final rule modifies the requirements for smaller banking organizations in a number of ways. First, as noted above, most banking organizations, other than state member bank subsidiaries of the large bank holding companies that participated in the SCAP, are not required to conduct their first stress test until 2013. The final rule also provides a longer period for smaller banking organizations to conduct their stress tests. Under the final rule, smaller banking organizations, other than state member bank subsidiaries of SCAP bank holding companies, are not required to report the results of the stress test until March 31. The final rule also modifies the public disclosure requirements, generally requiring less detailed disclosure for smaller banking organizations than for larger banking organizations. Separately, the Board intends to seek comment on reporting forms that smaller banking organizations would use in reporting the results of their stress tests to the Board, which are expected to be significantly more limited than the reporting forms applicable to large banking organizations.

As described in section III.C.3 of this preamble, banking organizations may be required to include additional components in their adverse and severely adverse scenarios or to use additional scenarios in their stress tests. The Board expects to apply such additional components and additional scenarios to large, complex banking organizations. For example, the Board expects to require large banking organizations with significant trading activities to include global market shock components in their adverse and severely adverse scenarios, and may require large or complex banking organizations to use additional components in the adverse and severely adverse scenarios or to use additional scenarios that are designed to capture salient risks to specific lines of business.

Finally, the Board plans to issue supervisory guidance to provide more detail describing supervisory expectation for company-run stress tests. This guidance will be tailored to banking organizations with total consolidated assets greater than $10 billion but less than $50 billion.

C. Coordination

Many commenters emphasized the need for the federal banking agencies to coordinate stress testing requirements for parent holding companies and depository institution subsidiaries and more generally in regard to stress testing frameworks. Commenters recommended that the Board, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC) coordinate in implementing the Dodd-Frank Act stress testing requirements in order to minimize regulatory burden. Commenters asked that the agencies eliminate duplicative requirements and use an interagency forum, like the Federal Financial Institutions Examination Council, to develop common forms, policies, procedures, assumptions, methodologies, and application of results.

The Board has coordinated closely with the FDIC and the OCC to help to ensure that the company-run stress testing regulations are consistent and comparable across depository institutions and depository institution holding companies and to address any burden that may be associated with having multiple entities within one organizational structure subject to stress testing requirements. The Board anticipates that it will continue to consult with the FDIC and OCC in the implementation of the final rule, and in particular, in the development of stress scenarios. The Board plans to develop scenarios each year in close consultation with the FDIC and the OCC, so that, to the greatest extent possible, a common set of scenarios can be used for the supervisory stress tests and the annual company-run stress tests across various banking entities within the same organizational structure.

D. Consolidated Publication and Group-Wide Systems and Models

In addition to requesting better coordination, commenters inquired as to whether a company-run stress test conducted by a parent holding company would satisfy the stress testing requirements applicable to that holding company's subsidiary depository institutions. Commenters recommended that, in order to reduce burden, the Board develop and require the use of a single set of scenarios for a bank holding company and any depository institution subsidiary of the bank holding company, if the Board imposed separate stress testing requirements on both the bank holding company and bank.

In order to reduce burden on banking organizations, the final rule provides that a subsidiary depository institution generally will disclose its stress testing results as part of the results disclosed by its bank holding company parent. Disclosure by the bank holding company of its stress test results and those of any subsidiary state member bank generally will satisfy any disclosure requirements applicable to the state member bank subsidiary.

Moreover, a state member bank that is controlled by a bank holding company may rely on the systems and models of its parent bank holding company if its systems and models fully capture the state member bank's risks. For example, under those circumstances, the bank holding company and state member bank may use the same data collection processes and methods and models for projecting and calculating potential losses, pre-provision net revenues, provision for loan and lease losses, and pro forma capital positions over the stress testing planning horizon.

III. Description of the Final Rule

A. Scope of Application

The final rule applies to any bank holding company with average total consolidated assets of greater than $10 billion but less than $50 billion, and any state member bank and savings and loan holding company that have average total consolidated assets of more than $10 billion (''asset threshold''). Average total consolidated assets is based on the average of the total consolidated assets as reported on bank holding company's or savings and loan holding company's four most recent Consolidated Financial Statement for Bank Holding Companies (FR Y–9C) or a state member bank's four most recent Consolidated Report of Condition and Income (Call Report). If the bank holding company, savings and loan holding company, or state member bank has not filed the FR Y–9C or Call Report, as applicable, for each of the four most recent quarters, average total consolidated assets will be based on the average of the company's total consolidated assets, as reported on the company's FR Y–9C or Call Report, as applicable, for the most recent quarter

or consecutive quarters. In either case, average total consolidated assets are measured on the as-of date of the relevant regulatory report.

Once a bank holding company, savings and loan holding company, or state member bank meets the asset threshold, the company will remain subject to the final rule's requirements unless and until the total consolidated assets of the company are less than $10 billion, as reported on four consecutively filed FR Y–9C or Call Report, as applicable (measured on the as-of date of the relevant FR Y–9C or Call Report, as applicable). A bank holding company, state member bank, or savings and loan holding company that has reduced its total consolidated assets to below $10 billion will again become subject to the requirements of this rule if it meets the asset threshold again at a later date.

However, if a bank holding company's total consolidated assets equal or exceed $50 billion or a savings and loan holding company becomes designated as a nonbank financial company supervised by the Board, such companies will be required to conduct stress tests under subpart G of the Board's Regulation YY (12 CFR part 252 subpart G). Such a company will be required to comply with this final rule until it is required to conduct stress tests under subpart G.

The final rule does not apply to foreign banking organizations. The Board expects to issue a separate rulemaking on the application of enhanced prudential standards to foreign banking organizations. A U.S.-domiciled bank holding company subsidiary of a foreign banking organization that has total consolidated assets of $10 billion or more is subject to the requirements of this rule.[13]

B. Effective Date

Under the proposal, the company-run stress testing requirements applicable to bank holding companies and state member banks would have become effective upon adoption of the final rule. A bank holding company, savings and loan holding company, or state member bank that met the rule's asset threshold as of the adoption of the rule would have been required to immediately comply with its requirements. A bank holding company, savings and loan holding company, or state member bank that met the proposal's asset threshold more than 90 days before September 30 of a given year would be subject to stress testing requirements beginning in that calendar year. The Board received comments with regard to the timing of the first stress test for institutions that meet the asset threshold upon the rule's effective date and for institutions that meet the asset threshold at a later date, and has modified both aspects of the final rule.

1. First Stress Test for Bank Holding Companies and State Member Banks That Meet the Asset Threshold On or Before December 31, 2012

Commenters indicated that smaller and mid-sized banking organizations need more time to develop the systems and procedures to conduct company-run stress tests and to collect the information requested by the Board in connection with these tests. In response to these comments, the Board is delaying the date that existing, smaller companies are required to conduct their first stress test, as described below.

a. Bank Holding Companies

Under the final rule, a bank holding company that meets the asset threshold on or before December 31, 2012, must conduct its first stress test beginning in the fall of 2013, unless that time is extended by the Board in writing.[14] Such a bank holding company is not required to publicly disclose the results of its stress test until June 2015.

b. State Member Banks

Under the final rule, a state member bank that meets the asset threshold on or before November 15, 2012, and is a subsidiary of a bank holding company that participated in the SCAP, or successor to such bank holding company,[15] must comply with the requirements of this subpart beginning in the fall of 2012, unless that time is extended by the Board in writing.

Any other state member bank that meets the asset threshold on or before December 31, 2012, must comply with the requirements of this subpart beginning in the fall of 2013, unless that time is extended by the Board in writing. If such a state member bank has total consolidated assets of less than $50 billion as of December 31, 2012, it is not required to publicly disclose the results of its stress test until June 2015.

2. First Stress Test for Bank Holding Companies and State Member Banks Subject to Stress Testing Requirements After December 31, 2012

Commenters similarly expressed concern that bank holding companies, state member banks, and savings and loan holding companies met the rule's asset threshold after the effective date of the final rule would not have sufficient time to build the systems, contract with outside vendors, recruit experienced personnel, and develop stress testing models that are unique to their organization under the proposed compliance date. In addition, the Federal Advisory Council recommended that the Board phase in disclosure requirements to minimize risk, build precedent, and allow banks and supervisors to gain experience, expertise, and mutual understanding of stress testing models.

In response to these comments, the Board extended the compliance date applicable to bank holding companies and state member banks that exceed the final rule's asset threshold after December 31, 2012. Under the final rule, these companies will be required to conduct their first stress tests beginning in the fall of the calendar year after they meet the asset threshold, unless that time is extended by the Board in writing.

3. First Stress Test for Savings and Loan Holding Companies

Under the final rule, a savings and loan holding company will not be required to conduct its first stress test until after it is subject to minimum capital requirements. A savings and loan holding company that meets the asset threshold when it becomes subject to minimum capital requirements will be required to conduct this first stress test in the fall of the calendar year after it first becomes subject to capital requirements, unless the Board accelerates or extends the time in writing.[16]

A savings and loan holding company that meets the asset threshold after it becomes subject to capital requirements

[13] A U.S.-domiciled bank holding company subsidiary of a foreign banking organization that is currently relying on Supervision and Regulation Letter SR 01–01 issued by the Board (as in effect on May 19, 2010) is not required to comply with the final rule's requirements until October 1, 2015.

