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WHEN: Tuesday, October 23, 2012
9 a.m.–12:30 p.m.

WHERE: Office of the Federal Register
Conference Room, Suite 700
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Washington, DC 20002

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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 25

[Docket No. FAA–2012–1120; Special Conditions No. 25–471–SC]

Special Conditions: Airbus Model A318, A319, A320, and A321 Series Airplanes; Design Roll Maneuver Conditions

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet). These airplanes will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include electronic flight controls that affect maneuvering. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is October 11, 2012. We must receive your comments by December 3, 2012.

ADDRESSES: Send comments identified by docket number FAA–2012–1120 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m. and 5 p.m., Monday through Friday, except federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Todd Martin, FAA, Airframe/Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1178; facsimile 425–227–1232.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On April 8, 2010, Airbus applied for a change to Type Certificate No. A28NM to include modification 160500 on Airbus Model A318, A319, and A320 series airplanes and modification 160023 on Model A321 series airplanes for the installation of a ''Sharklet,'' a large wingtip device. The Model A318, A319, A320, and A321 series airplanes are short to medium-range, twin turbofan, transport category airplanes with a maximum seating capacity of 136 to 220 passengers, a maximum takeoff weight of 130,071 to 205,027 pounds, and a maximum operating altitude of 39,800 feet.

FAA issued special conditions 25–ANM–23, effective December 15, 1988, originally applicable to Airbus Model A320 series airplanes and later to the Model A318, A319, and A321 series airplanes. Those special conditions included requirements for design roll maneuver conditions. The FAA has determined that new special conditions are needed for the Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet) and later derivatives because the existing special conditions have evolved over the years and need to be updated for this derivative program.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulation (14 CFR) 21.101, Airbus must show that the Model A318, A319, A320, and A321 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A28NM or the applicable

regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in Type Certificate No. A28NM are 14 CFR part 25, as amended by Amendments 25–1 through 25–56, and special conditions 25–ANM–23. In addition, the certification basis includes certain special conditions, exemptions, or later amended sections of the applicable part that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model A318, A319, A320, and A321 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model.

In addition to the applicable airworthiness regulations and special conditions, the Model A318, A319, A320, and A321 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet) will incorporate the following novel or unusual design feature: Electronic flight controls that affect maneuvering.

The current design roll maneuver requirement in 14 CFR part 25 is inadequate for addressing an aircraft with electronic flight controls that affect maneuvering. Special conditions are needed to adjust the current roll maneuver requirement in § 25.349(a) to take into account the effects of an electronic flight control system.

Discussion

Current part 25 airworthiness regulations account for control laws for which aileron deflection is proportional to control stick deflection. They do not address any nonlinearities or other effects on aileron actuation that may be caused by electronic flight controls. Since this type of system may affect flight loads, and therefore the structural capability of the airplane, specific regulations are needed to address these effects.

These proposed special conditions differ from current requirements in that they require that the roll maneuver be performed by actuation of the cockpit roll control as opposed to the aileron itself. Also, the proposed special conditions require an additional load condition at V_A, in which the cockpit roll control is returned to neutral following the initial roll input.

Applicability

As discussed above, these special conditions are applicable to the Airbus Model A318, A319, A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet). Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on the model series of airplanes listed above. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 with modification 160023 (Sharklet) series airplanes.

Design Roll Maneuver Conditions. The following conditions, speeds, and cockpit roll control motions (except as the motions may be limited by pilot effort) must be considered in combination with an airplane load factor of zero and of two-thirds of the positive maneuvering factor used in design. In determining the resulting control surface deflections, the torsional flexibility of the wing must be considered in accordance with § 25.301(b):

1. Conditions corresponding to steady rolling velocities must be investigated. In addition, conditions corresponding to maximum angular acceleration must be investigated for airplanes with engines or other weight concentrations outboard of the fuselage. For the angular acceleration conditions, zero rolling velocity may be assumed in the absence of a rational time history investigation of the maneuver.

2. At V_A, sudden movement of the cockpit roll control up to the limit is assumed. The position of the cockpit roll control must be maintained until a steady roll rate is achieved and then must be returned suddenly to the neutral position.

3. At V_C, the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than that obtained in paragraph 2.

4. At V_D, the cockpit roll control must be moved suddenly and maintained so as to achieve a roll rate not less than one third of that obtained in paragraph 2.

Issued in Renton, Washington, on October 11, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25606 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–1118; Special Conditions No. 25–469–SC]

Special Conditions: Airbus Model A318, A319, A320, and A321 Series Airplanes; Interaction of Systems and Structures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet). These airplanes will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. The design features are associated with the systems that affect the structural performance of the airplane. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for these design features. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is October 11, 2012. We must receive your comments by December 3, 2012.

ADDRESSES: Send comments identified by docket number FAA–2012–1118 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 8 a.m. and 5 p.m., Monday through Friday, except federal holidays.
- *Fax:* Fax comments to Docket Operations at 202–493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov/,* including any personal information the commenter provides. Using the search function of the docket Web site, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov/.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Todd Martin, FAA, Airframe/Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1178; facsimile 425–227–1232.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On April 8, 2010, Airbus applied for a change to Type Certificate No. A28NM to include modification 160500 on Airbus Model A318, A319, and A320 series airplanes and modification 160023 on Model A321 series airplanes for the installation of a ''Sharklet,'' a large wingtip device. The Model A318, A319, A320, and A321 series airplanes are short to medium-range, twin turbofan, transport category airplanes with a maximum seating capacity of 136 to 220 passengers, a maximum takeoff weight of 130,071 to 205,027 pounds, and a maximum operating altitude of 39,800 feet.

FAA issued special conditions 25–ANM–23, effective December 15, 1988, originally applicable to Airbus Model A320 series airplanes and later to the Model A318, A319, and A321 series airplanes. Those special conditions included requirements for interactions of systems and structures. Airbus requested, and FAA agrees, that these special conditions be updated for the Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet) and later derivatives to be consistent with the latest European Aviation Safety Standards (EASA) standards and the latest versions of the FAA special conditions issued on this subject.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulation (14 CFR) 21.101, Airbus must show that the Model A318, A319, A320, and A321 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A28NM or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in Type Certificate No. A28NM are 14 CFR part 25, as amended by Amendments 25–1 through 25–56, and special conditions 25–ANM–23. In addition, the certification basis includes certain special conditions, exemptions, or later amended sections of the applicable part that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model A318, A319, A320, and A321 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to

include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model.

In addition to the applicable airworthiness regulations and special conditions, the Model A318, A319, A320, and A321 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet) will incorporate the following novel or unusual design features: Systems that, directly or as a result of failure or malfunction, affect structural performance. These systems include flight control systems, autopilots, stability augmentation systems, load alleviation systems, fuel management systems, and other sytems.

Discussion

These airplanes are equipped with systems that, directly or as a result of failure or malfunction, affect its structural performance. Current regulations do not take into account loads for the aircraft due to the effects of systems on structural performance including normal operation and failure conditions with strength levels related to probability of occurrence. These special conditions define criteria to be used in the assessment of the effects of these systems on structures.

Applicability

As discussed above, these special conditions are applicable to the Airbus Model A318, A319, A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet). Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design features, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on the model series of airplanes listed above. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 with modification 160023 (Sharklet) series airplanes.

1. General

For airplanes equipped with systems that affect structural performance, either directly or as a result of a failure or malfunction, the influence of these systems and their failure conditions must be taken into account when showing compliance with the requirements of 14 CFR part 25 subparts C and D. The following criteria must be used for showing compliance with these special conditions for airplanes equipped with flight control systems, autopilots, stability augmentation systems, load alleviation systems, fuel management systems, and other systems that either directly or as a result of failure or malfunction affect structural performance. If these special conditions are used for other systems, it may be necessary to adapt the criteria to the specific system.

(a) The criteria defined herein only address the direct structural consequences of the system responses and performances and cannot be considered in isolation but should be included in the overall safety evaluation of the airplane. These criteria may in some instances duplicate standards already established for this evaluation. These criteria are only applicable to structure whose failure could prevent continued safe flight and landing. Specific criteria that define acceptable limits on handling characteristics or stability requirements when operating in the system degraded or inoperative mode are not provided in these special conditions.

(b) Depending upon the specific characteristics of the airplane, additional studies may be required that go beyond the criteria provided in these special conditions in order to demonstrate the capability of the airplane in meeting other realistic conditions such as alternative gust or maneuver descriptions for an airplane equipped with a load alleviation system.

(c) The following definitions are applicable to these special conditions:

Structural performance: Capability of the airplane to meet the structural requirements of 14 CFR part 25.

Flight limitations: Limitations that can be applied to the airplane flight conditions following an in-flight occurrence and that are included in the flight manual (e.g., speed limitations, avoidance of severe weather conditions, etc.).

Operational limitations: Limitations, including flight limitations, that can be applied to the airplane operating conditions before dispatch (e.g., fuel, payload and Master Minimum Equipment List limitations).

Probabilistic terms: The probabilistic terms (probable, improbable, extremely improbable) used in these special conditions are the same as those used in § 25.1309.

Failure condition: The term failure condition is the same as that used in § 25.1309, however, these special conditions apply only to system failure conditions that affect the structural performance of the airplane (e.g., system failure conditions that induce loads, change the response of the airplane to inputs such as gusts or pilot actions, or lower flutter margins).

2. Effects of Systems on Structures

The following criteria will be used in determining the influence of a system and its failure conditions on the airplane structure.

(a) *System fully operative.* With the system fully operative, the following apply:

(1) Limit loads must be derived in all normal operating configurations of the system from all the limit conditions

specified in Subpart C (or defined by special condition or equivalent level of safety in lieu of those specified in Subpart C), taking into account any special behavior of such a system or associated functions or any effect on the structural performance of the airplane that may occur up to the limit loads. In particular, any significant nonlinearity (rate of displacement of control surface, thresholds, or any other system nonlinearities) must be accounted for in a realistic or conservative way when deriving limit loads from limit conditions.

(2) The airplane must meet the strength requirements of part 25 (static strength, residual strength), using the specified factors to derive ultimate loads from the limit loads defined above. The effect of nonlinearities must be investigated beyond limit conditions to ensure the behavior of the system presents no anomaly compared to the behavior below limit conditions. However, conditions beyond limit conditions need not be considered when it can be shown that the airplane has design features that will not allow it to exceed those limit conditions.

(3) The airplane must meet the aeroelastic stability requirements of § 25.629.

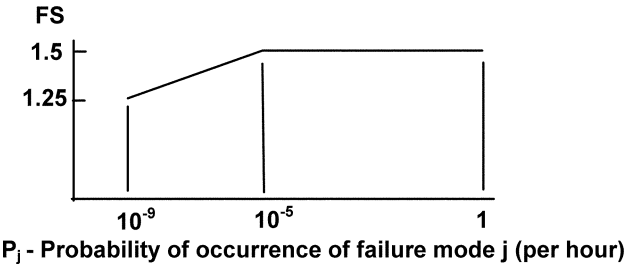
(b) *System in the failure condition.* For any system failure condition not shown to be extremely improbable, the following apply:

(1) At the time of occurrence, starting from 1-g level flight conditions, a realistic scenario, including pilot corrective actions, must be established to determine the loads occurring at the time of failure and immediately after failure.

(i) For static strength substantiation, these loads, multiplied by an appropriate factor of safety that is related to the probability of occurrence of the failure, are ultimate loads to be considered for design. The factor of safety (FS) is defined in Figure 1.

Figure 1

Factor of safety at the time of occurrence



(ii) For residual strength substantiation, the airplane must be able to withstand two thirds of the ultimate loads defined in subparagraph 2(b)(1)(i). For pressurized cabins, these loads must be combined with the normal operating differential pressure.

(iii) Freedom from aeroelastic instability must be shown up to the speeds defined in § 25.629(b)(2). For failure conditions that result in speeds beyond V_C/M_C, freedom from aeroelastic instability must be shown to increased speeds, so that the margins intended by § 25.629(b)(2) are maintained.

(iv) Failures of the system that result in forced structural vibrations (oscillatory failures) must not produce loads that could result in detrimental deformation of primary structure.

(2) For the continuation of the flight. For the airplane, in the system failed state and considering any appropriate reconfiguration and flight limitations, the following apply:

(i) The loads derived from the following conditions (or defined by special condition or equivalent level of safety in lieu of the following conditions) at speeds up to V_C/M_C, or the speed limitation prescribed for the remainder of the flight, must be determined:

(A) The limit symmetrical maneuvering conditions specified in § 25.331 and in § 25.345.

(B) The limit gust and turbulence conditions specified in § 25.341 and in § 25.345.

(C) The limit rolling conditions specified in § 25.349 and the limit unsymmetrical conditions specified in § 25.367 and § 25.427(b) and (c).

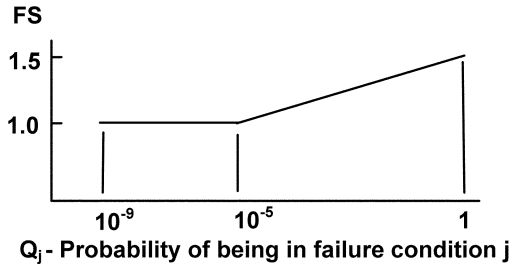
(D) The limit yaw maneuvering conditions specified in § 25.351.

(E) The limit ground loading conditions specified in §§ 25.473 and 25.491.

(ii) For static strength substantiation, each part of the structure must be able to withstand the loads in paragraph 2(b)(2)(i) of the special conditions multiplied by a factor of safety depending on the probability of being in this failure state. The factor of safety is defined in Figure 2.

Figure 2

Factor of safety for continuation of flight



$Q_j = (T_j)(P_j)$

Where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

Note: If P_j is greater than 10^{-3} per flight hour, then a 1.5 factor of safety must be applied to all limit load conditions specified in Subpart C.