[14] In exercising its authority to extend a deadline under the final rule, the Board intends to consider the activities, level of complexity, risk profile, scope of operations, and the regulatory capital of the bank holding company or nonbank financial company in addition to any other relevant factors.

[15] The bank holding companies that participated in SCAP were: American Express Company, Bank of America Corporation, BB&T Corporation, Bank of New York Mellon Corporation, Capital One Financial Corp., Citigroup, Inc., Fifth Third Bancorp, GMAC LLC (now Ally Financial Inc.), Goldman Sachs Group Inc., JPMorgan Chase & Co., KeyCorp, MetLife Inc., Morgan Stanley, PNC Financial Services Group, Regions Financial Corporation, State Street Corp., SunTrust Banks, Inc., U.S. Bancorp, and Wells Fargo & Company.

[16] In accelerating or extending the time period for savings and loan holding companies, the Board will consider the activities, level of complexity, risk profile, scope of operations, and the regulatory capital of the savings and loan holding company, and any other relevant factors.

will be required to conduct its first stress test beginning in the fall of the calendar year after it meets the asset threshold, unless that time is extended by the Board in writing.

C. Annual Stress Tests Requirements

1. Timing of Stress Testing Requirements

The Board proposed the following timeline for company-run tests in the NPR. The Board would have required an as-of date of September 30 of information to be submitted to the Board. By no later than mid-November of each calendar year, the Board would provide bank holding companies, state member banks, and savings and loan holding companies with scenarios for annual stress tests. By January 5 of the following calendar year, these companies would be required to submit regulatory reports to the Board on their stress tests. By early April of that calendar year, companies would be required to make public disclosure of results.

Several commenters provided suggestions on the proposed timeline. Those comments focused on the as-of date for data to be submitted by bank holding companies, state member banks, and savings and loan holding companies, the date for submitting results to the Board, and the dates when public disclosures of stress test results are to be made. For instance, some commenters suggested that the Board should use data collected at as-of dates other than September 30, such as June 30 or December 31, and make corresponding changes to the timing of public disclosure in order to reduce burden on companies during the year-end period. One commenter suggested having a floating submission date, allowing organizations to submit their results at the point in the year when it is most convenient. Some commenters also requested that the Board release the scenarios earlier to provide banking organizations more time to prepare the required reports for the stress tests.

The final rule maintains the as-of date for data for the purposes of the annual company-run stress tests so that the same set of scenarios can be used to conduct annual company-run stress tests for large bank holding companies and their subsidiary state-member banks. The Board believes, and several commenters noted, that such alignment is beneficial. Furthermore, using the same scenarios for all firms subject to stress testing requirements will decrease market confusion, minimize burden on institutions, and provide for comparability across institutions. As stated in the concurrent final rule for covered companies, it was necessary to maintain the September 30 as-of date for stress test requirements for large bank holding companies in order to align the stress testing requirements with the capital planning requirements applicable to these institutions under section 225.8 of the Board's Regulation Y.[17]

Commenters requested that the Board release the scenarios earlier in the annual stress test cycle to provide banking organizations more time to prepare the reports for company-run stress tests. Under the final rule, the Board will provide descriptions of the baseline, adverse, and severely adverse scenarios generally applicable to companies no later than November 15 of each year, and provide any additional components or scenarios by December 1. The Board believes that providing scenarios earlier than November could result in the scenarios being stale, particularly in a rapidly changing economic environment, and that it is important to incorporate economic or financial market data that are as current as possible while providing sufficient time for companies to incorporate the scenarios in their annual company-run stress tests.

Commenters suggested that smaller banking organizations be allowed additional time to conduct their company-run stress tests in light of resource constraints faced by these institutions. In response to these comments, the Board has delayed the timing of report submission to the Board for most banking organizations.

Consistent with the requirements imposed on large bank holding companies under subpart G, the final rule requires a state member bank that is controlled by a bank holding company that has average total consolidated assets of $50 billion or more and a savings and loan holding company that has average total consolidated assets of $50 billion or more to conduct its stress test and submit its results to the Board by January 5, unless that time is extended by the Board in writing. All other bank holding companies, savings and loan holding companies, and state member banks are required to conduct their stress tests and submit the results to the Board by March 31.

Commenters also noted that the proposed public disclosure deadlines would interfere with so-called ''quiet periods'' that some publicly traded banking organizations enforce in the lead up to earnings announcements. These quiet periods are designed to limit communications that could disseminate proprietary company information prior to earnings announcements.

In light of these comments, the Board adjusted the disclosure date to avoid interfering with firms' quiet periods. Under the final rule, a savings and loan holding company with total consolidated assets of $50 billion or more or a state member bank that is a subsidiary of a bank holding company with total consolidated assets of $50 billion or more is required to disclose the results of its stress tests between March 15 and March 31 of each year. All other banking organizations will be required to disclose their results between June 15 and June 31.

Table 1 below describes the steps for the company-run stress test cycle for bank holding companies, state member banks, and savings and loan holding companies, including general timeframes for each step.

TABLE 1—PROCESS OVERVIEW OF ANNUAL COMPANY-RUN STRESS TEST

Company-run stress test steps	Timeframe
Board publishes scenarios for upcoming annual cycle	No later than November 15.
State member banks that are subsidiaries of large bank holding companies and savings and loan holding companies with total consolidated assets of more than $50 billion	
Companies complete stress test and submit required regulatory report to the Board on their stress tests	By January 5.

[17] 12 CFR 225.8.

TABLE 1—PROCESS OVERVIEW OF ANNUAL COMPANY-RUN STRESS TEST—Continued

Company-run stress test steps	Timeframe
Companies disclose summary results of the annual company-run stress test	Between March 15 and March 31.
Bank holding companies, savings and loan holding companies with total consolidated assets of less than $50 billion, and state member banks that are not subsidiaries of large bank holding companies	
Companies complete stress test and submit required regulatory report to the Board on their stress tests	By March 31.
Companies disclose summary results of the annual company-run stress test	Between June 15 and June 30.

2. Conduct of a Stress Test

Under the final rule, a bank holding company, savings and loan holding company, or state member bank that meets the asset threshold will be required to conduct an annual stress test using scenarios provided by the Board. A stress test is defined as a process to assess the potential impact of the scenarios provided by the Board on the consolidated earnings, losses, and capital of a company over the planning horizon, taking into account the current condition of the company and the company's risks, exposures, strategies, and activities.[18]

A bank holding company, savings and loan holding company, or state member bank will be required to use the scenarios provided by the Board, which will include, at minimum, baseline, adverse, and severely adverse scenarios. The Board will provide descriptions of the baseline, adverse, and severely adverse scenarios generally applicable to subject companies no later than November 15 of a calendar year.

As described above in section E of this preamble, the Board may require a company with significant trading activity, as determined by the Board as specified in the Capital Assessments and Stress Testing information collection (FR Y–14), to include a global market shock component in the adverse and severely adverse scenarios that measures potential stress losses from trading activities and counterparty exposures in its stress test.[19]

In addition, depending on the systemic footprint and scope of operations and activities of a bank holding company, savings and loan holding company, or state member bank, the Board may require the company to include additional components in its adverse and severely adverse scenarios or to use additional scenarios that are designed to capture salient risks stemming from specific lines of business.[20] Scenarios may also include stress factors, such as operational risk, that materially affect the financial condition of a company but are not directly correlated to macroeconomic or financial assumptions.

The Board will notify a company in writing no later than September 30 that it will be required to include an additional component in its adverse and severely adverse scenarios or to use an additional scenario in its stress test. The notification will include the basis for requiring the company to include the additional component or additional scenario in its stress test. Within 14 calendar days of receipt of a notification, a company may request in writing that the Board reconsider the requirement that the company include additional components or use additional scenarios, including an explanation as to why the reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request. The Board will provide a company with a description of any additional component or additional scenario by December 1.

3. Methodologies and Practices

Consistent with the proposal, in conducting a stress test, a company will be required to calculate for each scenario, over each quarter of the planning horizon, pre-provision net revenue, losses, provision for loan and lease losses, and net income; and the potential impact of the scenarios on pro forma regulatory capital levels and pro forma capital ratios (including regulatory and any other capital ratios specified by the Board). Estimates of pro forma capital levels and capital ratios must incorporate the effects of any capital actions over the planning horizon and maintenance of an allowance for loan losses appropriate for credit exposures throughout the planning horizon.