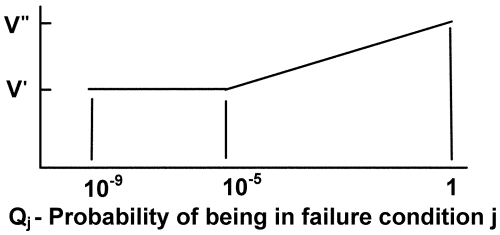
(iii) For residual strength substantiation, the airplane must be able to withstand two thirds of the ultimate loads defined in paragraph 2(b)(2)(ii) of the special conditions. For pressurized cabins, these loads must be combined with the normal operating differential pressure.

(iv) If the loads induced by the failure condition have a significant effect on fatigue or damage tolerance then their effects must be taken into account.

(v) Freedom from aeroelastic instability must be shown up to a speed determined from Figure 3. Flutter clearance speeds V′ and V″ may be based on the speed limitation specified for the remainder of the flight using the margins defined by § 25.629(b).

Figure 3

Clearance speed



V′ = Clearance speed as defined by § 25.629(b)(2).

V″ = Clearance speed as defined by § 25.629(b)(1).

$Q_j = (T_j)(P_j)$ where:

T_j = Average time spent in failure condition j (in hours)

P_j = Probability of occurrence of failure mode j (per hour)

Note: If P_j is greater than 10^{-3} per flight hour, then the flutter clearance speed must not be less than V″.

(vi) Freedom from aeroelastic instability must also be shown up to V′ in Figure 3 above, for any probable system failure condition combined with any damage required or selected for investigation by § 25.571(b).

(3) Consideration of certain failure conditions may be required by other sections of 14 CFR part 25 regardless of calculated system reliability. Where analysis shows the probability of these failure conditions to be less than 10^{-9}, criteria other than those specified in this paragraph may be used for structural substantiation to show continued safe flight and landing.

(c) *Failure indications.* For system failure detection and indication, the following apply:

(1) The system must be checked for failure conditions, not extremely improbable, that degrade the structural capability below the level required by part 25 or significantly reduce the reliability of the remaining system. As far as reasonably practicable, the flight crew must be made aware of these failures before flight. Certain elements of the control system, such as mechanical and hydraulic components, may use special periodic inspections, and electronic components may use daily checks, in lieu of detection and indication systems to achieve the objective of this requirement. These certification maintenance requirements must be limited to components that are not readily detectable by normal detection and indication systems and where service history shows that inspections will provide an adequate level of safety.

(2) The existence of any failure condition, not extremely improbable, during flight that could significantly affect the structural capability of the airplane and for which the associated reduction in airworthiness can be minimized by suitable flight limitations, must be signaled to the flight crew. For example, failure conditions that result in a factor of safety between the airplane strength and the loads of subpart C below 1.25, or flutter margins below V″, must be signaled to the crew during flight.

(d) *Dispatch with known failure conditions.* If the airplane is to be

dispatched in a known system failure condition that affects structural performance, or affects the reliability of the remaining system to maintain structural performance, then the provisions of these special conditions must be met, including the provisions of paragraph 2(a) for the dispatched condition, and paragraph 2(b) for subsequent failures. Expected operational limitations may be taken into account in establishing P_j as the probability of failure occurrence for determining the safety margin in Figure 1. Flight limitations and expected operational limitations may be taken into account in establishing Q_j as the combined probability of being in the dispatched failure condition and the subsequent failure condition for the safety margins in Figures 2 and 3. These limitations must be such that the probability of being in this combined failure state and then subsequently encountering limit load conditions is extremely improbable. No reduction in these safety margins is allowed if the subsequent system failure rate is greater than 10^{-3} per hour.

Issued in Renton, Washington, on October 11, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25604 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. FAA–2012–1119; Special Conditions No. 25–470–SC]

Special Conditions: Airbus Model A318, A319, A320, and A321 Series Airplanes; Design Dive Speed

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final special conditions; request for comments.

SUMMARY: These special conditions are issued for the Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet). These airplanes will have novel or unusual design features when compared to the state of technology envisioned in the airworthiness standards for transport category airplanes. These design features include a high-speed protection system. The applicable airworthiness regulations do not contain adequate or appropriate safety standards for this design feature. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

DATES: The effective date of these special conditions is October 11, 2012. We must receive your comments by December 3, 2012.

ADDRESSES: Send comments identified by docket number FAA–2012–1119 using any of the following methods:

- *Federal eRegulations Portal:* Go to *http://www.regulations.gov/* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30, U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12–140, West Building Ground Floor, Washington, DC, 20590–0001.
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Docket: Background documents or comments received may be read at *http://www.regulations.gov/* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Todd Martin, FAA, Airframe/Cabin Safety Branch, ANM–115, Transport Airplane Directorate, Aircraft Certification Service, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone 425–227–1178; facsimile 425–227–1232.

SUPPLEMENTARY INFORMATION: The FAA has determined that notice of, and opportunity for prior public comment on, these special conditions are impracticable because these procedures would significantly delay issuance of the design approval and thus delivery of the affected aircraft. In addition, the substance of these special conditions has been subject to the public comment process in several prior instances with no substantive comments received. The FAA therefore finds that good cause exists for making these special conditions effective upon issuance.

Comments Invited

We invite interested people to take part in this rulemaking by sending written comments, data, or views. The most helpful comments reference a specific portion of the special conditions, explain the reason for any recommended change, and include supporting data.

We will consider all comments we receive by the closing date for comments. We may change these special conditions based on the comments we receive.

Background

On April 8, 2010, Airbus applied for a change to Type Certificate No. A28NM to include modification 160500 on Airbus Model A318, A319, and A320 series airplanes and modification 160023 on Model A321 series airplanes for the installation of a ''Sharklet,'' a large wingtip device. The Model A318, A319, A320, and A321 series airplanes are short to medium-range, twin turbofan, transport category airplanes with a maximum seating capacity of 136 to 220 passengers, a maximum takeoff weight of 130,071 to 205,027 pounds, and a maximum operating altitude of 39,800 feet.

FAA issued special conditions 25–ANM–23, effective December 15, 1988, originally applicable to Airbus Model A320 series airplanes and later to the Model A318, A319, and A321 series airplanes. Those special conditions included revised requirements for dive speed based on incorporation of high-speed protection in the fight control laws. The FAA has determined that new special conditions are needed for the Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet) and later derivatives because the existing special conditions have evolved over the years and need to be updated for this derivative program.

Type Certification Basis

Under the provisions of Title 14, Code of Federal Regulation (14 CFR) 21.101, Airbus must show that the Model A318, A319, A320, and A321 series airplanes, as changed, continue to meet the applicable provisions of the regulations incorporated by reference in Type Certificate No. A28NM or the applicable regulations in effect on the date of application for the change. The regulations incorporated by reference in the type certificate are commonly referred to as the ''original type certification basis.'' The regulations incorporated by reference in Type Certificate No. A28NM are 14 CFR part 25, as amended by Amendments 25–1 through 25–56, and special conditions 25–ANM–23. In addition, the certification basis includes certain special conditions, exemptions, or later amended sections of the applicable part that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., 14 CFR part 25) do not contain adequate or appropriate safety standards for the Model A318, A319, A320, and A321 series airplanes because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16.

Special conditions are initially applicable to the model for which they are issued. Should the type certificate for that model be amended later to include any other model that incorporates the same novel or unusual design feature, or should any other model already included on the same type certificate be modified to incorporate the same novel or unusual design feature, the special conditions would also apply to the other model.

In addition to the applicable airworthiness regulations and special conditions, the Model A318, A319, A320, and A321 series airplanes must comply with the fuel vent and exhaust emission requirements of 14 CFR part 34 and the noise certification requirements of 14 CFR part 36.

The FAA issues special conditions, as defined in 14 CFR 11.19, in accordance with § 11.38, and they become part of the type-certification basis under § 21.101.

Novel or Unusual Design Features

The Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet) will incorporate the following novel or unusual design feature: A high-speed protection system that limits nose-down pilot authority at speeds above V_C/M_C. This system prevents the airplane from performing the maneuver required under § 25.335(b)(1).

Discussion

Section 25.335(b)(1) is an analytical envelope condition that was originally adopted in part 4b of the Civil Air Regulations in order to provide an acceptable speed margin between design cruise speed and design dive speed. Flutter clearance design speeds and airframe design loads are impacted by the design dive speed. While the initial condition for the upset specified in the rule is 1g level flight, protection is afforded for other inadvertent overspeed conditions as well. Section 25.335(b)(1) is intended as a conservative enveloping condition for potential overspeed conditions, including non-symmetric ones. To establish that potential overspeed conditions are enveloped, the applicant should demonstrate that any reduced speed margin, based on the high-speed protection system in the Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet), will not be exceeded in inadvertent, or gust-induced, upsets resulting in initiation of the dive from non-symmetric attitudes; or that the airplane is protected by the flight control laws from getting into non-symmetric upset conditions. The applicant should conduct a demonstration that includes a comprehensive set of conditions, as described below.

These special conditions are proposed in lieu of § 25.335(b)(1). Section 25.335(b)(2), which also addresses the design dive speed, is applied separately. Advisory Circular (AC) 25.335–1A provides an acceptable means of compliance to § 25.335(b)(2)).

Special conditions are necessary to address the high-speed protection system on the Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet). The proposed special conditions identify various symmetric and non-symmetric maneuvers that will ensure that an appropriate design dive speed, V_D/M_D, is established.

These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

Applicability

As discussed above, these special conditions are applicable to the Airbus Model A318, A319, A320 series airplanes with modification 160500 and Model A321 series airplanes with modification 160023 (Sharklet). Should Airbus apply at a later date for a change to the type certificate to include another model incorporating the same novel or unusual design feature, the special conditions would apply to that model as well.

Conclusion

This action affects only certain novel or unusual design features on the model series of airplanes listed above. It is not a rule of general applicability.

The substance of these special conditions has been subjected to the notice and comment period in several prior instances and has been derived without substantive change from those previously issued. It is unlikely that prior public comment would result in a significant change from the substance contained herein. Therefore, because a delay would significantly affect the certification of the airplane, which is imminent, the FAA has determined that prior public notice and comment are unnecessary and impracticable, and good cause exists for adopting these special conditions upon issuance. The FAA is requesting comments to allow interested persons to submit views that may not have been submitted in response to the prior opportunities for comment described above.

List of Subjects in 14 CFR Part 25

Aircraft, Aviation safety, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701, 44702, 44704.

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for Airbus Model A318, A319, and A320 series airplanes with modification 160500 and Model A321 with modification 160023 (Sharklet) series airplanes.

1. Design Dive Speed. In lieu of compliance with § 25.335(b)(1), if the flight control system includes functions that act automatically to initiate recovery before the end of the 20 second period specified in § 25.335(b)(1), V_D/M_D must be determined from the greater of the speeds resulting from conditions (a) and (b) below. The speed increase occurring in these maneuvers may be calculated if reliable or conservative aerodynamic data are used.

(a) From an initial condition of stabilized flight at V_C/M_C, the airplane is upset so as to take up a new flight path 7.5 degrees below the initial path. Control application, up to full authority, is made to try and maintain this new flight path. Twenty seconds after initiating the upset, manual recovery is made at a load factor of 1.5 g (0.5 acceleration increment), or such greater load factor that is automatically applied by the system with the pilot's pitch control neutral. Power, as specified in § 25.175(b)(1)(iv), is assumed until recovery is initiated, at which time power reduction and the use of pilot controlled drag devices may be used.

(b) From a speed below V_C/M_C, with power to maintain stabilized level flight at this speed, the airplane is upset so as to accelerate through V_C/M_C at a flight path 15 degrees below the initial path (or at the steepest nose-down attitude that the system will permit with full control authority if less than 15 degrees). The pilot's controls may be in the neutral position after reaching V_C/M_C and before recovery is initiated. Recovery may be initiated three seconds after operation of high-speed warning system by application of a load of 1.5g (0.5 acceleration increment), or such greater load factor that is automatically applied by the system with the pilot's pitch control neutral. Power may be reduced simultaneously. All other means of decelerating the airplane, the use of which is authorized up to the highest speed reached in the maneuver, may be used. The interval between successive pilot actions must not be less than one second.

2. The applicant must also demonstrate that the speed margin, established as above, will not be exceeded in inadvertent or gust-induced upsets resulting in initiation of the dive from non-symmetric attitudes, unless the airplane is protected by the flight control laws from getting into non-symmetric upset conditions. The upset maneuvers described in AC 25–7B, Change 1, section 32, paragraphs c(3)(a) and (c) may be used to comply with this requirement.

3. Detected loss of the high-speed protection function must be less than 10^{-3} per flight hour.

4. Failures of the system must be annunciated to the pilots. Flight manual instructions must be provided that reduce the maximum operating speeds. The new operating speeds, V_{max}/M_{max}, must be reduced to a value that maintains a speed margin between these speeds and V_D/M_D that is consistent with showing compliance with § 25.335(b) without the benefit of the high-speed protection system.

5. Dispatch of the airplane with the high-speed protection system inoperative could be allowed under an approved minimum equipment list that would require flight manual instructions to indicate reduced maximum operating speeds, as described in paragraph (4). In addition, the cockpit display of the reduced operating speeds, as well as the overspeed warning for exceeding those speeds, must be equivalent to that of the normal airplane with the high-speed protection system operative. Also, it must be shown that no additional hazards are introduced with the high-speed protection system inoperative.

Issued in Renton, Washington, on October 11, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25605 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 10, 24, 162, 163, and 178

[USCBP–2011–0043; CBP Dec. 12–18]

RIN 1515–AD79

United States-Peru Trade Promotion Agreement

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

ACTION: Final rule.

SUMMARY: This document adopts as a final rule, with one change, interim amendments to the U.S. Customs and Border Protection (CBP) regulations which were published in the **Federal Register** on November 3, 2011, as CBP Dec. 11–22, to implement the preferential tariff treatment and other customs-related provisions of the United States-Peru Trade Promotion Agreement.

DATES: Final rule effective November 19, 2012.

FOR FURTHER INFORMATION CONTACT:

Textile Operational Aspects: Nancy Mondich, Trade Policy and Programs, Office of International Trade, (202) 863–6524.