Several commenters asked that the Board generally adopt the disclosure approach it used in CCAR 2012, which included some common assumptions of capital actions across bank holding companies. In response to these commenters and to enable comparisons across firms and between the company-run and supervisory stress test, the final rule requires a bank holding company or savings and loan holding company to make the following assumptions regarding its capital actions over the planning horizon. For the first quarter of the planning horizon, the company must take into account its actual capital actions as of the end of the calendar quarter. For each of the second through ninth quarters of the planning horizon, the company must include the following items in the projections of capital: (i) Common stock dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year (that is, the first quarter of the planning horizon and the preceding three calendar quarters); (ii) payments on any other instrument that is eligible for inclusion in the numerator of a regulatory capital ratio equal to the stated dividend, interest, or principal due on such instrument during the quarter; and (iii) an assumption of no redemption or repurchase of any capital instrument that is eligible for inclusion in the numerator of a regulatory capital ratio. The Board is providing for these assumptions to ensure that the publicly disclosed results of company run stress tests are comparable across institutions and reflect the effect of common macroeconomic scenarios on net income

[18] "Planning horizon" is defined as the period of at least nine quarters, beginning on the first day of a stress test cycle (on October 1), over which the relevant projections extend. One commenter requested that the Board shorten the planning horizon. The Board has maintained a nine-quarter planning horizon in the final rule because it believes that a firm should be able to make informed projections of its financial and capital position for a two-year calendar period.

[19] As of September 30, 2012, companies subject to the global market shock scenario included those bank holding companies with total consolidated assets of $500 billion or more that were subject to the market-risk measure set forth in Appendix E of the Board's Regulation Y (12 CFR Part 225, Appendix E).

[20] In making this assessment, the Board will consider the financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy of the company.

and capital but not company-specific assumptions about capital distributions.

The proposed rule would have required a subject company to establish and maintain a system of controls, oversight, and documentation, including policies and procedures, designed to ensure that the stress testing processes were effective. It also would have required the board of directors and senior management of the company to annually review the controls, oversight, and documentation established pursuant to the final rule.

Several commenters asked for clarification on the roles of the board of directors and senior management in establishing and reviewing these controls. In response to these commenters, the final rule clarifies that the senior management of a bank holding company, savings and loan holding company, or state member bank is responsible for establishing and maintaining the system of controls, oversight, and documentation, including policies and procedures, designed to ensure that the stress testing processes used by the company are effective in meeting the requirements of the final rule. The board of directors, or an appropriate committee thereof, is responsible for approving and reviewing the policies and procedures governing the stress testing processes as frequently as economic conditions or the condition of the company may warrant, but no less than annually. The board of directors and senior management of the company must receive a summary of the results of the stress test.

The final rule also requires the board of directors and senior management of each bank holding company, savings and loan holding company, or state member bank to consider the results of the stress tests in the normal course of business, including but not limited to, the banking organization's capital planning, assessment of capital adequacy, and risk management practices.[21]

4. Report to the Board of Stress Test Results and Related Information

As required by the Dodd-Frank Act, the final rule requires each bank holding, state member bank, and savings and loan holding company to report the results of the stress tests conducted by the company in the manner and form prescribed by the Board.

Savings and loan holding companies with average total consolidated assets of $50 billion or more and state member bank subsidiaries of large bank holding companies are required to submit reports to the Board by January 5. All other bank holding companies, savings and loan holding companies, and state member banks are required to submit reports to the Board by March 31.

The report of the results of the stress test must include, under the baseline, adverse, and severely adverse scenarios, a description of the types of risks included in the stress test, a summary description of the methodologies used in the stress test, for each quarter of the planning horizon, aggregate losses, pre-provision net revenue, provision for loan and lease losses, net income, and pro forma capital ratios (including regulatory and any other capital ratios specified by the Board), an explanation of the most significant causes for the changes in regulatory capital ratios; and any other information required by the Board. This reporting requirement will remain applicable until such time as the Board issues a reporting form to collect the results of the company-run stress test.

In the future, the Board plans to publish, for notice and comment, any new data schedules that would be used to report the results of stress tests conducted under the rule. The Board expects that it would tailor the data schedules for bank holding companies, state member banks, and saving and loan holding companies with total consolidated assets greater than $10 billion but less than $50 billion to reduce reporting burden on those companies.

The Board may also request supplemental information, as needed.

5. Supervisory Review of Companies' Stress Test Processes and Results

Based on information submitted by a bank holding company, state member bank, or savings and loan holding company, as well as other relevant information, the Board will conduct an analysis of the quality of the company's stress tests processes and related results. The Board expects to provide feedback about such analysis to a company through the supervisory process. The Board may also require other actions consistent with safety and soundness of the company.

6. Publication of Results by the Company

Under the proposal, each bank holding company, state member bank, and savings and loan holding company would be required to disclose a summary of the results of its company-run stress tests within 90 days of submitting its required report to the Board. The Board asked commenters to provide information on the benefits and drawbacks associated with company-specific disclosures, specific concerns about the possible release of a company's proprietary information, and alternatives to the company-specific disclosures being proposed.

In response, nearly all commenters advocated that the Board curtail disclosure requirements for the company-run stress tests, in particular, strongly recommending against the disclosure of the results under the baseline scenario. Commenters indicated the baseline scenario results would be perceived as earnings guidance, which may compel a banking organization to prioritize short-term results over more appropriate longer-term risk management and sustained long term results. Commenters also indicated that baseline results may force the premature disclosure of future plans by the institution, create confusion among investors and the public, and give rise to liability under securities laws.

Several commenters suggested that the Board adopt the template used in reporting the CCAR results, which they likened to publication of only the severely adverse results. Commenters expressed the view that the CCAR disclosure regime was appropriately balanced by providing useful information to market participants while simultaneously ensuring that disclosure of stress test results does not result in providing earnings guidance.

As noted above, the Board believes that public disclosure is a key component of stress test requirements mandated by the Act, and helps to provide valuable information to market participants, enhance transparency, and facilitate market discipline. However, the Board also understands the concern that the disclosure of results (particularly baseline results) could be viewed as earnings guidance to the market. Thus, the final rule requires banking organizations to disclose only the severely adverse results. As companies begin conducting company-run stress tests, submitting the results of all scenarios to the Board, and disclosing a summary of their results under the severely adverse scenario, the Board expects to evaluate whether public disclosure of the results of the adverse and potentially baseline scenarios would assist in informing the company and its investors about the condition of the banking organization. Thus, the Board expects to revisit the scope of required public disclosure from time to time, and may determine to

[21] The capital plan requirements under the Board's 12 CFR 225.8 of the Board's Regulation Y (12 CFR 225.8) apply only to bank holding companies with $50 billion or more in total consolidated assets.

require disclosure of the results under the adverse and baseline scenario in the future.

Additionally, commenters recommended simpler and more limited disclosure requirements, particularly for smaller companies, so that these companies would not need to rely on vendors or third-party professionals to produce the summary of results. In response to commenters, the Board modified the disclosure requirements to include a more limited set of information. Under the final rule, a bank holding company, savings and loan holding company, or a state member bank not controlled by a bank holding company is required to disclose a summary of results under the severely adverse scenario, which must include, at a minimum: (i) A description of the types of risks being included in the stress test; (ii) a summary description of the methodologies used in the stress test; (iii) estimates of aggregate losses, pre-provision net revenue, provision for loan and lease losses, net income, and pro forma capital ratios (including regulatory and any other capital ratios specified by the Board); and, (iv) an explanation of the most significant causes for the changes in regulatory capital ratios. The Board expects the summary description under (ii) above to include a general description of methodologies used to estimate losses, pre-provision net revenue, net income, and changes in capital positions over the planning horizon.

Several commenters suggested that regulatory agencies coordinate disclosure requirements for multiple banking organizations within a single parent company as the release of conflicting test results could confuse market participants. In the final rule, bank holding companies and savings and loan holding companies must disclose a summary of results of the stress test conducted by any insured depository institution subsidiary that meets the asset threshold.[22] The summary must include, with respect to the severely adverse scenario, any changes in regulatory capital ratios of the depository institution subsidiary and an explanation of the most significant causes for the changes in regulatory capital ratios. For subsidiary state member banks, the Board expects that this disclosure will include a general description of methodologies used to estimate capital actions over the planning horizon. Such disclosure will be deemed to satisfy disclosure requirements applicable to state member bank subsidiaries under section 165(i)(2) of the Dodd-Frank Act, unless the Board determines that the disclosures at the holding company level do not adequately capture the potential impact of the scenarios on the capital of the state member bank. In this case, the state member bank would be required to make the same disclosure required of a state member bank not controlled by a bank holding company.

In addition, commenters requested that the Board not require publication of information as of each quarter-end of the planning horizon. In response to these comments, the rule clarifies that the disclosure of aggregate losses, pre-provision net revenue, provision for loan and lease losses, and net income requires disclosure of only the cumulative totals over the planning horizon, and the disclosure of regulatory capital ratios requires disclosure of the beginning value, ending value and minimum value of each ratio over the planning horizon.

As in the proposed rule, the final rule provides that the summary could be published on the Web site of the banking organization or in any other forum that is reasonably accessible to the public.

7. Scenarios

The proposal provided that the Board would publish a minimum of three different sets of economic and financial conditions, including baseline, adverse, and severely adverse scenarios, under which the Board would conduct its annual analyses and companies would conduct their annual company-run stress tests. The Board would update, make additions to, or otherwise revise these scenarios as appropriate, and would publish any such changes to the scenarios in advance of conducting each year's stress test.

Commenters suggested that significant changes in scenarios from year to year could cause a banking organization's stress testing results to dramatically change. To ameliorate this volatility, commenters suggest that the federal banking agencies have a uniform approach for identifying stress scenarios or establish a ''quantitative severity limit'' in the final rule to ensure that scenarios do not drastically change from year to year. Commenters pointed out that consistency in annual scenario development will make comparability of stress test results between institutions and across time periods more accurate, increase market confidence in the results of stress tests, and make for more dependable capital planning by banking organizations. Commenters also requested the opportunity to provide input on the scenarios.

The Board believes that it is important to have a consistent and transparent framework to support scenario design. To further this goal, the final rule clarifies the definition of ''scenarios'' and includes definitions of baseline, adverse, and severely adverse scenarios. In the final rule, ''scenarios'' are defined as those sets of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank that the Board annually determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

The baseline scenario is defined as a set of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank, and that reflect the consensus views of the economic and financial outlook. The adverse scenario is defined as a set of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank that are more adverse than those associated with the baseline scenario and may include trading or other additional components. The severely adverse scenario is defined as a set of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

In general, the baseline scenario will reflect the consensus views of the macroeconomic outlook expressed by professional forecasters, government agencies, and other public-sector organizations as of the beginning of the annual stress-test cycle. The Board expects that the severely adverse scenario will, at a minimum, include the paths of economic variables that are generally consistent with the paths observed during severe post-war U.S. recessions. Each year, the Board expects to take into account of salient risks that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, and state member bank that may not be observed in a typical severe recession. The Board expects that the adverse scenario will, at a minimum, include the paths of economic variables that are generally consistent with mild to moderate recessions. The Board may vary the approach it uses for the adverse

[22] A parallel provision is included in the final rule applicable to bank holding companies with total consolidated assets of $50 billion or more.

scenario each year so that the results of the scenario provide the most value to supervisors, given the current conditions of the economy and the banking industry. Some of the approaches the Board may consider using include, but are not limited to, a less severe version of the severely adverse scenario or specifically capturing, in the adverse scenario, risks that the Board believes should be understood better or should be monitored.

The scenarios will consist of a set of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank over the stress test planning horizon. These conditions will include projections for a range of macroeconomic and financial indicators, such as real Gross Domestic Product (GDP), the unemployment rate, equity and property prices, and various other key financial variables, and will be updated each year to reflect changes in the outlook for economic and financial conditions. The paths of these economic variables could reflect risks to the economic and financial outlook that are especially salient but were not prevalent in recessions of the past.

Depending on the systemic footprint and scope of operations and activities of a company, the Board may require that company to include additional components in its adverse or severely adverse scenarios or to use additional scenarios or more complex scenarios that are designed to capture salient risks to specific lines of business.[23] For example, the Board recognizes that certain trading positions and trading-related exposures are highly sensitive to adverse market events, potentially leading to large short-term volatility in certain companies' earnings. To address this risk, the Board will require companies with significant trading activities to include market price and rate ''shocks,'' as specified by the Board, that are consistent with historical or other adverse market events. The final rule also provides that the Board may impose this trading shock on a state member bank that is subject to the Board's market risk rule (12 CFR part 208, appendix E) and that is a subsidiary of a bank holding company subject to the trading shock under the final rule or under the Board's company-run stress test rule for covered companies (12 CFR 252.144(b)(2)(i)). The Board is making this modification to allow for coordination of the trading shock between a bank holding company and any state member bank subsidiary that is subject to the market risk rule.

In addition, the scenarios, in some cases, may also include stress factors that may not be directly correlated to macroeconomic or financial assumptions but nevertheless can materially affect covered companies' risks, such as factors that affect operational risks. The process by which the Board may require a company to include additional components or use additional scenarios is described under section D.2 of this preamble.

Some commenters suggested that the Board adopt a tailored approach to scenarios to better capture idiosyncratic characteristics of each company. For example, commenters representing the insurance industry suggested that any stress testing regime applicable to insurance companies incorporate shocks relating to the exogenous factors that actually impact a particular company, such as a shock to the insurance company's insurance policy portfolio arising from a natural disaster, and de-emphasize shocks arising from traditional banking activities.

In the Board's view, a generally uniform set of scenarios is necessary to provide a basis for comparison across companies. However, the Board expects that each company's stress testing practices will be tailored to its business model and lines of business, and that the company may not use all of the variables provided in the scenario, if those variables are not appropriate to the firm's line of business, or may add additional variables, as appropriate.[24] In addition, the Board expects banking organizations to consider other scenarios that are more idiosyncratic to their operations and associated risks, as part of their ongoing internal analyses of capital adequacy.

IV. Administrative Law Matters

A. Use of Plain Language

Section 722 of the Gramm-Leach-Bliley Act (Pub. L. 106–102, 113 Stat. 1338, 1471, 12 U.S.C. 4809) requires the Federal banking agencies to use plain language in all proposed and final rules published after January 1, 2000. The Board invited comment on whether the proposed rule was written plainly and clearly, or whether there were ways the Board could make the rule easier to understand. The Board received no comments on these matters and believes that the final rule is written plainly and clearly.

B. Riegle Community Development and Regulatory Improvement Act

Section 302 of Riegle Community Development and Regulatory Improvement Act (12 U.S.C. 4802) generally requires that regulations prescribed by Federal banking agencies which impose additional reporting, disclosures or other new requirements on insured depository institutions take effect on the first day of a calendar quarter which begins on or after the date on which the regulation is published in final form unless the agency determines, for good cause published with the regulation, that the regulation should become effective before such time. The final rule will be effective on November 15, 2012. The first day of a calendar quarter which begins on or after the date on which the final rule will be published is January 1, 2013. As discussed below, the Board has determined for good cause that the regulation should take effect on November 15, 2012.

Stress tests provide important forward-looking information to the Board to assist in the overall assessment of a state member bank's capital adequacy. Stress tests also help determine whether additional analytical techniques and exercises are appropriate for a state member bank to employ in identifying, measuring, and monitoring risks to the financial soundness of the bank. Further, stress tests serve as an ongoing risk management tool that support a state member bank's forward-looking assessment of its risks and better equip such institutions to address a range of adverse outcomes.

It is necessary for a final rule to be in place this fall to ensure that the six state member bank subsidiaries of bank holding companies that participated in SCAP begin conducting annual stress tests this year. A November 15, 2012, effective date will facilitate integration of these state member banks' stress testing systems and processes with the systems and processes of its parent bank holding company. These systems and processes establish the basis for a bank's stress testing framework and will permit the institution to provide critical supervisory information in a timely manner and help to ensure that the state member bank is prepared for adverse economic situations. In addition, a November 15, 2012, effective date permits the Board to synchronize its

[23] In making this assessment, the Board will consider the financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy of the company.

[24] The Board expects banking organizations to ensure that the paths of such additional variables are consistent with the scenarios the Board provided. For example, the path of any local economic variable should be consistent with the path of a national economic variable that the Board provides.

supervisory efforts related to stress testing with the OCC and the FDIC. Accordingly, the Board finds good cause for the final rule to take effect on November 15, 2012, approximately one month after publication in the **Federal Register**.

C. Paperwork Reduction Act Analysis

Request for Comment on Final Information Collection

In accordance with section 3512 of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) (PRA), the Board may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control number will be assigned. The Board reviewed the final rule under the authority delegated to the Board by OMB.

The final rule contains requirements subject to the PRA. The recordkeeping requirements are found in section 252.155(c) (formerly section 252.145(b)(1) in the proposed rule) and the reporting requirements for state member banks are found in section 252.156 (formerly section 252.148 in the proposed rule). The burden for the disclosure requirements for state member banks in section 252.157 is accounted for in section 252.156. These information collection requirements would implement section 165(i)(2) of the Dodd-Frank Act for Board-regulated companies with $10 billion or more in total consolidated assets that are not covered companies, as mentioned in the Abstract below.

The reporting requirements for bank holding companies and saving and loan holding companies in section 252.156 will be addressed in a separate **Federal Register** notice at a later date.

The Board received general comments regarding the burden of the proposed rule, particularly for companies with less than $50 billion in total consolidated assets. Commenters suggested that companies with total consolidated assets greater than $10 billion but less than $50 billion that have not previously been subject to stress-testing requirements need more time to develop the necessary systems and procedures to be able to conduct company-run stress tests and to collect the information that the Board may require in connection with these tests. In response to these comments and to reduce burden, the final rule delays the compliance date for most smaller companies, extends the timeline for most smaller companies to submit the results of the test to the Board, tailors disclosure requirements, and synchronizes the disclosure regime for bank holding companies and their depository institution subsidiaries.

The Board has an ongoing interest in your comments.