Other Operational Aspects: Katrina Chang, Trade Policy and Programs, Office of International Trade, (202) 863–6532.

Legal Aspects: Karen Greene, Regulations and Rulings, Office of International Trade, (202) 325–0041.

SUPPLEMENTARY INFORMATION:

Background

On November 3, 2011, CBP published CBP Dec. 11–22 in the **Federal Register** (76 FR 68067) setting forth interim amendments to implement the preferential tariff treatment and other customs-related provisions of the United States-Peru Trade Promotion Agreement (PTPA). Please refer to that document for further background information. In order to provide transparency and facilitate their use, the majority of the PTPA implementing regulations set forth in that interim rule and adopted as final in this document have been included within Subpart Q in Part 10 of the CBP regulations (19 CFR Part 10). However, in those cases in which PTPA implementation is more appropriate in the context of an existing regulatory provision, the PTPA regulatory text has been incorporated in an existing Part within the CBP regulations. CBP Dec. 11–22 also set forth a number of cross-references and other consequential changes to existing regulatory provisions to clarify the relationship between those existing provisions and the new PTPA implementing regulations.

Although the interim regulatory amendments were promulgated without prior public notice and comment procedures and took effect on November 3, 2011, CBP Dec. 11–22 provided for the submission of public comments which would be considered before adoption of the interim regulations as a final rule, and the prescribed public comment closed on January 3, 2012. CBP received no comments.

Conclusion

After further review of the matter, and in light of the fact that no comments were submitted in response to CBP's solicitation of public comment, CBP has determined to adopt as final, with a technical correction, the interim rule published in the **Federal Register** (76 FR 68067) on November 3, 2011. The technical correction is made to § 10.918(c)(1)(ii) to reflect amendments to additional U.S. Note 4(d) to subchapter XXI of chapter 98 of the Harmonized Tariff Schedule of the United States (HTSUS) effected by Presidential Proclamation 8240 of April 17, 2008, whereby the tariff numbers of subheading ''5402.19.30,'' and subheading ''5402.19.60'' were added. As CBP Dec. 11–22 inadvertently omitted inclusion of these two tariff numbers within 19 CFR 10.918(c)(1)(ii),

the technical correction is necessary to conform the CBP regulations to the current version of the HTSUS.

Executive Order 12866

This document is not a regulation subject to the provisions of Executive Order 12866 of September 30, 1993 (58 FR 51735, October 1993), because it pertains to a foreign affairs function of the United States and implements an international agreement, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866.

Regulatory Flexibility Act

CBP Dec. 11–22 was issued as an interim rule rather than a notice of proposed rulemaking because CBP had determined that the interim regulations involve a foreign affairs function of the United States pursuant to section 553(a)(1) of the APA. Because no notice of proposed rulemaking was required, the provisions of the Regulatory Flexibility Act, as amended (5 U.S.C. 601 *et seq.*), do not apply. Accordingly, this final rule is not subject to the regulatory analysis requirements or other requirements of 5 U.S.C. 603 and 604.

Paperwork Reduction Act

The collections of information contained in these regulations have previously been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1651–0117. The collections of information in these regulations are in §§ 10.903 and 10.904. This information is required in connection with claims for preferential tariff treatment under the PTPA and the Act and will be used by CBP to determine eligibility for tariff preference under the PTPA and the Act. The likely respondents are business organizations including importers, exporters and manufacturers.

The estimated average annual burden associated with the collection of information in this final rule is 0.2 hours per respondent or recordkeeper. Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Office of Management and Budget, Attention: Desk Officer for the Department of Homeland Security, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of International Trade, U.S. Customs and Border Protection, 799 9th Street NW., 5th Floor, Washington, DC 20229–1179. Under the Paperwork Reduction Act, an agency may not conduct or sponsor, and an individual is not required to respond to, a collection of information unless it displays a valid OMB control number.

Signing Authority

This document is being issued in accordance with § 0.1(a)(1) of the CBP regulations (19 CFR 0.1(a)(1)) pertaining to the authority of the Secretary of the Treasury (or his/her delegate) to approve regulations related to certain CBP revenue functions.

List of Subjects

19 CFR Part 10

Alterations, Bonds, Customs duties and inspection, Exports, Imports, Preference programs, Repairs, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 24

Accounting, Customs duties and inspection, Financial and accounting procedures, Reporting and recordkeeping requirements, Trade agreements, User fees.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Penalties, Trade agreements.

19 CFR Part 163

Administrative practice and procedure, Customs duties and inspection, Exports, Imports, Reporting and recordkeeping requirements, Trade agreements.

19 CFR Part 178

Administrative practice and procedure, Exports, Imports, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

Accordingly, the interim rule amending Parts 10, 24, 162, 163, and 178 of the CBP regulations (19 CFR Parts 10, 24, 162, 163, and 178), which was published at 76 FR 68067 on November 3, 2011, is adopted as a final rule with one change as discussed above and set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

■ 1. The general authority citation for Part 10 and the specific authority for new Subpart Q continue to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314;

* * * * *

Sections 10.901 through 10.934 also issued under 19 U.S.C. 1202 (General Note 32, HTSUS), 19 U.S.C. 1520(d), and Pub. L. 110–138, 121 Stat. 1455 (19 U.S.C. 3805 note).

§ 10.918 [Amended]

■ 2. In § 10.918, paragraph (c)(1)(ii) is amended by adding, in numerical order, a reference to ''5402.19.30, 5402.19.60,''.

David V. Aguilar,

Deputy Commissioner, U.S. Customs and Border Protection.

Approved: October 15, 2012.

Timothy E. Skud,

Deputy Assistant Secretary of the Treasury.

[FR Doc. 2012–25668 Filed 10–17–12; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Part 12

Special Classes of Merchandise

CFR Correction

In Title 19 of the Code of Federal Regulations, Parts 0 to 140, revised as of April 1, 2012, on page 441, in § 12.112 (a), the words ''(Index of Pesticide Products located in the Environmental Protection Agency's handbook entitled *Recognition and Management of Pesticide Poisonings,* found at *http://www.epa.gov*)'' are corrected to read ''(Environmental Protection Agency Form 3540–1)''.

[FR Doc. 2012–25792 Filed 10–17–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1308

[Docket No. DEA–357]

Schedules of Controlled Substances: Extension of Temporary Placement of Methylone Into Schedule I of the Controlled Substances Act

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final order.

SUMMARY: This Final Order is issued by the Administrator of the Drug Enforcement Administration (DEA) to extend the temporary scheduling of methylone (3,4-methylenedioxy-N-methylcathinone) including its salts,

isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, into Schedule I of the Controlled Substances Act (CSA). The temporary scheduling of methylone is due to expire on October 20, 2012. This document will extend the temporary scheduling of methylone to April 20, 2013, or until rulemaking proceedings are completed, whichever occurs first.

DATES: *Effective Date:* October 18, 2012.

FOR FURTHER INFORMATION CONTACT: Alan G. Santos, Associate Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (202) 307–7165.

SUPPLEMENTARY INFORMATION: On October 21, 2011, the Administrator of the DEA published a Final Order in the **Federal Register** (76 FR 65371) amending 21 CFR 1308.11(g) to temporarily place three synthetic cathinones, namely mephedrone (4-methyl-N-methylcathinone), MDPV (3,4-methylenedioxypyrovalerone) and methylone, into Schedule I of the CSA pursuant to the temporary scheduling provisions of 21 U.S.C. 811(h). That Final Order, which became effective on the date of publication, was based on findings by the Administrator of the DEA that the temporary scheduling of these three synthetic cathinones was necessary to avoid an imminent hazard to the public safety pursuant to 21 U.S.C. 811(h)(1). At the time the Final Order took effect, section 201(h)(2) of the CSA (21 U.S.C. 811(h)(2) (2011)) required that the temporary scheduling of a substance expire at the end of one year from the date of issuance of the order and that during the pendency of proceedings under 21 U.S.C. 811(a)(1) with respect to the substance, the temporary scheduling of that substance could be extended for up to six months.[1] Proceedings for the scheduling of a substance under 21 U.S.C. 811(a) may be initiated by the Attorney General (delegated to the Administrator of the DEA pursuant to 28 CFR 0.100) on his own motion, at the request of the Secretary of Health and Human Services,[2] or on the petition of any interested party.

The DEA has gathered and reviewed the available information regarding the pharmacology, chemistry, trafficking, actual abuse, pattern of abuse and the relative potential for abuse for these three synthetic cathinones. On March 30, 2012, the Administrator of the DEA submitted a letter to the Assistant Secretary for Health of the Department of Health and Human Services, requesting scientific and medical evaluations and scheduling recommendations for these three synthetic cathinones. In response to this letter, on August 14, 2012, the Assistant Secretary provided to DEA a scientific and medical evaluation and recommendation that methylone be placed in Schedule I.[3] Proceedings regarding methylone have been initiated in accordance with 21 U.S.C. 811(a)(1). Therefore, pursuant to 21 U.S.C. 811(h)(2), the Administrator of the DEA hereby orders that the temporary scheduling of methylone, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, is extended to April 20, 2013, or until rulemaking proceedings are completed, whichever occurs first.

In accordance with this Final Order, the Schedule I requirements for handling methylone including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible, will remain in effect until April 20, 2013, or until rulemaking proceedings are completed, whichever occurs first.

Pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act) (5 U.S.C. 801–808), DEA has submitted a copy of this Final Order to both Houses of Congress and to the Comptroller General.

Dated: October 10, 2012.

Michele M. Leonhart,

Administrator.

[FR Doc. 2012–25510 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

[1] On July 9, 2012, President Obama signed the Food and Drug Administration Safety and Innovation Act (Pub. L. 112–144) (FDASIA), which amended section 201(h)(2) of the CSA to extend the timeframes applicable to temporary scheduling.

[2] Because the Secretary of the Department of Health and Human Services has delegated to the Assistant Secretary for Health of the Department of Health and Human Services the authority to make domestic drug scheduling recommendations, for purposes of this Final Order, all subsequent references to ''Secretary'' have been replaced with ''Assistant Secretary.''

[3] Section 1152 of FDASIA controlled mephedrone and MDPV as Schedule I controlled substances, but it did not similarly control methylone. Accordingly, HHS provided a Scientific and Medical Evaluation and Scheduling Recommendation for methylone, recommending that methylone be placed in Schedule I.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

Discharge of Liens; Redemption by United States

CFR Correction

In Title 26 of the Code of Federal Regulations, Parts 300 to 499, revised as of April 1, 2012, on page 563, in § 301.7425–4, in paragraph (b)(5) *Example 1,* at the end of the third sentence, ''$1,000'' is corrected to read ''$100,000''.

[FR Doc. 2012–25795 Filed 10–17–12; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF THE TREASURY

Alcohol and Tobacco Tax and Trade Bureau

27 CFR Part 9

[Docket No. TTB–2012–0003; T.D. TTB–108; Ref: Notice No. 128]

RIN 1513–AB85

Establishment of the Ancient Lakes of Columbia Valley Viticultural Area

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

ACTION: Final rule; Treasury decision.

SUMMARY: The Alcohol and Tobacco Tax and Trade Bureau (TTB) establishes the 162,762-acre ''Ancient Lakes of Columbia Valley'' viticultural area in Douglas, Grant, and Kittitas Counties in central Washington. The viticultural area lies entirely within the larger Columbia Valley viticultural area. TTB designates viticultural areas to allow vintners to better describe the origin of their wines and to allow consumers to better identify wines they may purchase.

DATES: *Effective Date:* November 19, 2012.

FOR FURTHER INFORMATION CONTACT: Karen A. Thornton, Regulations and Rulings Division, Alcohol and Tobacco Tax and Trade Bureau, 1310 G St. NW., Box 12, Washington, DC 20005; phone 202–453–1039, ext. 175.

SUPPLEMENTARY INFORMATION:

Background on Viticultural Areas

TTB Authority

Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations

for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120–01 (Revised), dated January 21, 2003, to the TTB Administrator to perform the functions and duties in the administration and enforcement of this law.

Part 4 of the TTB regulations (27 CFR part 4) allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. Part 9 of the TTB regulations (27 CFR part 9) sets forth standards for the preparation and submission of petitions for the establishment or modification of American viticultural areas and lists the approved American viticultural areas.

Definition

Section 4.25(e)(1)(i) of the TTB regulations (27 CFR 4.25(e)(1)(i)) defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features as described in part 9 of the regulations and a name and a delineated boundary as established in part 9 of the regulations. These designations allow vintners and consumers to attribute a given quality, reputation, or other characteristic of a wine made from grapes grown in an area to its geographic origin. The establishment of viticultural areas allows vintners to describe more accurately the origin of their wines to consumers and helps consumers to identify wines they may purchase. Establishment of a viticultural area is neither an approval nor an endorsement by TTB of the wine produced in that area.

Requirements

Section 4.25(e)(2) of the TTB regulations outlines the procedure for proposing an American viticultural area and provides that any interested party may petition TTB to establish a grape-growing region as a viticultural area. Section 9.12 of the TTB regulations (27 CFR 9.12) prescribes standards for petitions for the establishment or modification of American viticultural areas. Such petitions must include the following:

- Evidence that the area within the proposed viticultural area boundary is nationally or locally known by the viticultural area name specified in the petition;
- An explanation of the basis for defining the boundary of the proposed viticultural area;
- A narrative description of the features of the proposed viticultural area that affect viticulture, such as climate, geology, soils, physical features, and elevation, and that make the proposed viticultural area distinctive and distinguish it from adjacent areas outside the proposed viticultural area boundary;
- A copy of the appropriate United States Geological Survey (USGS) map(s) showing the location of the proposed viticultural area, with the boundary of the proposed viticultural area clearly drawn thereon; and
- A detailed narrative description of the proposed viticultural area boundary based on USGS map markings.

Ancient Lakes of Columbia Valley Petition

TTB received a petition from Joan R. Davenport, a professor of soil sciences at Washington State University, and Cameron Fries of White Heron Cellars, on behalf of the vintners and grape growers in the Ancient Lakes region of central Washington, proposing the establishment of the ''Ancient Lakes of Columbia Valley'' viticultural area. The proposed viticultural area contains 162,762 acres, with 1,399 acres dedicated to 6 commercially-producing vineyards. The petition states that there are also six wineries located within the proposed viticultural area. The petition includes a map showing that the vineyards and wineries are dispersed throughout the proposed viticultural area.

TTB notes that the proposed Ancient Lakes of Columbia Valley viticultural area lies completely within the existing Columbia Valley viticultural area (27 CFR 9.74). The proposed viticultural area does not overlap with any other existing or proposed viticultural areas.

Notice of Proposed Rulemaking and Comments Received

TTB published Notice No. 128 in the **Federal Register** on May 8, 2012 (77 FR 27001), proposing to establish the Ancient Lakes of Columbia Valley viticultural area. In the proposed rule, TTB summarized the evidence from the petition regarding the name, boundary, and distinguishing features for the proposed viticultural area. The distinguishing features of the proposed viticultural area include climate, topography, and soils. The proposed rule contained a comparison of the distinguishing features of the proposed viticultural area with the surrounding regions. Notice No. 128 also contained a comparison of the proposed viticultural area with the existing Columbia Valley viticultural area detailing how the distinguishing features of the proposed viticultural area are consistent with, and distinct from, the established Columbia Valley viticultural area. For a description of the evidence relating to the name, boundary, and distinguishing features of the proposed viticultural area, see Notice No. 128.

In Notice No. 128, TTB solicited comments on the accuracy of the name, boundary, climatic, and other required information submitted in support of the petition. In addition, given the proposed viticultural area's location within the existing Columbia Valley viticultural area, TTB also solicited comments on whether the evidence submitted in the petition regarding the distinguishing features of the proposed viticultural area sufficiently differentiates the proposed viticultural area from the existing Columbia Valley viticultural area. TTB also asked for comments on whether the geographical features of the proposed viticultural area are so distinguishable from the surrounding Columbia Valley viticultural area that the proposed Ancient Lakes of Columbia Valley viticultural area should no longer be part of the existing viticultural area. The comment period closed on July 9, 2012.

In response to Notice No. 128, TTB received a total of three comments regarding the proposed viticultural area: One from Cameron Fries, one of the original petitioners; one from the executive director of a Washington State non-profit wine tourism promotion association; and one from the City Administrator of Quincy, Washington, commenting on his own behalf. All three commenters supported the establishment of the Ancient Lakes of Columbia Valley viticultural area as proposed in Notice No. 128. TTB received no comments in opposition of the Ancient Lakes of Columbia Valley viticultural area as proposed. In regards to the question of whether the Ancient Lakes of Columbia Valley viticultural area was so distinct that it should be separated from the existing Columbia Valley viticultural area, TTB received no comments.

TTB Determination

After careful review of the petition and the comments received in response

to Notice No. 128, TTB finds that the evidence provided by the petitioner supports the establishment of the 162,762-acre Ancient Lakes of Columbia Valley viticultural area within the Columbia Valley viticultural area. Accordingly, under the authority of the FAA Act, section 1111(d) of the Homeland Security Act of 2002, and part 4 of the TTB regulations, TTB establishes the ''Ancient Lakes of Columbia Valley'' viticultural area in Douglas, Grant, and Kittitas Counties, Washington, effective 30 days from the publication date of this document.

Boundary Description

See the narrative boundary description of the viticultural area in the regulatory text published at the end of this final rule.

Maps

The petitioners provided the required maps, and TTB lists them below in the regulatory text.

Impact on Current Wine Labels

Part 4 of the TTB regulations prohibits any label reference on a wine that indicates or implies an origin other than the wine's true place of origin. With the establishment of this viticultural area, its name, ''Ancient Lakes of Columbia Valley,'' is recognized as a name of viticultural significance under 27 CFR 4.39(i)(3), as the text of this regulation makes clear. Once this regulation becomes effective, wine bottlers using ''Ancient Lakes of Columbia Valley'' in a brand name, including a trademark, or in another label reference as to the origin of the wine, will have to ensure that the product is eligible to use the viticultural area's name as an appellation of origin.

The establishment of the Ancient Lakes of Columbia Valley viticultural area will not affect any existing viticultural area, and any bottlers using ''Columbia Valley'' as an appellation of origin or in a brand name for wines made from grapes grown within the Ancient Lakes of Columbia Valley viticultural area will not be affected by the establishment of this new viticultural area. The establishment of the Ancient Lakes of Columbia Valley viticultural area will allow vintners to use ''Ancient Lakes of Columbia Valley'' and ''Columbia Valley'' as appellations of origin for wines made from grapes grown within the Ancient Lakes of Columbia Valley viticultural area.

For a wine to be eligible to use a viticultural area name as an appellation of origin or a term of viticultural significance in a brand name, at least 85 percent of the wine must be derived from grapes grown within the area represented by that name or term, and the wine must meet the other conditions listed in 27 CFR 4.25(e)(3). If the wine is not eligible to use the viticultural area name as an appellation of origin and that name or other term of viticultural significance appears in the brand name, then the label is not in compliance and the bottler must change the brand name and obtain approval of a new label. Similarly, if the viticultural area name or other term of viticultural significance appears in another reference on the label in a misleading manner, the bottler would have to obtain approval of a new label.

Different rules apply if a wine has a brand name containing a viticultural area name or other term of viticultural significance that was used as a brand name on a label approved before July 7, 1986. See 27 CFR 4.39(i)(2) for details.

Regulatory Flexibility Act

TTB certifies that this regulation will not have a significant economic impact on a substantial number of small entities. The regulation imposes no new reporting, recordkeeping, or other administrative requirement. Any benefit derived from the use of a viticultural area name would be the result of a proprietor's efforts and consumer acceptance of wines from that area. Therefore, no regulatory flexibility analysis is required.

Executive Order 12866

This final rule is not a significant regulatory action as defined by Executive Order 12866. Therefore, no regulatory assessment is required.

Drafting Information

Karen A. Thornton of the Regulations and Rulings Division drafted this final rule.

List of Subjects in 27 CFR Part 9

Wine.

The Regulatory Amendment

For the reasons discussed in the preamble, TTB amends title 27, chapter I, part 9, Code of Federal Regulations, as follows:

PART 9—AMERICAN VITICULTURAL AREAS

■ 1. The authority citation for part 9 continues to read as follows:

Authority: 27 U.S.C. 205.

Subpart C—Approved American Viticultural Areas

■ 2. Subpart C is amended by adding § 9.227 to read as follows:

§ 9.227 Ancient Lakes of Columbia Valley.

(a) *Name.* The name of the viticultural area described in this section is ''Ancient Lakes of Columbia Valley''. For purposes of part 4 of this chapter, ''Ancient Lakes of Columbia Valley'' is a term of viticultural significance.

(b) *Approved maps.* The 12 United States Geological Survey (USGS) 1:24,000 scale topographic maps used to determine the boundary of the Ancient Lakes of Columbia Valley viticultural area are titled:

(1) West Bar, Washington, 1966;

(2) Rock Island Dam, Washington, 1966;

(3) Appledale, Washington, 1966, photoinspected 1976;

(4) Monument Hill, Washington—Grant County, 1966;

(5) Ephrata SW., Washington—Grant County, 1956;

(6) Winchester, Washington—Grant County, 1966;

(7) Winchester SW., Washington—Grant County, 1966, photorevised 1978;

(8) Royal City, Washington—Grant County, provisional edition 1986 (formerly named Smyrna);

(9) Beverly NE., Washington—Grant County, 1965;

(10) Vantage, Washington, 1965, photorevised 1978;

(11) Ginkgo, Washington, 1953, photorevised 1978; and

(12) Cape Horn SE., Washington, 1966, photoinspected 1975.

(c) *Boundary.* The Ancient Lakes of Columbia Valley viticultural area is located in Douglas, Grant, and Kittitas Counties in central Washington. The boundary of the Ancient Lakes of Columbia Valley viticultural area is as described below:

(1) The beginning point is on the West Bar map where the western shoreline of the Columbia River in Kittitas County intersects with the north boundary line of section 8, T20N/R22E. Proceed east along the section boundaries for approximately 4.35 miles, over the Columbia River and into Douglas County, to the intersection of the line with the Grant and Douglas Counties common boundary line (concurrent with the R22E and R23E common line) at the northwest corner of section 12, T20N/R22E; then

(2) Proceed north along the Grant and Douglas Counties common boundary line for approximately 2.25 miles, onto the Rock Island Dam map, to the northwest corner of section 31, T21N/R23E; then

(3) Proceed east in a straight line along the section boundaries for approximately 12.1 miles, over the Appledale and Monument Hills maps, onto the Ephrata SW map to the

intersection of the line with the R24E and R25E common line at the northwest corner of section 36, T21N/R24E; then

(4) Proceed south along the R24E and R25E common line for approximately 22.5 miles, over the Winchester and Winchester SW maps, onto the Royal City map, passing over the West Canal and into the Frenchman Hills, to the southwest corner of section 12, T17N/R24E (concurrent with the intersection of the R24E and R25E common line and a single transmission line); then

(5) Proceed west in a straight line along the section boundaries (marked for 3 sections by the single transmission line) for approximately 4 miles, onto the Beverly NE map, to the southwest corner of section 9, T17N/R24E; then

(6) Proceed north in a straight line along the section boundary for approximately 1 mile to the northwest corner of section 9, T17N/R24E; then

(7) Proceed west in a straight line along the section boundaries for approximately 7.9 miles, onto the Vantage map, crossing over Interstate Route 90 and Columbia River, to the western shoreline of the Columbia River, at Hole in the Wall in Kittitas County, section 6, T17N/R23E; and then

(8) Proceed north along the western shoreline of the meandering Columbia River for approximately 23.3 miles, crossing over the Ginkgo and Cape Horn SE maps, and onto the West Bar map, returning to the beginning point.

Signed: September 18, 2012.

John J. Manfreda,

Administrator.

Approved: September 27, 2012.

Timothy E. Skud,

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

[FR Doc. 2012–25639 Filed 10–17–12; 8:45 am]

BILLING CODE 4810–31–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[USCG–2012–0909]

Drawbridge Operation Regulations; Long Island, New York Inland Waterway From East Rockaway Inlet to Shinnecock Canal, Hempstead, NY

AGENCY: Coast Guard, DHS.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, First Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the Wantagh State Parkway Bridge across the Sloop Channel, mile 15.4, at Jones Beach, New York. The deviation is necessary to install bascule girders at the bridge. This deviation allows the bridge to remain in the closed position.

DATES: This deviation is effective from October 8, 2012 through November 16, 2012.

ADDRESSES: Documents mentioned in this preamble as being available in the docket are part of docket USCG–2012–0909 and are available online at *www.regulations.gov,* inserting USCG–2012–0909 in the ''Keyword'' and then clicking ''Search''. They are also available for inspection or copying at the Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ms. Judy Leung-Yee, Project Officer, First Coast Guard District, *judy.k.leung-yee@uscg.mil,* telephone (212) 668–7165. If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION: The Wantagh State Parkway Bridge has a vertical clearance in the closed position of 20 feet at mean high water and 23 feet at mean low water. The existing drawbridge operation regulations are listed at 33 CFR 117.5.

The New York Department of Transportation requested a temporary deviation to facilitate installation and painting of bascule girders at the bridge.

The waterway has seasonal recreational vessels and fishing vessels of various sizes. We contacted the New York Marine Trades Association and no objections were received.

We did not receive 30-days advance notice for this temporary deviation; however, the Coast Guard is approving this temporary deviation because this girder installation and painting must be performed during mild climate conditions to facilitate the painting operations and allow the new bridge construction to continue on schedule. Additional notice to the public will be provided in the Local Notice to Mariners and via a broadcast notice to mariners.

Under this temporary deviation the Wantagh State Parkway Bridge at mile 15.4, across Sloop Channel, shall operate between October 8, 2012 and November 16, 2012, as follows:

Monday through Friday the bridge may remain closed to vessel traffic from 6:30 a.m. through 12 p.m. and from 12:15 p.m. through 5 p.m.

Saturday and Sunday the bridge shall open on signal between 7:30 a.m. and 8:30 p.m. after at least a thirty minute advance notice is given by calling the number posted at the bridge.

At all other times the bridge shall open on signal after at least a thirty minute advance notice is given by calling the number posted at the bridge.

Vessels that can pass under the bridge during the closed periods without a bridge opening may do so at all times. There are no alternate routes for vessel traffic.

In accordance with 33 CFR 117.35(e), the bridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: October 5, 2012.

Gary Kassof,

Bridge Program Manager, First Coast Guard District.

[FR Doc. 2012–25542 Filed 10–17–12; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2011–0372; FRL–9741–8]

Determination of Attainment of the 1-Hour Ozone National Ambient Air Quality Standards in the Sacramento Metro Nonattainment Area in California

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is determining that the Sacramento Metro 1-hour ozone nonattainment area (Sacramento Metro Area) has attained the revoked National Ambient Air Quality Standard (1-hour ozone NAAQS or standard), and to exclude certain 2008 data caused by wildfire exceptional events. These air quality determinations were proposed in conjunction with a proposed determination to terminate the State of California's obligations regarding 1-hour ozone section 185 fee program SIP provisions for the Sacramento Metro Area. In this notice, EPA is finalizing only that portion of its notice of proposed rulemaking that determines that the Sacramento Metro Area has attained the 1-hour ozone standard, and that excludes certain exceedances as caused by ozone exceptional events.

These air quality determinations were addressed separately in the proposed rulemaking and are severable from the other issues that relate to termination of section 185 1-hour ozone requirements. EPA is not at this time taking final action on other aspects of our notice of proposed rulemaking that address termination of 1-hour ozone section 185 fee requirements. EPA intends to address any other issues relating to Sacramento Metro Area 1-hour ozone section 185 requirements, and their termination, in a separate future rulemaking.