Comments are invited on:

(a) Whether the proposed collections of information are necessary for the proper performance of the Federal Reserve's functions, including whether the information has practical utility;

(b) The accuracy of the Federal Reserve's estimate of the burden of the proposed information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the information collections on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Comments on aspects of this notice that may affect reporting, recordkeeping, or disclosure requirements and burden estimates should be sent to the addresses listed in the **ADDRESSES** section. A copy of the comments may also be submitted to the OMB desk officer for the Agencies: By mail to U.S. Office of Management and Budget, 725 17th Street NW., #10235, Washington, DC 20503 or by facsimile to 202–395–5806, Attention, Commission and Federal Banking Agency Desk Officer.

Title of Information Collection: Recordkeeping and Disclosure Requirements Associated with Regulation YY (Subpart H).

Frequency of Response: Annual.

Affected Public: Businesses or other for-profit.

Respondents: U.S. bank holding companies, savings and loan holding companies, and state member banks.

Abstract: Section 165 of the Dodd-Frank Act implements the enhanced prudential standards. The enhanced standards include risk-based capital and leverage requirements, liquidity standards, requirements for overall risk management (including establishing a risk committee), single-counterparty credit limits, stress test requirements, and debt-to-equity limits for companies that the Council has determined pose a grave threat to financial stability.

Section 252.155(c) requires that each bank holding company, savings and loan holding company, or state member bank must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress testing processes are effective in meeting the requirements in Subpart H. These policies and procedures must, at a minimum, describe the company's stress testing practices and methodologies, and processes for validating and updating the company's stress test practices and methodologies consistent with applicable laws, regulations, and supervisory guidance.

Section 252.156 requires state member banks with $50 billion or more in total consolidated assets to report the results of the stress test to the Board by March 31 of each calendar year, unless that time is extended by the Board in writing. The report must include, under the baseline scenario, adverse scenario, and severely adverse scenario, a description of the types of risks being included in the stress test, a summary description of the methodologies used in the stress test, for each quarter of the planning horizon, estimates of aggregate losses, pre-provision net revenue, provision for loan and lease losses, net income, and regulatory capital ratios; an explanation of the most significant causes for the changes in regulatory capital ratios; and any other information required by the Board. This requirement will remain applicable until such time as the Board issues a reporting form to collect the results of the stress test required under section 252.154.

Estimated Paperwork Burden

Estimated Burden per Response:

Section 252.155(c) recordkeeping—40 hours (Initial setup 240 hours for institutions over $10 million in total consolidated assets).

Section 252.156 reporting—80 hours (Initial setup 200 hours).

Number of respondents: For recordkeeping requirements—39 U.S. bank holding companies with total consolidated assets over $10 billion and less than $50 billion, 21 state member banks with total consolidated assets over $10 billion, 39 savings and loan holding companies with total consolidated assets over $10 billion.

For reporting requirements—6 large state member banks.

Total estimated annual burden: 29,400 hours (24,960 hours for initial setup and 4,440 hours for ongoing compliance).

D. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* (RFA), requires each

federal agency to prepare a final regulatory flexibility analysis in connection with the promulgation of a final rule, or certify that the final rule will not have a significant economic impact on a substantial number of small entities.[25] The Board believes that the final rule will not have a significant economic impact on a substantial number of small entities, but nonetheless is conducting the RFA Analysis for this final rule.

In accordance with section 165(i) (2) of the Dodd-Frank Act, the Board is adopting the final rule as Regulation YY and is adding new Part 252 (12 CFR part 252) to establish the requirements that a holding company, savings and loan holding company, or state member bank conduct company-run stress tests annually.[26] The reasons and justification for the final rule are described in the **SUPPLEMENTARY INFORMATION.**

Under regulations issued by the Small Business Administration (''SBA''), a ''small entity'' includes those firms within the ''Finance and Insurance'' sector with asset sizes that vary from $7 million or less in assets to $175 million or less in assets.[27] The Board believes that the Finance and Insurance sector constitutes a reasonable universe of firms for these purposes because such firms generally engage in actives that are financial in nature. Consequently, bank holding companies, savings and loan holding companies, or state member banks with assets sizes of $175 million or less are small entities for purposes of the RFA.

As discussed in the **SUPPLEMENTARY INFORMATION**, the final rule applies to bank holding companies with greater than $10 billion but less than $50 billion in total consolidated assets and state member banks and savings and loan holding companies with greater than $10 billion in total consolidated assets. Companies that are subject to the final rule therefore substantially exceed the $175 million asset threshold at which a banking entity is considered a ''small entity'' under SBA regulations.

As noted above, because the final rule will not apply to any company with assets of $175 million or less, the final rule will not apply to any small entity for purposes of the RFA. Moreover, as discussed in the **SUPPLEMENTARY INFORMATION**, the Dodd-Frank Act requires the Board to adopt rules implementing the provisions of section 165(i)(2) of the Dodd-Frank Act. The Board does not believe that the final rule would have a significant economic impact on a substantial number of small entities or that the final rule duplicates, overlaps, or conflicts with any other federal rules.

List of Subjects in 12 CFR Part 252

Administrative practice and procedure, Banks, Banking, Federal Reserve System, Holding companies, Reporting and recordkeeping requirements, Securities, Stress Testing.

Authority and Issuance

For the reasons stated in the preamble, the Board of Governors of the Federal Reserve System amends 12 CFR part 252 as follows:

PART 252—ENHANCED PRUDENTIAL STANDARDS (Regulation YY)

■ 1. The authority citation for part 252 continues to read as follows:

Authority: 12 U.S.C. 321–338a, 1467a(g), 1818, 1831p–1, 1831o, 1844(b), 1844(c), 5365.

■ 2. Subpart H to part 252 is added to read as follows:

Subpart H—Company-Run Stress Test Requirements for Banking Organizations With Total Consolidated Assets Over $10 Billion That Are Not Covered Companies

Sec.
252.151 Authority and Purpose.
252.152 Definitions.
252.153 Applicability.
252.154 Annual stress test.
252.155 Methodologies and practices.
252.156 Reports of stress test results.
252.157 Disclosure of stress test results.

§ 252.151 Authority and purpose.

(a) *Authority.* 12 U.S.C. 321–338a, 1467a(g), 1818, 1831o, 1831p–1, 1844(b), 1844(c), 3906–3909, 5365.

(b) *Purpose.* This subpart implements section 165(i)(2) of the Dodd-Frank Act (12 U.S.C. 5365(i)(2)), which requires a bank holding company with total consolidated assets of greater than $10 billion but less than $50 billion and savings and loan holding companies and state member banks with total consolidated assets of greater than $10 billion to conduct annual stress tests. This subpart also establishes definitions of stress test and related terms, methodologies for conducting stress tests, and reporting and disclosure requirements.

§ 252.152 Definitions.

For purposes of this subpart, the following definitions apply:

(a) *Adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank that are more adverse than those associated with the baseline scenario and may include trading or other additional components.

(b) *Asset threshold* means—

(1) For a bank holding company, average total consolidated assets of greater than $10 billion but less than $50 billion, and

(2) For a savings and loan holding company or state member bank, average total consolidated assets of greater than $10 billion.

(c) *Average total consolidated assets* means the average of the total consolidated assets as reported by a bank holding company, savings and loan holding company, or state member bank on its Consolidated Financial Statements for Bank Holding Companies (FR Y–9C) or Consolidated Report of Condition and Income (Call Report), as applicable, for the four most recent consecutive quarters. If the bank holding company, savings and loan holding company, or state member bank has not filed the FR Y–9C or Call Report, as applicable, for each of the four most recent consecutive quarters, average total consolidated assets means the average of the company's total consolidated assets, as reported on the company's FR Y–9C or Call Report, as applicable, for the most recent quarter or consecutive quarters. Average total consolidated assets are measured on the as-of date of the most recent FR Y–9C or Call Report, as applicable, used in the calculation of the average.

(d) *Bank holding company* has the same meaning as in section 225.2(c) of the Board's Regulation Y (12 CFR 225.2(c)).

(e) *Baseline scenario* means a set of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank, and that reflect the consensus views of the economic and financial outlook.

(f) *Capital action* has the same meaning as in section 225.8(c)(1) of the Board's Regulation Y (12 CFR 225.8(c)(1)).

(g) *Covered company subsidiary* means a state member bank that is a subsidiary of a covered company as defined in subpart F of this part.

(h) *Depository institution* has the same meaning as in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(i) *Foreign banking organization* has the same meaning as in section

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

[26] *See* 12 U.S.C. 5365(d).

[27] 13 CFR 121.201.

211.21(o) of the Board's Regulation K (12 CFR 211.21(o)).

(j) *Planning horizon* means the period of at least nine quarters, beginning on the first day of a stress test cycle (on October 1) over which the relevant projections extend.

(k) *Pre-provision net revenue* means the sum of net interest income and non-interest income less expenses before adjusting for loss provisions.

(l) *Provision for loan and lease losses* means the provision for loan and lease losses as reported by the bank holding company, savings and loan holding company, or state member bank on the FR Y–9C or Call Report, as appropriate.