DATES: This rule will be effective on November 19, 2012.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2011–0372 for this action. Generally, documents in the docket for this action are available electronically at *http://www.regulations.gov* or in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *http://www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps, multi-volume reports), and some may not be available in either location (e.g., confidential business information (CBI)). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: John J. Kelly, EPA Region IX, (415) 947–4151, *kelly.johnj@epa.gov.*

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

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I. EPA's Proposed Action

On May 18, 2011 (76 FR 28696), EPA proposed to determine that the Sacramento Metro Area attained the 1-hour ozone standard in 2009 based on complete, quality-assured and certified ambient air quality monitoring data for the 2007–2009 monitoring period, excluding exceedances of the 1-hour ozone standard that occurred due to wildfire exceptional events in 2008.[1] In making its proposed determination, EPA proposed to exclude from use certain air quality monitoring data for 2008, because they meet the criteria for ozone exceptional events that are caused by wildfires. These air quality determinations were addressed separately in the proposal and are severable from the other issues and criteria in the May 18, 2011 notice of proposed rulemaking that relate to termination of section 185 1-hour ozone requirements.

EPA further proposed to determine that the State of California is no longer required to submit or implement section 185 fee program State Implementation Plan (SIP) provisions for the Sacramento Metro Area to satisfy anti-backsliding requirements for the revoked 1-hour ozone national ambient air quality standard (1-hour ozone NAAQS or standard).[2] EPA's proposal to terminate the section 185 fee requirements for the area identified certain criteria—(1) whether the area attained and (2) that any such attainment was due to permanent and enforceable emissions reductions—on which to base termination, and addressed each of these separately. With respect to the criterion of attainment of the 1-hour standard, in a section titled, ''1-Hour Ozone Attainment'' EPA stated:

> EPA proposes to determine that the Sacramento Metro Area has attained the 1-hour ozone standard; that is, the number of expected exceedances at any site in the nonattainment area is not greater than one per year. [internal citation deleted] This proposed determination is based on three years of complete, quality-assured and certified ambient air quality monitoring data in AQS showing attainment of the 1-hour ozone standard for the 2007–2009 monitoring period, and complete, quality-assured data in AQS for 2008–2010 that show continued attainment. As explained below, in determining the area's attainment of the 1-hour ozone standard, EPA is also proposing to exclude from consideration exceedances that occurred on three days in 2008, because they are due to wildfire exceptional events.

May 18, 2011, 76 FR 28700.

The May 18, 2011 proposal presented monitoring data for the Sacramento Metro Area for 2007–2009, along with EPA's explication that showed the area attained the 1-hour ozone NAAQS, and continued to attain through 2010. Table 1 shows that the Sacramento Metro Area has continued to attain the 1-hour ozone NAAQS since that time, based on complete, quality-assured and certified data for 2008–2010, 2009–2011 and preliminary data available for 2010–2012.[3]

TABLE 1—1-HOUR OZONE DATA FOR THE SACRAMENTO METRO 1-HOUR OZONE NONATTAINMENT AREA [a]

Site (monitor ID)	Expected exceedances by year				Expected exceedances 3-yr average	
	2008 [b]	2009	2010	2011	2008–2010	2009–2011
Placerville (06–017–0010)	2.0	0.0	0.0	0.0	0.7	0.0
Echo Summit (06–017–0012)	0.0	0.0	0.0	0.0	0.0	0.0
Cool (06–017–0020)	2.0	0.0	0.0	0.0	0.7	0.0
Auburn (06–061–0002)	0.0	0.0	0.0	0.0	0.0	0.0
Colfax (06–061–0004)	0.0	0.0	0.0	0.0	0.0	0.0
Roseville (06–061–0006)	2.0	0.0	0.0	0.0	0.7	0.0
North Highlands (06–067–0002)	0.0	0.0	0.0	0.0	0.0	0.0
Sacramento-Del Paso Manor (06–067–0006)	0.0	0.0	0.0	0.0	0.0	0.0
Sacramento-T Street (06–067–0010)	0.0	0.0	0.0	0.0	0.0	0.0
Elk Grove (06–067–0011)	0.0	0.0	0.0	0.0	0.0	0.0
Folsom (06–067–0012)	[b] 2.0	0.0	0.0	0.0	0.7	0.0
Sacramento-Airport Road [c] (06–067–0013)	0.0	NA	NA	NA	NA	NA

[1] EPA proposed that the area continued in attainment based on complete, quality-assured data for 2010.

[2] On the same day that EPA's proposal was published in the **Federal Register**, EPA published a separate interim final determination ''to defer CAA section 179 sanctions associated with the Sacramento Metro Area's 1-hour Ozone CAA section 185 obligation based on our concurrent proposal to approve a CAA section 185 termination determination which would remove the obligation of the state to submit a section 185 SIP when finalized.'' May 18, 2011, 76 FR 28661.

[3] Preliminary data on the California Air Resources Board (CARB) Web site show a single exceedance (0.128 ppm) of the 1-hour ozone NAAQS on August 13, 2012 at the Sloughhouse Road monitoring site. Since there were no exceedances at this site in 2010 or 2011, this one exceedances in 2012 would not by itself constitute a violation of the 1-hour ozone NAAQS for the period 2010–2012.

TABLE 1—1-HOUR OZONE DATA FOR THE SACRAMENTO METRO 1-HOUR OZONE NONATTAINMENT AREA [a]—Continued

Site (monitor ID)	Expected exceedances by year				Expected exceedances 3-yr average	
	2008 [b]	2009	2010	2011	2008–2010	2009–2011
Sacramento-Goldenland Court (06–067–0014)	0.0	0.0	0.0	0.0	0.0	0.0
Sloughhouse Rd. (06–067–5003)	3.0	0.0	0.0	0.0	1.0	0.0
Vacaville (06–095–3003)	0.0	0.0	0.0	0.0	0.0	0.0
Davis (06–113–0004)	0.0	0.0	0.0	0.0	0.0	0.0
Woodland (06–113–1003)	0.0	0.0	0.0	0.0	0.0	0.0

Source: Quicklook Report, August 20, 2012 (in the docket to this action).
[a] 40 CFR part 50, Appendix H—Interpretation of the 1-Hour Primary and Secondary National Ambient Air Quality Standards for Ozone.
[b] Data shown exclude exceedances on June 23, June 27 and July 10, 2008 due to exceptional events.
[c] The Airport Road site was relocated to the Goldenland Court site in August 2008.
NA—Data are not available.

Two other issues in the May 18, 2011 notice were addressed separately: (1) Whether, separate from determining whether the area attained the standard based on monitored air quality data, EPA could determine that such attainment was due to permanent and enforceable emissions reductions; and (2) whether EPA's proposed determinations regarding attainment and permanent and enforceable emissions reductions could support termination of the area's 1-hour ozone section 185 anti-backsliding requirements.

II. Public Comments

EPA's proposed action provided a 30-day public comment period. During this period, the following parties submitted comments:

1. Paul Cort, Earthjustice, submitted on behalf of Natural Resources Defense Council (NRDC); letter dated June 16, 2011.
2. Tim Shesteck, American Chemistry Council (ACC); letter dated June 17, 2011.
3. Zachary L. Craft, Baker Botts, LLP; letter dated June 17, 2011.
4. Catherine H. Reheis-Boyd, Western States Petroleum Association (WSPA); letter dated June 17, 2011.
5. Leslie Sue Ritts, The National Environmental Development Association's Clean Air Project (NEDA–CAP); letter dated June 18, 2011.

No adverse comments were directed at EPA's proposal to determine, based on complete, quality-assured air quality data, that the Sacramento Metro Area has attained the 1-hour ozone standard. Similarly, no adverse comments were directed at EPA's proposal to exclude certain monitored exceedances in 2008 as due to exceptional events.

NRDC submitted adverse comments relating to EPA's proposal to terminate 1-hour ozone section 185 requirements for the area, and set forth NRDC's contentions regarding additional criteria and legal bases for termination. No comments disputed EPA's proposed determination that the area has attained the 1-hour ozone standard. No adverse comments address the component of EPA's notice of proposed rulemaking that is the sole subject of today's final action—EPA's determination that the area has attained the 1-hour ozone standard based on monitored air quality since 2009, including the determination to exclude certain monitored exceedances in 2008 as due to exceptional wildfire events.

As noted above, EPA intends to address in separate rulemaking the subject of NRDC's comments—EPA's proposed termination of the Sacramento Metro 1-hour ozone section 185 requirements, and criteria for termination other than monitored attainment.

EPA is acting today to finalize only that portion of the proposal that determines, based on air quality monitoring data, that the area has attained the 1-hour ozone standard, including determining that three exceedances in 2008 are excluded from consideration because they were caused by exceptional wildfire events. This notice is not intended to address, and does not finalize, any other portion of EPA's proposal related to termination of 1-hour ozone section 185 anti-backsliding requirements in the Sacramento Metro Area. As set forth above, EPA intends to address these issues in separate, future rulemaking.

III. EPA Action

EPA is determining that the Sacramento Metro 1-hour ozone nonattainment area has attained the 1-hour ozone NAAQS based on complete, quality-assured, and certified ambient air quality monitoring data. Since 2009, and continuing through 2010 and 2011, complete, quality-assured and certified air quality data show continuous attainment. Preliminary data available for 2012 are consistent with continued attainment. EPA is also finalizing its determination to exclude from use, in determining the area has attained the 1-hour ozone standard, certain air quality monitoring data for 2008, because they meet the criteria for ozone exceptional events that are caused by wildfires. These air quality determinations were addressed separately and are severable from the other issues and criteria in the May 18, 2011 notice of proposed rulemaking that relate to termination of section 185 1-hour ozone requirements.

Apart from EPA's determination of attainment based on air quality,[4] EPA is not in this notice taking final action on any other aspects of its proposed determination to terminate the 1-hour ozone section 185 fee program requirements for the Sacramento Metro Area.

IV. Statutory and Executive Order Reviews

This action makes a determination based on air quality data 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);

[4] This includes EPA's determination with respect to the 2008 exceedances caused by wildfire exceptional events.

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

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

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

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

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

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

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 17, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: October 3, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

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

Subpart F—California

■ 2. Section 52.282 is amended by adding paragraph (f) to read as follows:

§ 52.282 Control strategy and regulations: Ozone.

* * * * *

(f) *Determination of attainment.* EPA has determined that, as of November 19, 2012, the Sacramento Metro 1-hour ozone nonattainment area has attained the 1-hour ozone standard, based upon complete, quality-assured and certified ambient air quality monitoring data for 2007–2009.

[FR Doc. 2012–25547 Filed 10–17–12; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2012–0566; FRL–9740–3]

Limited Approval and Disapproval of Air Quality Implementation Plans; Nevada; Clark County; Stationary Source Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is finalizing a limited approval and limited disapproval of revisions to the Clark County portion of the applicable state implementation plan (SIP) for the State of Nevada. The submitted revisions include new and amended rules governing the issuance of permits for stationary sources, including review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act (CAA). The effect of this limited approval and limited disapproval action is to update the applicable SIP with current Clark County permitting rules and to set the stage for remedying certain deficiencies in these rules. This limited disapproval action triggers an obligation on EPA to promulgate a Federal Implementation Plan unless the State of Nevada corrects the deficiencies, and EPA approves the related plan revisions, within two years of the final action, and for certain deficiencies the limited disapproval also triggers sanctions under section 179 of the CAA unless the State of Nevada submits (on behalf of Clark County) and we approve SIP revisions that correct the deficiencies within 18 months of final action.

DATES: *Effective Date:* This rule is effective on November 19, 2012.

ADDRESSES: EPA has established docket number EPA–R09–OAR–2012–0566 for this action. Generally, documents in the docket for this action available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material), and some may not be publicly available at either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Laura Yannayon, EPA Region IX, 75 Hawthorne Street (AIR–3), San Francisco, CA 94105, phone number (415) 972–3534, fax number (415) 947–3579, or by email at *yannayon.laura@epa.gov.*

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

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I. Summary of Proposed Action
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I. Summary of Proposed Action

On July 24, 2012 (77 FR 43206), EPA proposed a limited approval and limited disapproval of revisions to the Clark County portion of the Nevada State Implementation Plan (SIP). The submittals included new and amended regulations governing the issuance of permits for stationary sources under the jurisdiction of the Clark County Department of Air Quality (Clark or DAQ), including review and permitting

of major sources and major modifications under parts C and D of title I of the CAA. Collectively, the submitted regulations (referred to as ''Sections'') comprise DAQ's current program for preconstruction review and permitting of new or modified stationary sources under DAQ jurisdiction in Clark County, including related definitions. These SIP submittals, referred to herein as the ''NSR SIP submittal'' or ''submitted NSR rules,'' represent a comprehensive revision to Clark County's preconstruction review and permitting program. Specifically, EPA proposed a limited approval and limited disapproval of the new and amended Clark County regulations listed in Table 1.

TABLE 1—SUBMITTED NSR RULES

Section No.	Section title	Adopted	Submitted
0	Definitions	3/6/12	5/22/12
12.0	Applicability, General Requirements and Transition Procedures	11/3/09	2/11/10
12.1	Permit Requirements for Minor Sources	11/3/09	2/11/10
12.2	Permit Requirements for Major Sources in Attainment Areas (Prevention of Significant Deterioration).	3/6/12	5/22/12
12.3	Permit Requirements for Major Sources in Nonattainment Areas	5/18/10	9/01/10
12.4	Authority to Construct Application and Permit Requirements for Part 70 Sources	5/18/10	9/01/10

In our proposed rule (77 FR 43206, at 43208), we identified the existing Clark County SIP rules governing NSR for stationary sources as listed in Table 2.

TABLE 2—EXISTING SIP RULES GOVERNING NSR FOR STATIONARY SOURCES UNDER DAQ JURISDICTION

Section No.	Section title	Fed. Reg. citation and EPA approval date
0	Definitions	69 FR 54006, 9/7/04.
1	Definitions (33 terms retained in SIP in 69 FR 54006, 9/7/04)	46 FR 21758, 4/14/81 and 47 FR 26620, 6/21/82.
11	Ambient Air Quality Standards	69 FR 54006, 9/7/04.
12	Preconstruction Review for New or Modified Stationary Sources	69 FR 54006, 9/7/04.
16	Operating Permits	47 FR 26386, 6/18/82.
58	Emission Reduction Credits	69 FR 54006, 9/7/04.
59	Emission Offsets	69 FR 54006, 9/7/04.
NAC 445B.22083	Construction, major modification or relocation of plants to generate electricity using steam produced by burning of fossil fuels..	69 FR 54006, 9/7/04.

As a result of today's final action, all of these rules except for Section 11, NAC section 445B.22083, and portions of Section 1, are replaced in, or otherwise deleted from, the Nevada SIP by the submitted set of rules listed in Table 1. With respect to Section 1, of the 33 terms contained in the Nevada SIP, the following six terms are replaced by revised definitions contained in the submitted NSR rules: (1) ''Air contaminant'' (subsection 1.3); (2) ''minor source'' (subsection 1.50); (3) ''shutdown'' (subsection 1.78); (4) ''significant'' (unnumbered); (5) ''special mobile equipment'' (subsection 1.85); and (6) ''start up'' (subsection 1.89).[1]

[1] Although our proposed rule indicated that all of the Section 1 definitions in the SIP would be replaced by the NSR SIP submission (*see* 77 FR 43206, 43208), EPA has found that only these six definitions in SIP-approved Section 1 were in fact part of the existing SIP rules governing NSR for stationary sources under DAQ jurisdiction. Therefore, in this final rule, we are clarifying that only those Section 1 definitions that pertain to NSR for stationary sources under DAQ jurisdiction and that are in fact superseded, under state law, by revised Clark County definitions in the submitted NSR rules, are being replaced in the Nevada SIP.

The most significant deficiencies that we identified in the submitted NSR rules, as discussed in detail in the TSD, are generally as follows: (1) The absence of minor NSR provisions that ensure protection of the 2006 $PM_{2.5}$ NAAQS and 2008 Lead (Pb) NAAQS; (2) minor NSR applicability provisions that do not cover stationary sources of $PM_{2.5}$; (3) deficiencies in the definitions of certain terms used in PSD and Nonattainment NSR (NNSR) applicability determinations; (4) definition of ''regulated NSR pollutant'' that does not adequately address PSD and NNSR requirements for regulation of condensable particulate matter; (5) deficiencies in the criteria for assessing the quality (or ''integrity'') of emission reduction credits used to satisfy NNSR offset requirements; and (6) the absence of minor NSR or NNSR provisions to ensure that the air quality impacts of stationary sources are not underestimated due to stack heights that exceed good engineering practice or unacceptable air dispersion modeling techniques. We identified these as the ''most significant'' deficiencies because these are the most likely to affect pollutant emissions within Clark County, compared to other deficiencies that we do not expect would significantly affect emissions levels (e.g., administrative requirements for permit issuance).

We proposed to approve SIP revisions that exclude certain insignificant/de minimis activities from minor source permitting requirements in the Clark County portion of the Nevada SIP. Under the Clark County rules that we proposed to approve, some of these insignificant/de minimis activities must continue to comply with many of the requirements that would apply to sources needing to obtain preconstruction permits. We received no comments on our proposed approvals and are finalizing those approvals as consistent with 40 CFR 51.160(e).

II. Public Comment on Proposed Action

EPA's proposed action provided a 30-day public comment period. During this period, we received two comment letters, one from the Nevada Division of

Environmental Protection (NDEP), dated September 7, 2012, and one from the Clark County Department of Air Quality (Clark or DAQ), dated September 6, 2012. We summarize and provide responses to these comments below.

Comment 1: Clark County disagreed with EPA's statement that the applicability provisions in Section 12.1 are deficient with respect to regulation of $PM_{2.5}$ precursor emissions and stated that Section 12.1 addresses each of the pollutants identified by EPA as $PM_{2.5}$ precursors (NO_X, SO_2, and VOCs). In addition, Clark County asserted that $PM_{2.5}$ emissions are a subset of PM_{10} emissions, which Section 12.1 also addresses. Clark County stated that ''[a]lthough defining precursors to $PM_{2.5}$ more explicitly might clarify the rule, the county believes the rule currently provides sufficient authority to regulate sources of these pollutants * * *.''

EPA Response: We disagree. Section 110(a)(2)(C) of the CAA requires, among other things, that each state have a permit program to provide for regulation of the construction and modification of minor stationary sources within the areas covered by the plan as necessary to assure that the NAAQS are achieved. Under EPA's implementing regulations in 40 CFR 51.160–51.164, these permit programs must contain enforceable procedures that enable the permitting authority to determine whether the construction or modification of a stationary source will result in (1) a violation of applicable portions of the control strategy; or (2) interference with attainment or maintenance of a NAAQS in the State in which the proposed source (or modification) is located or in a neighboring State, and procedures for preventing any such construction or modification. For purposes of implementing the 1997 $PM_{2.5}$ NAAQS, as explained in our TSD, States were required by EPA's 2008 New Source Review implementing regulations for the 1997 $PM_{2.5}$ NAAQS (''$PM_{2.5}$ NSR Implementation Rule'') to revise their minor source programs to include direct and condensable $PM_{2.5}$ emissions and $PM_{2.5}$ precursor emissions in the same manner as included for purposes of $PM_{2.5}$ major NSR. *See* TSD at 16 (citing 73 FR 28321 at 28344, May 16, 2008).

Clark County's minor NSR program in Section 12.1 generally defines ''minor source'' as a stationary source that is not a major source and that has a potential to emit equal to or greater than specified levels for the following seven pollutants: PM_{10}, CO, VOC, NO_X, SO_2, Lead (Pb), and H2S. *See* Section 12.1, subsection 12.1.1 (a) and (c) (definitions). Similarly, for purposes of regulating modifications at minor sources, Section 12.1 establishes ''significant'' emission levels for these same seven pollutants and for Total Reduced Sulfur. *Id.* at subsection (g). These provisions are not adequate for purposes of implementing the $PM_{2.5}$ NAAQS for three reasons.

First, the provisions do not explicitly regulate sources of direct $PM_{2.5}$ emissions. Second, the provisions do not address the condensable fraction of $PM_{2.5}$ or $PM_{10,}$ which is required to be accounted for in permitting actions on or after January 1, 2011. 73 FR 28321 at 28334 (May 16, 2008) (''Because condensable PM emissions exist almost entirely in the 2.5 micrometer range and smaller, these emissions are inherently more significant for $PM_{2.5}$ than for prior PM standards addressing larger particles''); *see also* 75 FR 80118 (December 21, 2010) (final rule establishing methods for measurement of filterable and condensable PM_{10} and $PM_{2.5}$ emissions from stationary sources). Third, the provisions do not adequately address $PM_{2.5}$ precursors. Although we agree with Clark County that these applicability provisions cover sources of $NO_{X,}$ SO_2, and VOCs, which pollutants the EPA has defined as precursors to $PM_{2.5}$, those applicability provisions in themselves do not ensure that emissions of the appropriate pollutants will be addressed as $PM_{2.5}$ precursors in the minor source program in the same manner as included for purposes of $PM_{2.5}$ major NSR.

In response to our proposed disapproval of Section 12.1 with respect to the requirements for $PM_{2.5}$, Clark asserted that the provisions governing PM_{10} emissions in Section 12.1 provide sufficient authority to regulate sources of direct $PM_{2.5}$ emissions. We disagree with this assertion, particularly to the extent that Clark County may be suggesting that PM_{10} is an effective surrogate for $PM_{2.5}$ in all cases. Effective May 16, 2011, EPA ended the states' ability to use, as a matter of policy, evaluation of PM_{10} (including the PM_{10} NAAQS) as a surrogate for evaluation of $PM_{2.5}$ in Prevention of Significant Deterioration (PSD) permitting actions, as had previously been allowed pursuant to a 1997 guidance document entitled ''Interim Implementation for the New Source Review Requirements for $PM_{2.5}$,'' October 23, 1997 (''PM_{10} Surrogate Policy'').[2] 76 FR 28646 (May 18, 2011). EPA terminated the use of the 1997 PM_{10} Surrogate Policy in PSD permitting programs based on the Agency's conclusion that the necessary technical tools to conduct $PM_{2.5}$ analyses for PSD sources had become available and that it was therefore no longer appropriate to rely on the PM_{10} Surrogate Policy to protect the $PM_{2.5}$ NAAQS. *Id.* at 28648. Thus, PSD permit applications must now be reviewed directly against the $PM_{2.5}$ requirements. *Id.* at 28647. For these same reasons, we conclude that it is not appropriate for Clark County to rely categorically on the PM_{10} provisions in Section 12.1 to satisfy the requirements of CAA section 110(a)(2)(C) with respect to the 1997 or 2006 $PM_{2.5}$ NAAQS. Consistent with EPA's end to the use of the PM_{10} Surrogate Policy for PSD permit programs, minor NSR permit programs under CAA section 110(a)(2)(C) must require owners and operators of sources and permitting authorities to conduct permit-related $PM_{2.5}$ analyses and may not allow the automatic use of PM_{10} analysis as a surrogate for satisfying $PM_{2.5}$ requirements.

In sum, Section 12.1 does not contain enforceable procedures that enable Clark County to determine whether the construction or modification of a stationary source of direct $PM_{2.5}$ emissions and any emissions of $PM_{2.5}$ precursors will result in either a violation of an applicable control strategy or interference with attainment or maintenance of the 1997 or 2006 $PM_{2.5}$ NAAQS, nor does the rule contain enforceable procedures for preventing construction or modification of such sources, as required by CAA section 110(a)(2)(C) and 40 CFR 51.160–51.164. Consequently, we are disapproving Section 12.1 with respect to the requirement in CAA section 110(a)(2)(C) to regulate the construction and modification of stationary sources of $PM_{2.5}$ emissions as necessary to assure that the 1997 and 2006 $PM_{2.5}$ NAAQS are achieved.

Comment 2: Clark County disagreed with EPA's proposal to disapprove language regarding federal enforceability in subsection 12.1.3.6(a)(5) and stated that it ''could find no language [in the CAA or EPA regulations] that explicitly prohibits an applicant from specifying or declaring anything it deems appropriate in the information it submits.'' Referencing an EPA guidance document addressing CAA title V (Part 70) permitting issues,

[2] The preamble to EPA's $PM_{2.5}$ NSR Implementation Rule provided that States with SIP-approved PSD programs could continue to implement the program for particulate matter less than 10 micrometers (PM_{10}) as a surrogate for meeting the PSD program requirements for $PM_{2.5}$ pursuant to the PM_{10} Surrogate Policy. See 73 FR at 28341. As confirmed in a May 18, 2011 rulemaking, however, EPA has ended the use of this policy both under the Federal PSD program and in SIP-approved PSD program areas. *See* 76 FR 28646 (May 18, 2011).

Clark County stated that ''EPA indicated some precedent for declaring which of the conditions of an 'authority to construct or operate' permit would be federally enforceable within the context of a Part 70 Operating Permit application.'' The County asserted that EPA's authority to disapprove a state's minor source program is extremely limited and that EPA may only disapprove such programs under CAA section 110(a)(2)(C) if they ''interfere with attainment of the NAAQS or other applicable requirements of the Act.'' Clark County stated its belief that ''there can be provisions and conditions in minor source permits that do not pertain to SIP requirements, nor otherwise relate to any of the requirements of the Act,'' such as requirements addressing noxious odors and public nuisances. Clark County stated that it had intended to ''separately incorporate these conditions into a minor source permit without submitting the conditions, nor the mechanism for their adoption, as part of the SIP permit program,'' and that such conditions should not be subject to federal enforcement or citizen suits under CAA section 113 or 304.

EPA Response: We agree with the County that nothing in the CAA or EPA regulations prohibits a state from issuing permits for minor stationary sources containing requirements that are enforceable only under state law, and we understand that the County's intention may have been to use minor NSR permits issued pursuant to Section 12.1 both for purposes of implementing the SIP-approved minor NSR program and for purposes of implementing other state/local requirements not approved into the SIP. We are disapproving subsection 12.1.3.6(a)(5), however, because the current text of this provision is significantly misleading to the regulated community and the public with respect to EPA's enforcement authorities under the CAA, and because Section 12.1 as a whole does not provide a reliable mechanism for distinguishing between federally-enforceable permit conditions and state-only enforceable permit conditions, as explained further below.

Under the CAA and EPA's implementing regulations, all limitations and conditions in a permit issued pursuant to SIP-approved regulations, including SIP-approved minor NSR permit programs, are federally enforceable under the Act. *See* CAA 113(a)(1), (3), 42 U.S.C. 7413(a)(1), (3); 40 CFR 52.21(b)(17) (defining ''Federally enforceable'' to include ''any permit requirements established * * * under regulations approved pursuant to 40 CFR part 51, subpart I''); 40 CFR 52.23 (''Failure to comply with * * * any permit condition * * * issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources * * * shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act.''); *see also* 54 FR 27274, 27282 (June 28, 1989) (noting that all construction permits issued under regulations approved pursuant to 40 CFR 51.160–165 are federally enforceable). Such permit conditions are also enforceable by citizens under CAA section 304 of the CAA. 42 U.S.C. 7604(a)(1), (f)(4) (authorizing citizen suit for violation of ''an emission standard or limitation under [the Act],'' including any ''standard, limitation, or schedule established under any permit issued * * * under any applicable State implementation plan approved by the Administrator. * * *''). Thus, upon EPA's approval of Section 12.1 into the Clark County portion of the Nevada SIP, all of the terms and conditions of a permit issued under Section 12.1 are enforceable by the Administrator under CAA section 113 and by citizens under CAA section 304.