(m) *Regulatory capital ratio* means a capital ratio for which the Board established minimum requirements by regulation or order, including a company's leverage ratio and tier 1 and total risk-based capital ratios as calculated under the Board's regulations, including appendices A, D, E, and G to 12 CFR part 225 and appendices A, B, E, and F to 12 CFR part 208 or any successor regulation.

(n) *Savings and loan holding company* has the same meaning as in section 238.2(m) of the Board's Regulation LL (12 CFR 238.2(m)).

(o) *Scenarios* are those sets of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank that the Board annually determines are appropriate for use in the company-run stress tests, including, but not limited to, baseline, adverse, and severely adverse scenarios.

(p) *Severely adverse scenario* means a set of conditions that affect the U.S. economy or the financial condition of a bank holding company, savings and loan holding company, or state member bank and that overall are more severe than those associated with the adverse scenario and may include trading or other additional components.

(q) *State member bank* has the same meaning as in section 208.2(g) of the Board's Regulation H (12 CFR 208.2(g)).

(r) *Stress test* means a process to assess the potential impact of scenarios on the consolidated earnings, losses, and capital of a bank holding company, savings and loan holding company, or state member bank over the planning horizon, taking into account the current condition, risks, exposures, strategies, and activities.

(s) *Stress test cycle* means the period between October 1 of a calendar year and September 30 of the following calendar year. For the purposes of the stress test cycle commencing in 2012, such cycle will begin on November 15, 2012.

(t) *Subsidiary* has the same meaning as in section 225.2(o) the Board's Regulation Y (12 CFR 225.2(o)).

§ 252.153 Applicability.

(a) *Compliance date for bank holding companies and state member banks that meet the asset threshold on or before December 31, 2012*—(1) *Bank holding companies*—(i) *In general.* Except as provided in paragraph (a)(1)(ii) of this section, a bank holding company that meets the asset threshold on or before December 31, 2012, must comply with the requirements of this subpart beginning with the stress test cycle that commences on October 1, 2013, unless that time is extended by the Board in writing.

(ii) *SR Letter 01–01.* A U.S.-domiciled bank holding company that is a subsidiary of a foreign banking organization that is currently relying on Supervision and Regulation Letter SR 01–01 issued by the Board (as in effect on May 19, 2010) must comply with the requirements of this subpart beginning with the stress test cycle that commences on October 1, 2015, unless that time is extended by the Board in writing.

(2) *State member banks.* (i) A state member bank that meets the asset threshold as of November 15, 2012, and is a subsidiary of a bank holding company that participated in the 2009 Supervisory Capital Assessment Program, or a successor to such bank holding company, must comply with the requirements of this subpart beginning with the stress test cycle that commences on November 15, 2012, unless that time is extended by the Board in writing.

(ii) A state member bank that meets the asset threshold on or before December 31, 2012, and is not described in paragraph (a)(2)(i) of this section must comply with the requirements of this subpart beginning with the stress test cycle that commences on October 1, 2013, unless that time is extended by the Board in writing.

(b) *Compliance date for bank holding companies and state member banks that meet the asset threshold after December 31, 2012.* A bank holding company or state member bank that meets the asset threshold after December 31, 2012, must comply with the requirements of this subpart beginning with the stress test cycle that commences in the calendar year after the year in which the company meets the asset threshold, unless that time is extended by the Board in writing.

(c) *Compliance date for savings and loan holding companies.* (1) A savings and loan holding company that meets the asset threshold on or before the date on which it is subject to minimum regulatory capital requirements must comply with the requirements of this subpart beginning with the stress test cycle that commences in the calendar year after the year in which the company becomes subject to the Board's minimum regulatory capital requirements, unless the Board accelerates or extends the compliance date.

(2) A savings and loan holding company that meets the asset threshold after the date on which it is subject to minimum regulatory capital requirements must comply with the requirements of this subpart beginning with the stress test cycle that commences in the calendar year after the year in which the company becomes subject to the Board's minimum regulatory capital requirements, unless that time is extended by the Board in writing.

(d) *Ongoing application.* A bank holding company, savings and loan holding company, or state member bank that meets the asset threshold will remain subject to the requirements of this subpart unless and until its total consolidated assets fall below $10 billion for each of four consecutive quarters, as reported on the FR Y–9C or Call Report, as applicable. The calculation will be effective on the as-of date of the fourth consecutive FR Y–9C or Call Report, as applicable.

(e) *Interaction with 12 CFR part 252, subpart G.* Notwithstanding paragraph (d) of this section, a bank holding company or savings and loan holding company that becomes a covered company as defined in subpart G of this part and conducts a stress test pursuant to that subpart is not subject to the requirements of this subpart.

§ 252.154 Annual stress test.

(a) *General requirements*—(1) *Savings and loan holding companies with average total consolidated assets of $50 billion or more and state member banks that are covered company subsidiaries.* A savings and loan holding company with average total consolidated assets of $50 billion or more or a state member bank that is a covered company subsidiary or must conduct a stress test by January 5 of each calendar year based on data as of September 30 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(2) *Bank holding companies, savings and loan holding companies with total*

consolidated assets of less than $50 billion, and state member banks that are not covered company subsidiaries. Except as provided in paragraph (a)(1) of this section, a bank holding company, savings and loan holding company, or state member bank must conduct a stress test by March 31 of each calendar year using financial statement data as of September 30 of the preceding calendar year, unless the time or the as-of date is extended by the Board in writing.

(b) *Scenarios provided by the Board*—(1) *In general.* In conducting a stress test under this section, a bank holding company, savings and loan holding company, or state member bank must use the scenarios provided by the Board. Except as provided in paragraphs (b)(2) and (3) of this section, the Board will provide a description of the scenarios to each bank holding company, savings and loan holding company, or state member bank no later than November 15 of that calendar year.

(2) *Additional components.* (i) The Board may require a bank holding company, savings and loan holding company, or state member bank with significant trading activity, as determined by the Board and specified in the Capital Assessments and Stress Testing report (FR Y–14), to include a trading and counterparty component in its adverse and severely adverse scenarios in the stress test required by this section. The Board may also require a state member bank that is subject to 12 CFR part 208, Appendix E and that is a subsidiary of a bank holding company subject to this paragraph (b)(2)(i) or 12 CFR 252.144(b)(2)(i) to include a trading and counterparty component in the state member bank's adverse and severely adverse scenarios in the stress test required by this section. The data used in this component will be as of a date between October 1 and December 1 of that calendar year selected by the Board, and the Board will communicate the as-of date and a description of the component to the company no later than December 1 of the calendar year.

(ii) The Board may require a bank holding company, savings and loan holding company, or state member bank to include one or more additional components in its adverse and severely adverse scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(3) *Additional scenarios.* The Board may require a bank holding company, savings and loan holding company, or state member bank to include one or more additional scenarios in the stress test required by this section based on the company's financial condition, size, complexity, risk profile, scope of operations, or activities, or risks to the U.S. economy.

(4) *Notice and response.* If the Board requires a bank holding company, savings and loan holding company, or state member bank to include one or more additional components in its adverse and severely adverse scenarios under paragraph (b)(2)(ii) of this section or to use one or more additional scenarios under paragraph (b)(3) of this section, the Board will notify the company in writing no later than September 30. The notification will include a general description of the additional component(s) or additional scenario(s) and the basis for requiring the company to include the additional component(s) or additional scenario(s). Within 14 calendar days of receipt of a notification under this paragraph, the bank holding company, savings and loan holding company, or state member bank may request in writing that the Board reconsider the requirement that the company include the additional component(s) or additional scenario(s), including an explanation as to why the reconsideration should be granted. The Board will respond in writing within 14 calendar days of receipt of the company's request. The Board will provide the bank holding company, savings and loan holding company, or state member bank with a description of any additional component(s) or additional scenario(s) by December 1.

§ 252.155 Methodologies and practices.

(a) *Potential impact on capital.* In conducting a stress test under § 252.154, for each quarter of the planning horizon, a bank holding company, savings and loan holding company, or state member bank must estimate the following for each scenario required to be used:

(1) Losses, pre-provision net revenue, provision for loan and lease losses, and net income; and

(2) The potential impact on pro forma regulatory capital levels and pro forma capital ratios (including regulatory capital ratios and any other capital ratios specified by the Board), incorporating the effects of any capital actions over the planning horizon and maintenance of an allowance for loan losses appropriate for credit exposures throughout the planning horizon.

(b) *Assumptions regarding capital actions.* In conducting a stress test under § 252.154 of this part, a bank holding company or savings and loan holding company is required to make the following assumptions regarding its capital actions over the planning horizon—

(1) For the first quarter of the planning horizon, the bank holding company or savings and loan holding company must take into account its actual capital actions as of the end of that quarter; and

(2) For each of the second through ninth quarters of the planning horizon, the bank holding company or savings and loan holding company must include in the projections of capital—

(i) Common stock dividends equal to the quarterly average dollar amount of common stock dividends that the company paid in the previous year (that is, the first quarter of the planning horizon and the preceding three calendar quarters);

(ii) Payments on any other instrument that is eligible for inclusion in the numerator of a regulatory capital ratio equal to the stated dividend, interest, or principal due on such instrument during the quarter; and

(iii) An assumption of no redemption or repurchase of any capital instrument that is eligible for inclusion in the numerator of a regulatory capital ratio.