By contrast, title V operating permits may contain permit conditions that are not federally enforceable. Specifically, EPA's regulations to implement the operating permit program in title V of the CAA allow states to issue operating permits containing terms and conditions that are not federally enforceable, provided those terms and conditions are specifically identified as such in the permit. *See* 40 CFR 70.6(b)(2) (''Permit content'') (''the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements''). These regulations in 40 CFR part 70, however, apply to state operating permit programs submitted to meet the requirements of title V of the CAA; they do not apply to preconstruction review permit programs submitted to meet the requirements of section 110(a)(2)(C) of the Act, which are, instead, subject to EPA's regulations for review of new sources and modifications in 40 CFR part 51, subpart I. We note that although EPA does not require states to submit title V operating permit programs for SIP approval, states may choose to do so, *e.g.,* to provide a mechanism for establishing federally enforceable permit limits that enable otherwise major sources to avoid PSD or Nonattainment NSR (also known as ''synthetic minor'' permit limits). Once a state operating permit program is approved by EPA and incorporated into the applicable SIP under section 110 of the Act, all terms and conditions contained in a permit issued pursuant to such a program are considered federally enforceable. 40 CFR 52.21(b)(17) and 52.23; *see also* 54 FR 27274 at 27281, 27284 (June 28, 1989).

Subsection 12.1.3.6(a)(5) of Clark County's minor NSR rule states that a permit applicant may, at its option, include in its application ''a declaration that it wants the entire permit, or specifically identified permit conditions or applicable requirements, to be federally enforceable.'' On its face, this language allows a permit applicant to identify those permit conditions for which the applicant ''wants'' a federally enforceable requirement, without regard to whether the conditions so identified (or not identified) derive from SIP-approved requirements or state-only requirements. At minimum, this provision is misleading to the regulated community and the public because it suggests that an applicant may request, and that Clark County may issue, permit conditions limiting federal enforcement authority with respect to permit conditions that derive from SIP-approved requirements in Section 12.1. Given that all conditions of a permit issued pursuant to a SIP-approved program are enforceable under sections 113 and 304 the Act, and that permit conditions deriving only from state law are not federally enforceable, it is not appropriate to suggest that permit applicants have such an undefined ''option.''

We recognize, however, that Clark County may have intended to use minor NSR permits issued under Section 12.1 to implement not only the substantive requirements of Section 12.1, all of which are federally enforceable upon SIP approval, but also to implement requirements in other state regulations not submitted for SIP approval—*e.g.,* conditions addressing noxious odors or public nuisances as defined under state law. To the extent that this was the County's intent, we recommend that the County add separate provisions to Section 12.1 that authorize the County to include ''state-only'' terms and conditions in a minor source permit issued pursuant to Section 12.1, provided those terms and conditions and the state/local requirements that they implement are specifically identified in the permit. In this case, Clark County may provide permit applicants the option of identifying

such requirements as ''state-only'' requirements, provided the rule clearly limits the option to those state-only requirements. For example, subsection 12.1.3.6(a)(5) could be revised to read as follows:

At the option of the applicant, an application may identify for the Control Officer's consideration those permit conditions that do not derive from requirements of the Clean Air Act or regulations approved into the applicable Nevada SIP and that the applicant believes should, therefore, be identified in the permit as conditions enforceable only under state law.

Comment 3: Clark County questioned EPA's proposal to disapprove the County's definition of ''baseline actual emissions'' (BAE) in Section 12.2 and Section 12.3 in several respects. First, the County asserted that with respect to existing electric utility steam generating units (EUSGUs), notwithstanding its use of the phrase ''as of the particular date'' in its definition of BAE, its definition is at least as stringent as the corresponding federal regulation because EPA's regulations ''contain no requirement for any adjustment of compliant emissions whatsoever'' for EUSGUs. Second, the County recognized that its definition differed from EPA's definition of BAE for existing emission units other than EUSGUs (*i.e.,* non-EUSGUs) but stated that this difference was intentional and necessary because ''EPA does not interpret or implement the definition [of BAE] consistent with its plain meaning.'' Quoting from EPA's explanation, in the preamble to EPA's 2002 final rule promulgating this definition (67 FR at 80197, December 31, 2002), of the meaning of the term ''current'' in the context of evaluating a contemporaneous emissions change for netting purposes, Clark County asserted that it ''implements its rule in the same manner EPA does'' and that ''rather than codifying rule language inconsistent with this interpretation, the county has adopted rule language consistent with both its own interpretation and practice and EPA's interpretation and practice.''

EPA Response: We understand that Clark County's definition of BAE reflects an attempt to clarify the methodology for calculating BAE and, in response to the County's comments, we are approving the County's definitions of this term, with one narrow exception discussed below. We remain concerned, however, about ambiguities in the terms and strongly recommend that the County revise the definitions at the next opportunity to ensure that modifications at existing sources are subject to clear and consistent criteria for calculating BAE.

Under EPA's PSD and NSR applicability provisions for ''major modifications,'' both the assessment of whether a ''significant emissions increase'' has occurred (step 1 of the applicability analysis) and the assessment of creditable emissions increases or decreases which occurred during a prior ''contemporaneous'' period (step 2 of the applicability analysis) require calculation of ''baseline actual emissions'' (BAE). *See* 40 CFR 51.165(a)(2)(ii)(B) and 51.166(a)(7)(iv)(*b*) (procedures for calculating emissions increases; 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3)(i) (definition of ''net emissions increase''). Thus, a calculation of BAE is required both for the project under review and for any previous (''contemporaneous'') changes that resulted in creditable emissions increases or decreases. In both cases, EPA's definition of BAE requires adjustments to the emission calculations to ensure that any emissions exceeding certain applicable requirements are not included in calculating the BAE.

Generally, for existing emission units, BAE is defined as ''the average rate, in tons per year, at which the unit actually emitted [a regulated NSR] pollutant'' during any consecutive 24-month period selected by the owner or operator within a 5-year or 10-year period immediately preceding the date that actual construction begins, depending upon the type of unit being modified and with limited exceptions. 40 CFR 51.165(a)(1)(xxxv) and 51.166(b)(47). For any existing emissions unit other than an electric utility steam generating unit (*i.e.,* any existing ''non-EUSGU''), EPA's definition of BAE requires, among other things, that the average emissions rate ''be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply, had such major stationary source been required to comply with such limitations during the consecutive 24-month period.'' 40 CFR 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47)(ii)(*c*). The purpose of this requirement is to ensure that any emissions that are not allowed under any legally enforceable limitations and that apply at the time of the project are not counted as part of BAE. *See* 67 FR 80186, 80195 (December 31, 2002) (source owners/operators must ''identify the most current legally enforceable limits on your emissions unit'' and ''[i]f these legally enforceable emission limitations and operating restrictions are more stringent than those that applied during the 24-month period, you must adjust downward the average annual emissions rate that you calculated from the consecutive 24-month period to reflect these current restrictions''); *see also* 67 FR at 80201 (''The approach that we have adopted allows you to reference plant capacity that has actually been used, but not pollution levels that are not legally allowed at the time the modification is to occur.'').

For the calculation of BAE in step 1 of the applicability analysis for a modification at an existing non-EUSGU, the reference to emission limitations with which the source ''must currently comply, had [the] source been required to comply with such limitations during the consecutive 24-month period,'' is in reference to only one point in time—*i.e.,* when the project under review occurs. Thus, if the average emission rate calculated for the selected 24-month period [3] exceeds an emission limitation that applies at the time the project under review occurs, the past emissions in excess of that current emission limitation must be excluded from the calculation of BAE for the project under review. *See* 67 FR 80186 at 80195, 80201.

For the netting methodology in step 2 (*i.e.,* for purposes of calculating creditable increases and decreases in emissions from changes that are ''contemporaneous'' with the project under review), the term ''current'' may have multiple defining points, depending on the number of ''contemporaneous'' changes being evaluated. EPA explained the meaning of ''current'' in the context of a netting analysis for an existing non-EUSGU in the preamble to the final rule promulgating sections 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47), as follows:

Although we are not changing our definition of ''contemporaneous,'' today's action allows existing [non-EUSGUs] to calculate the [BAE] for each contemporaneous event using the 10-year look back period. That is, you can select any consecutive 24-month period during the 10-year period immediately preceding the change occurring in the contemporaneous period to determine the [BAE] for each creditable emissions change. Generally, for each emissions unit at which a

[3] For a non-EUSGU, this may be any consecutive 24-month period ''within the 10-year period immediately preceding either the date the owner or operator begins actual construction of the project, or the date a complete permit application is received by the reviewing authority for a permit required either under this section or under a plan approved by the Administrator, whichever is earlier, except that the 10-year period shall not include any period earlier than November 15, 1990.'' 40 CFR 51.165(a)(1)(xxxv)(B) and 51.166(b)(47)(ii).

contemporaneous emissions change has occurred, you should use the 10-year look back period relevant to that change [footnote omitted]. When evaluating emissions increases from multi-unit modifications, if more than one emissions unit was changed as part of a single project during the contemporaneous period, you may select a separate consecutive 24-month period to represent each emissions unit that is part of the project. In any case, the calculated [BAE] for each emissions unit must be adjusted to reflect the most current emission limitations (including operational restrictions) applying to that unit. ''Current'' in the context of a contemporaneous emissions change refers to limitations on emissions and source operation that existed just prior to the date of the contemporaneous change.

67 FR 80186, 80197 (December 31, 2002).

Thus, for each ''contemporaneous'' change that is considered in a netting analysis, the reference in sections 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47)(ii)(*c*) to emission limitations with which the source ''must currently comply, had [the] source been required to comply with such limitations during the consecutive 24-month period,'' is in reference to requirements that applied just before the date of the particular ''contemporaneous'' change. As with those ''current'' emission limits that must be reflected in the BAE for the project under review, those emission limits that applied to a particular unit just before it underwent a prior ''contemporaneous'' change (*i.e.,* the most ''current'' applicable requirements at the time of the change) must be reflected in the BAE for that particular change before any emissions increases or decreases associated with it may be credited in the netting analysis.

Clark County's definitions of BAE for non-EUSGUs in Section 12.2 and 12.3 require downward adjustments in average emission rates to exclude emissions that exceed applicable emission limitations but use the phrase ''the particular date'' instead of ''currently'' to define the point in time that governs the identification of applicable emission limitations. *See* Section 12.2, subsection 12.2.2(c)(1)(B)(i) and (2)(D); Section 12.3, subsection 12.3.2(c)(1)(C) and (2)(D). Specifically, the County's definitions of BAE require downward adjustments to average emission rates to ''exclude any emissions that would have exceeded an emission limitation with which the major stationary source must comply *as of the particular date,* had such major stationary source been required to comply with such limitations during the consecutive 24-month period.'' *Id.* (emphasis added).[4] These definitions also contain a sentence providing further direction on the calculation of BAE only for contemporaneous projects, as follows: ''For the purposes of determining [BAE] for contemporaneous changes pursuant to [the definition of NEI], the particular date is the date on which the particular change occurred.'' *Id.* Although these provisions differ from the language in EPA's definition of BAE in 40 CFR 51.165(a)(1)(xxxv)(B) and 51.166(b)(47)(ii), the language is generally consistent with EPA's interpretative statements in the preamble to the 2002 rulemaking, as discussed above, and we understand the County intends to implement these provisions consistent with those EPA interpretations. Thus, we are approving the definitions, with one narrow exception for what appears to be a drafting error in the definition of BAE for non-EUSGUs in subsection 12.2.2(c)(2)(D), as discussed further below. However, we strongly encourage the County to clarify the meaning of the phrase ''the particular date'' for purposes of calculating BAE both for the project under review (step 1) and for any contemporaneous changes pursuant to the definition of NEI (step 2). We recommend that the County provide such a clarification in the regulatory text itself, so that the definition is clear on its face and consistent with EPA's interpretative statements in the preamble to the final rule promulgating these definitions (67 FR 80186).

Alternatively, Clark County may adopt BAE definitions that track EPA's regulatory language in 40 CFR 51.165(a)(1)(xxxv)(B)(*3*) and 51.166(b)(47)(ii)(*c*). Although we recognize that EPA's regulatory text does not specify the meaning of ''currently'' in the context of assessing either the project under review or prior contemporaneous changes, EPA provided an interpretation of this term in the preamble to the 2002 rulemaking (67 FR 80186).

With respect to Clark County's definition of BAE for non-EUSGUs in subsection 12.2.2(c)(2)(D), we are disapproving this provision because the definition is internally inconsistent and confusing. Subsection 12.2.2(c)(2)(D) uses language consistent with EPA's definition in the first sentence (''The average rate shall be adjusted downward to exclude any emissions that would have exceeded an emission limitation with which the major stationary source must currently comply had such [source] been required to comply with such limitations during the consecutive 24-month period''), but refers, in the second sentence, to language that deviates from EPA's definition without explanation (''For the purposes of determining the baseline actual emissions for contemporaneous changes pursuant to paragraph (ii)(1)(B) of the definition of [NEI], the particular date is the date on which the particular change occurred''). This internal inconsistency is problematic, as neither the regulatory text nor any supporting analysis associated with this rulemaking explains whether/how the phrase ''the particular date'' in the second sentence informs the phrase ''currently comply'' in the first sentence of subsection 12.2.2(c)(2)(D). Although we recognize that this may simply be a drafting error and that Clark County may have intended to use the phrase ''as of the particular date'' in this provision, we are disapproving the provision because on its face it is confusing and raises enforceability concerns.

Comment 4: Clark County questioned EPA's proposal to disapprove the definition of ''net emissions increase'' (NEI) in Section 12.2 and strongly disagreed, in particular, with the statement in EPA's TSD that EPA's regulatory definition of NEI ''does not call for any assessment of actual emissions after a contemporaneous project.'' The County stated that the federal definition of NEI expressly requires that NEI be calculated using the difference between baseline actual emissions before a contemporaneous project and the new level of actual emissions resulting from that project and asserted that ''[t]he only sensible interpretation of the phrase 'new level of actual emissions' in this context is 'the actual emissions after the contemporaneous project.' '' The County suggested that EPA clarify what it means by ''does not call for any assessment of actual emissions after a contemporaneous project.''