(c) *Controls and oversight of stress testing processes*—(1) *In general.* The senior management of a bank holding company, savings and loan holding company, or state member bank must establish and maintain a system of controls, oversight, and documentation, including policies and procedures, that are designed to ensure that its stress testing processes are effective in meeting the requirements in this subpart. These policies and procedures must, at a minimum, describe the company's stress testing practices and methodologies, and processes for validating and updating the company's stress test practices and methodologies consistent with applicable laws, regulations, and supervisory guidance.

(2) *Oversight of stress testing processes.* The board of directors, or a committee thereof, of a bank holding company, savings and loan holding company, or state member bank must approve and review the policies and procedures of the stress testing processes as frequently as economic conditions or the condition of the company may warrant, but no less than annually. The board of directors and senior management of the bank holding company, savings and loan holding company, or state member bank must receive a summary of the results of the stress test conducted under this section.

(3) *Role of stress testing results.* The board of directors and senior management of a bank holding company, savings and loan holding

company, or state member bank must consider the results of the stress test in the normal course of business, including but not limited to, the banking organization's capital planning, assessment of capital adequacy, and risk management practices.

§ 252.156 Reports of stress test results.

(a) *Reports to the Board of stress test results*—(1) *Savings and loan holding companies with average total consolidated assets of $50 billion or more and state member banks that are covered company subsidiaries.* A savings and loan holding company with average total consolidated assets of $50 billion or more or a state member bank that is a covered company subsidiary must report the results of the stress test to the Board by January 5 of each calendar year in the manner and form prescribed by the Board, unless that time is extended by the Board in writing.

(2) *Bank holding companies, savings and loan holding companies, and state member banks.* Except as provided in paragraph (a)(1) of this section, a bank holding company, savings and loan holding company, or state member bank must report the results of the stress test to the Board by March 31 of each calendar year in the manner and form prescribed by the Board, unless that time is extended by the Board in writing.

(b) *Contents of reports.* The report required under paragraph (a) of this section must include, under the baseline scenario, adverse scenario, severely adverse scenario, and any other scenario required under § 252.154(b)(3) of this part, a description of the types of risks being included in the stress test; a summary description of the methodologies used in the stress test; and, for each quarter of the planning horizon, estimates of aggregate losses, pre-provision net revenue, provision for loan and lease losses, net income, and regulatory capital ratios. In addition, the report must include an explanation of the most significant causes for the changes in regulatory capital ratios and any other information required by the Board. This paragraph will remain applicable until such time as the Board issues a reporting form to collect the results of the stress test required under § 252.154 of this part.

(c) *Confidential treatment of information submitted.* The confidentiality of information submitted to the Board under this subpart and related materials shall be determined in accordance with applicable exemptions under the Freedom of Information Act (5 U.S.C. 552(b)) and the Board's Rules Regarding Availability of Information (12 CFR part 261).

§ 252.157 Disclosure of stress test results.

(a) *Public disclosure of results*—(1) *In general.* (i) Except as provided in paragraph (a)(1)(ii) or (b)(2) of this section, a bank holding company, savings and loan holding company, or state member bank must disclose a summary of the results of the stress test in the period beginning on June 15 and ending on June 30 unless that time is extended by the Board in writing.

(ii) Except as provided in paragraph (b)(2) of this section, a state member bank that is a covered company subsidiary or a savings and loan holding company with average total consolidated assets of $50 billion or more must disclose a summary of the results of the stress test in the period beginning on March 15 and ending on March 31, unless that time is extended by the Board in writing.

(2) *Initial disclosure.* A bank holding company, savings and loan holding company, or state member bank that has total consolidated assets of less than $50 billion on or before December 31, 2012, must comply with the requirements of this section beginning with the stress test cycle commencing on October 1, 2014.

(3) *Disclosure method.* The summary required under this section may be disclosed on the Web site of a bank holding company, savings and loan holding company, or state member bank, or in any other forum that is reasonably accessible to the public.

(b) *Summary of results*—(1) *Bank holding companies and savings and loan holding companies.* A bank holding company or savings and loan holding company must disclose, at a minimum, the following information regarding the severely adverse scenario:

(i) A description of the types of risks included in the stress test;

(ii) A summary description of the methodologies used in the stress test;

(iii) Estimates of—

(A) Aggregate losses;

(B) Pre-provision net revenue;

(C) Provision for loan and lease losses;

(D) Net income; and

(E) Pro forma regulatory capital ratios and any other capital ratios specified by the Board;

(iv) An explanation of the most significant causes for the changes in regulatory capital ratios; and

(v) With respect to a stress test conducted by an insured depository institution subsidiary of the bank holding company or savings and loan holding company pursuant to section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, changes in regulatory capital ratios and any other capital ratios specified by the Board of the depository institution subsidiary over the planning horizon, including an explanation of the most significant causes for the changes in regulatory capital ratios.

(2) *State member banks that are subsidiaries of bank holding companies.* A state member bank that is a subsidiary of a bank holding company will satisfy the public disclosure requirements under section 165(i)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act when the bank holding company publicly discloses summary results of its stress test pursuant to this section or section 252.148 of this part, unless the Board determines that the disclosures at the holding company level do not adequately capture the potential impact of the scenarios on the capital of the state member bank. In this case, the state member bank must make the same disclosure as required by paragraph (b)(3) of this section.

(3) *State member banks that are not subsidiaries of bank holding companies.* A state member bank that is not a subsidiary of a bank holding company must disclose, at a minimum, the following information regarding the severely adverse scenario:

(i) A description of the types of risks being included in the stress test;

(ii) A summary description of the methodologies used in the stress test;

(iii) Estimates of—

(A) Aggregate losses;

(B) Pre-provision net revenue

(C) Provision for loan and lease losses;

(D) Net income; and

(E) Pro forma regulatory capital ratios and any other capital ratios specified by the Board; and

(iv) An explanation of the most significant causes for the changes in regulatory capital ratios.

(c) *Content of results.* (1) The disclosure of aggregate losses, pre-provision net revenue, provision for loan and lease losses, and net income that is required under paragraph (b) of this section must be on a cumulative basis over the planning horizon.

(2) The disclosure of pro forma regulatory capital ratios and any other capital ratios specified by the Board that is required under paragraph (b) of this section must include the beginning value, ending value and minimum value of each ratio over the planning horizon.

By order of the Board of Governors of the Federal Reserve System, October 5, 2012.

Robert deV. Frierson,

Secretary of the Board.

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Part V

The President

Proclamation 8884—Establishment of the César E. Chávez National Monument

Federal Register
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Presidential Documents

Title 3—

The President

Proclamation 8884 of October 8, 2012

Establishment of the César E. Chávez National Monument

By the President of the United States of America

A Proclamation

The property in Keene, California, known as Nuestra Señora Reina de la Paz (Our Lady Queen of Peace) (La Paz), is recognized for its historic significance to César Estrada Chávez and the farm worker movement. César Chávez is one of the most revered civil rights leaders in the history of the United States. From humble beginnings in Yuma, Arizona, to the founding of the United Farm Workers (UFW) movement, César Chávez knew firsthand the hard work of farm workers in the fields across the United States and their contribution to feeding the Nation. He saw and experienced the difficult conditions and hardships that confronted farm worker families. And through his hard work, perseverance, and personal sacrifice, he dedicated his life to the struggle for respect and dignity for the farm workers of America.

His faith, his passion for nonviolence rooted in the teachings of Dr. Martin Luther King, Jr., and Mohandas Gandhi, and his inspirational leadership are best reflected in his own eloquent words: ''When the man who feeds the world by toiling in the fields is himself deprived of the basic rights of feeding, sheltering, and caring for his own family, the whole community of man is sick.''

La Paz served as the national headquarters of the UFW and the home and workplace of César Chávez, his family, union members, and supporters. It remains the symbol of the movement's most significant achievements and its expanding horizons.

In 1972, the UFW made La Paz its official national headquarters. With existing residential buildings, administrative spaces, maintenance shops, and supporting infrastructure from its former use as a tuberculosis sanatorium, the property supported a new community almost immediately. César Chávez and his family moved to the property, as did a fluctuating population of union employees, members, and supporters.

From the 1970s through César Chávez death in 1993, La Paz was at the forefront of the American farm worker movement. Thousands of farm workers and their supporters from California and across the country streamed through La Paz to meet with movement leaders, learn from other farm workers, devise strategies, negotiate contracts, receive training, volunteer their time, and celebrate meaningful events. Throughout this period, La Paz became a symbol of the accomplishments and broadening of the American farm worker movement.

At La Paz, members of the farm worker movement celebrated such victories as the passage of the Agricultural Labor Relations Act of 1975, the first Federal law recognizing farm workers' collective bargaining rights. At La Paz, the UFW grew and expanded from its early roots as a union for farm workers to become a national voice for the poor and disenfranchised.

For César Chávez, La Paz also provided the respite he needed to continue serving the farm worker movement. His attachment to La Paz as both a refuge and a place where he engaged in his life's work grew stronger over the years.

La Paz was a place where he and other farm worker leaders strategized and reflected on challenges the union was facing, celebrated victories and mourned losses, and watched the union endure and modernize. The building that is now the Visitor Center contains César Chávez's office (which still houses original furnishings and artifacts), as well as the UFW legal aid offices. La Paz also was a place where he watched his children grow up, marry, and begin to raise children of their own. The home of César and Helen Chávez remains at La Paz. That César Chávez wished to be buried at La Paz upon his death is an enduring testament to the strength of his association with the property. The Chávez Memorial Garden contains the grave site of César Chávez. Other buildings and structures at the La Paz campus, which is listed in the National Register of Historic Places and designated a National Historic Landmark, are recognized as contributing to its historic significance.

This site marks the extraordinary achievements and contributions to the history of the United States made by César Chávez and the farm worker movement that he led with great vision and fortitude. La Paz reflects his conviction that ordinary people can do extraordinary things.

Whereas section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431) (the ''Antiquities Act''), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected;

Whereas Nuestra Señora Reina de la Paz was designated a National Historic Landmark on October 8, 2012, establishing its national significance based on its association with César Chávez and the farm worker movement that he led;

Whereas the National Chávez Center and the César Chávez Foundation have expressed support for establishing a unit of the National Park System at La Paz;

Whereas the National Chávez Center has donated to the United States certain lands and interests in lands at La Paz (including fee title in the Visitor Center that contains the office of César Chávez and legal aid offices, César Chávez's home, and the Memorial Garden that includes the grave of César Chávez, as well as an easement for the protection of and access to other historically significant buildings, structures, and associated landscapes located adjacent to the fee lands) for administration by the Secretary of the Interior (Secretary) in accordance with the provisions of the Antiquities Act and other applicable laws;

Whereas it is in the public interest to preserve the historic objects at La Paz;

NOW, THEREFORE, I, BARACK OBAMA, President of the United States of America, by the authority vested in me by section 2 of the Antiquities Act hereby proclaim, set apart, and reserve as the César E. Chávez National Monument (monument) the objects identified above and all lands and interests in lands owned or controlled by the Government of the United States within the boundaries described on the accompanying map, which is attached to and forms a part of this proclamation. These reserved Federal lands and interests in lands encompass approximately 10.5 acres, together with appurtenant easements for all necessary purposes, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, leasing, or other disposition under the public lands

laws, including withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing.

The establishment of this monument is subject to valid existing rights. Lands and interests in lands within the monument's boundaries not owned or controlled by the United States shall be reserved as part of the monument upon acquisition of ownership or control by the United States.

The Secretary shall manage the monument through the National Park Service, pursuant to applicable legal authorities, consistent with the purposes and provisions of this proclamation. For the purpose of preserving, restoring, and enhancing the public visitation and appreciation of the monument, the Secretary shall prepare a management plan for the monument within 3 years of the date of this proclamation. The management plan will ensure that the monument fulfills the following purposes for the benefit of present and future generations: (1) to preserve the historic resources; (2) to commemorate the life and work of César Chávez; and (3) to interpret the struggles and achievements of the broader farm worker movement throughout the United States. The management plan shall, among other provisions, set forth the desired relationship of the monument to other related resources, programs, and organizations at La Paz, as well as at other sites significant to the farm worker movement, such as the Forty Acres National Historic Landmark site and the Filipino Community Hall in Delano, California, the Santa Rita Center in Phoenix, Arizona, and McDonnell Hall in San Jose, California, including march routes. The management planning process shall provide for maximum public involvement, including consultation with the National Chávez Center and the César Chávez Foundation, and shall identify steps to be taken to provide interpretive opportunities for the entirety of the National Historic Landmark District at La Paz and related sites as described above, where appropriate for a broader understanding of the farm worker movement.

The National Park Service shall consult with the National Chávez Center, the César Chávez Foundation, and other appropriate organizations in planning for interpretation and visitor services at the monument. The National Park Service shall, in its interpretive programming, recognize the contributions of many people, cultures, and organizations to the farm worker movement, such as women, youth, and religious organizations. To the extent practicable and appropriate, the National Park Service shall seek to provide coordinated visitor services and interpretive opportunities with the National Chávez Center throughout the La Paz site, on property owned and managed by the National Chávez Center as well as on property administered by the National Park Service. The National Park Service is directed to use applicable authorities to seek to enter into agreements with the National Chávez Center to address common interests, including provision of visitor services, interpretation and education, establishment and care of museum collections, and care of historic resources.

Further, to the extent authorized by law, the Secretary shall promulgate any additional regulations needed for the proper care and management of the monument.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the monument shall be the dominant reservation.

Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of October, 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.

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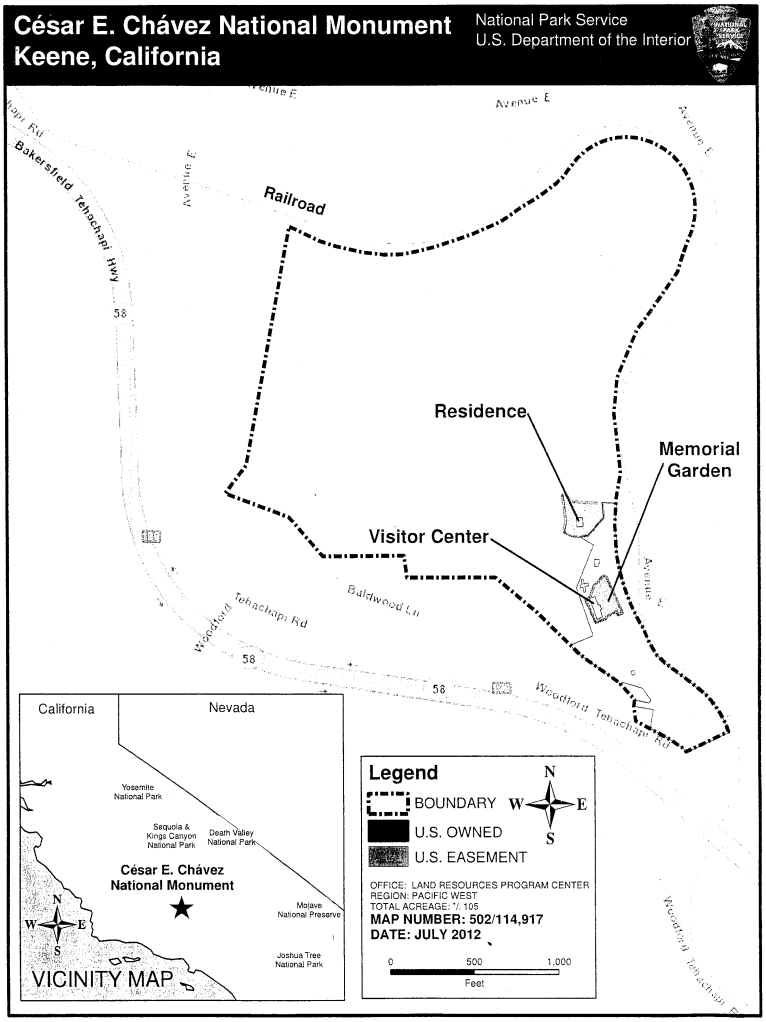

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Minnesota Chippewa Tribe Judgment Fund Distribution Act of 2012 (Oct. 5, 2012; 126 Stat. 1411)

H.R. 1791/P.L. 112–180
To designate the United States courthouse under construction at 101 South United States Route 1 in Fort Pierce, Florida, as the ''Alto Lee Adams, Sr., United States Courthouse''. (Oct. 5, 2012; 126 Stat. 1415)

H.R. 2139/P.L. 112–181
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To designate the new United States courthouse in Buffalo, New York, as the ''Robert H. Jackson United States Courthouse''. (Oct. 5, 2012; 126 Stat. 1424)

H.R. 4158/P.L. 112–185
To confirm full ownership rights for certain United States astronauts to artifacts from the astronauts' space missions. (Oct. 5, 2012; 126 Stat. 1425)

H.R. 4223/P.L. 112–186
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H.R. 4347/P.L. 112–187
To designate the United States courthouse located at 709 West 9th Street in Juneau, Alaska, as the ''Robert Boochever United States Courthouse''. (Oct. 5, 2012; 126 Stat. 1432)

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To amend the Trademark Act of 1946 to correct an error in the provisions relating to remedies for dilution. (Oct. 5, 2012; 126 Stat. 1436)

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91 VA Major Construction Authorization and Expiring Authorities Extension Act of 2012 (Oct. 5, 2012; 126 Stat. 1437)

H.R. 6431/P.L. 112–192
To provide flexibility with respect to United States support for assistance provided by international financial institutions for Burma, and for other purposes. (Oct. 5, 2012; 126 Stat. 1441)

H.R. 6433/P.L. 112–193
FDA User Fee Corrections Act of 2012 (Oct. 5, 2012; 126 Stat. 1443)

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