EPA Response: EPA agrees that our explanation of this issue in our TSD was not entirely accurate or clear. For example, our statement that EPA's definition of ''net emissions increase'' (NEI) ''does not call for any assessment of actual emissions after a contemporaneous project'' was incorrect. As the County correctly notes, for purposes of identifying creditable increases and decreases in emissions occurring prior to the particular physical or operational change under review, during a period that is ''contemporaneous'' with that particular

[4] Subsection 12.2.2(c)(2)(D) does not contain this language and instead contains language tracking EPA's definition in 40 CFR 51.166(b)(47)(ii)(*c*), but this appears to be a drafting error, as discussed further below.

change, EPA's definition of NEI requires an assessment of ''baseline actual emissions'' before and ''actual emissions'' after the prior ''contemporaneous'' project. *See, e.g.,* 40 CFR 51.166(b)(3)(vi)(*a*) (''[a] decrease in actual emissions is creditable only to the extent that: (*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions * * *.''). However, although we understand that Clark County's definition of NEI reflects an attempt to clarify the term, we are disapproving it because the County has not demonstrated that its definition is more stringent than or at least as stringent in all respects as EPA's corresponding definition. *See* 40 CFR 51.165(a)(1), 51.166(a)(7)(iv). Specifically, the definition of NEI in Section 12.2 is deficient because it does not establish an appropriate method for calculating the ''actual emissions'' after a previous contemporaneous project, as explained further below, and the substantively identical definition of NEI in Section 12.3 is also deficient for the same reasons.

Under EPA's PSD and NSR regulations, a determination as to whether a significant emissions increase is a ''major modification'' requires a determination as to whether the change has resulted in a significant ''net emissions increase.'' *See* 40 CFR 51.165(a)(1)(v) and 51.166(b)(2) (defining ''major modification''); 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3) (defining NEI). EPA's definition of NEI in 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3), in turn, requires a calculation of all creditable increases and decreases which occurred during a previous period that is ''contemporaneous'' with the particular project under review. The definition of NEI requires that ''[b]aseline actual emissions for calculating increases and decreases'' associated with a contemporaneous project be determined as provided in EPA's definition of ''baseline actual emissions'' (40 CFR 51.165(a)(xxxv) and 51.166(b)(47)), with limited exceptions. *See* 40 CFR 51.165(a)(1)(vi)(A)(*2*) and 51.166(b)(3)(i)(*b*).

EPA's definition of NEI does not specify how the actual emissions after (*i.e.,* resulting from) a prior contemporaneous project must be calculated. *Id.* Importantly, however, for purposes of determining creditable increases and decreases in a netting evaluation, EPA's definition of NEI provides that paragraphs 40 CFR 51.165(a)(1)(xii)(B) and 51.166(b)(21)(ii)[5] shall not apply in determining post-project actual emissions. Those sections define ''actual emissions'' based on actual operating hours, production rates, and types of materials processed, stored, or combusted during a previous 24-month period that is ''representative of normal source operation.'' *See* 40 CFR 51.165(a)(1)(vi)(G) and 51.166(b)(3)(viii). Thus, only ''source-specific allowable emissions'' or ''potential to emit'' may be used to calculate the actual emissions after (*i.e.,* resulting from) a prior contemporaneous project in the netting analysis. *See* 40 CFR 51.165(a)(1)(xii)(C), (D) and 51.166(b)(21)(iii), (iv). EPA regulations specifically provide that the ''actual emissions'' of an emissions unit that has not begun operations as of a particular date must be equal to its ''potential to emit'' on that date. 40 CFR 51.165(a)(1)(xii)(D) and 51.166(b)(21)(iv) (''For any emissions unit that has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.'')

Consistent with these regulations, EPA's longstanding policy provides that where a ''contemporaneous'' project ''will affect the normal operations of an existing emissions unit (as in the case of a change which could result in increased use of the unit), 'actual emissions' after the change must be assumed to be equal to 'potential to emit.''' Memorandum dated September 18, 1989, from John Calagni, Director, Air Quality Management Division, to William B. Hathaway, Director, Air, Pesticides, and Toxics Division, ''Request for Clarification of Policy Regarding the 'Net Emissions Increase''' (1989 NEI Policy Memo) at 3 (quoting 40 CFR 52.21(b)(21)(iv)). Alternatively, where ''allowable emissions'' are the same as or less than the ''potential to emit'' for an emissions unit, ''allowable emissions'' may be used to define the ''actual emissions'' of that unit after the change. *Id.*

Finally, with respect to a decrease in actual emissions associated with a contemporaneous change, such decrease is creditable only when three specific criteria are met: (1) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions; (2) it is enforceable as a practical matter at and after the time that actual construction on the particular change begins; and (3) it has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change. 40 CFR 51.165(a)(1)(vi)(E) and 51.166(b)(3)(vi). The second of these three criteria essentially requires the use of ''allowable emissions'' or ''potential to emit'' to define the ''actual emissions'' of a unit after a prior ''contemporaneous'' change in order to credit an associated emissions decrease in the netting evaluation.

The three additional paragraphs contained in the Section 12.2 definition of NEI (under subsection 12.2.2(ii)(1)(C)), which are not included in EPA's definition of NEI in 40 CFR 51.166(b)(3), state as follows:

(i) For the purposes of calculating increases under paragraph (1)(B) of this definition, actual emissions after the contemporaneous project shall be determined as provided in the definition of actual emissions, except as provided in paragraph (1)(C)(iii) of this definition.

(ii) For the purposes of calculating increases under paragraph (1)(B) of this definition, if the Control Officer determines that there is no sufficiently representative time period of actual emissions after a contemporaneous project, pursuant to Section 12.2.2(a)(1), actual emissions after the contemporaneous project shall be determined as provided in the definition of projected actual emissions.

(iii) For the purposes of calculating decreases under paragraph (1)(B) of this definition, actual emissions after the contemporaneous project shall be determined as provided in the definition of actual emissions.

Section 12.2, subsection 12.2.2(ii)(1)(C)(i)–(iii).[6]

These three provisions are inconsistent with EPA regulations and longstanding interpretations, for the following reasons.

[5] These two provisions, which are identical, state as follows: In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a consecutive 24-month period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

40 CFR 51.165(a)(1)(xii)(B), 51.166(b)(21)(ii).

[6] The applicable definition of ''actual emissions'' in this context is in subsection 12.2.2(a), which contains language identical to EPA's definition of ''actual emissions'' in 40 CFR 51.166(b)(21)(ii). See Section 12.2, subsection 12.2.2 (Definitions) (''Unless the context otherwise requires, the following terms shall have the meanings set forth [in subsection 12.2.2] for the purposes of Section 12.2 * * * .'')

First, subsection 12.2.2(ii)(1)(C)(i) states that for the purposes of calculating creditable increases that are contemporaneous with a particular change, ''actual emissions after the contemporaneous project shall be determined as provided in the definition of *actual emissions*'' with limited exceptions (emphasis added), but it does not prohibit use of ''actual emissions'' as defined in subsection 12.2.2(a)(1) (*i.e.,* using the unit's ''actual operating hours, production rates, and types of materials processed, stored, or combusted during'' a previous 24-month period that is ''representative of normal source operation''). This is problematic because the language defining ''actual emissions'' in subsection 12.2.2(a)(1) is substantively identical to EPA's language defining ''actual emissions'' in 40 CFR 51.166(b)(21)(ii), which as noted above EPA's definition of BAE explicitly prohibits source owners/operators from using for purposes of determining creditable increases and decreases in a netting evaluation. *See* 40 CFR 51.165(a)(1)(vi)(G) and 51.166(b)(3)(viii). For purposes of determining ''actual emissions'' immediately after a contemporaneous physical or operational change, use of this definition of ''actual emissions'' is not appropriate because there is no relevant data regarding operating hours, production rates, and types of materials processed, stored, or combusted. Rather, ''actual emissions'' in this context must be equal to the new or modified unit's ''potential to emit'' (PTE) or ''allowable emissions,'' where allowable emissions are the same as or less than PTE. *See* 40 CFR 51.166(b)(21)(iv) and 1989 NEI Policy Memo at 3.

Second, subsection 12.2.2(ii)(1)(C)(ii) states that ''if the Control Officer determines that there is no sufficiently representative time period of actual emissions after a contemporaneous project, pursuant to Section 12.2.2(a)(1), actual emissions after the contemporaneous project shall be determined as provided in the definition of projected actual emissions.'' [7] As discussed above, for purposes of a netting analysis, EPA regulations require that the ''actual emissions'' following a contemporaneous change be calculated based on PTE or ''allowable emissions,'' not projected actual emissions. 40 CFR 51.165(a)(1)(xii)(C), (D) and 51.166(b)(21)(iii), (iv); *see also* 67 FR 80186, 80191 (December 31, 2002) (noting that the actual-to-projected actual applicability test should be used only for purposes of determining whether a proposed modification results in a significant emissions increase (*i.e.,* step 1 of the applicability analysis) and ''should not be used when determining a source's actual emissions on a particular date as may be used for other NSR-related requirements''). As EPA explained in April 2011, EPA revised the PSD and NNSR rules in 2002 by adding provisions to implement the new ''actual-to-projected-actual'' test for certain projects in step one of the applicability analysis but left the existing regulatory structure in place for implementing step two. *See* letter dated April 4, 2011, from Cheryl L. Newton, Director, Air and Radiation Division, EPA Region 5, to Keith Baugues, Assistant Commissioner, Office of Air Quality, Indiana Department of Environmental Management (2011 NEI Letter) at 3 (citing, *e.g.,* 40 CFR 52.21(a)(2)(iv)(b)).[8] Neither the definition of significant NEI in 40 CFR 51.166(b)(3) nor any of the definitions used to calculate a significant NEI use ''projected actual emissions.'' 2011 NEI Letter at 3.

Finally, subsection 12.2.2(ii)(1)(C)(iii) is substantively identical to subsection 12.2.2(ii)(1)(C)(i), except that it applies to calculating emission decreases instead of increases associated with a contemporaneous change. This provision is problematic because it calls for the use of ''actual emissions'' as defined in 40 CFR 51.166(b)(21)(ii) for purposes of calculating creditable decreases in a netting analysis, which as discussed above is inconsistent with EPA's definition of NEI. *See* 40 CFR 51.166(b)(3)(viii). The use of ''actual emissions'' as defined in section 51.166(b)(21)(ii) for this purpose also conflicts with EPA's criteria in 40 CFR 51.166(b)(3)(vi) for crediting emission decreases associated with a contemporaneous change, because such ''actual emissions'' generally are not enforceable as a practical matter.

For all of these reasons, we are disapproving subsections 12.2.2(ii)(1)(C)(i), (ii), and (iii) in Clark County's definition of NEI, because these provisions are inconsistent with EPA's definition of NEI in 40 CFR 51.166(b)(3) and relevant policy. For the same reasons, we are also disapproving identical language in Clark County's definition of NEI in Section 12.3, subsections 12.3.2(aa)(1)(B)(ii), (iii), and (iv). *See* 40 CFR 51.165(a)(1)(vi)(E) and (G). Clark County may address these deficiencies by adopting language consistent with EPA's prohibition on use of ''actual emissions'' as defined in 51.165(a)(1)(xii)(B) and 40 CFR 51.166(b)(21)(ii), so that the definitions of NEI in both Section 12.3 and Section 12.2 track EPA's corresponding definitions in 40 CFR 51.165(a)(1)(vi) and 51.166(b)(3). Alternatively, should Clark County seek to further clarify the methodology for calculating the emissions increases or decreases resulting from a contemporaneous project, we recommend that the County replace the three paragraphs discussed above with the following language:

> For the purposes of calculating emissions increases or decreases under paragraph (1)(B) of this definition, actual emissions after the contemporaneous project shall be equal to the ''potential to emit'' or ''allowable emissions'' of the project, whichever is lower.

Comment 5: With respect to the Nevada Division of Environmental Protection's (NDEP) obligation to submit NSR SIP revisions meeting the applicable requirements of subpart 2 of part D, title I of the Act, for the portion of Clark County that is designated and classified as ''marginal'' nonattainment for the 1997 8-hour ozone standard, NDEP expressed concern about EPA's suggestion that the State could address the regulatory gap by submitting a revised rule extending the existing construction prohibition in NAC section 445B.22083 to cover the entire Clark County ozone nonattainment area. NDEP stated that such an expansion of the existing construction prohibition is not a viable option given current economic conditions and stated that there are ''two equally obvious and significantly less harmful options'' for addressing this requirement.

First, NDEP emphasized that EPA has made a clean data finding for the 1997 8-hour ozone nonattainment area within Clark County and that the State is awaiting EPA action on Clark County's redesignation request and maintenance plan for this standard. Both NDEP and Clark County urged EPA to take action soon on this redesignation request and maintenance plan.

Second, NDEP stated that it has nonattainment provisions in its SIP and that NDEP ''is not required to adopt a program if it has adequate, equivalent-performing regulatory provisions.'' NDEP stated that EPA has not provided specific guidance on the NSR

[7] We assume that Clark County intended here to reference the definition of ''projected actual emissions'' in subsection 12.2.2(nn) of Section 12.2.

[8] EPA purposefully did not extend the actual-to-projected-actual test to the netting evaluation in step two of the applicability test, because the Agency believed it was ''appropriate [for] projects that will result in a significant emissions increase under step one of the process, and, thus, are more likely to adversely impact air quality, to undergo a more conservative examination using the actual-to-potential methodology under step two of the analysis.'' 2011 NEI Letter at 3.

deficiencies but that NDEP is currently reviewing its nonattainment provisions.

EPA Response: As an initial matter, we note that comments regarding NDEP's NSR obligations with respect to stationary sources under its jurisdiction within the Clark County ozone nonattainment area are outside the scope of today's action on Clark County's NSR SIP submission. Our proposed rule identified this issue not as a current program deficiency but rather as a courtesy to remind the State of upcoming NSR obligations for the 1997 8-hour ozone standard. Given our proposed action on Clark County's NSR SIP submission highlighted this upcoming obligation on NDEP's part, however, we respond below to the State's and Clark County's comments on this issue.

EPA appreciates NDEP's concerns about expanding the existing construction prohibition in NAC section 445B.22083 and agrees that several other options are available to address the State's NSR obligations with respect to ozone precursor emissions from fossil fuel-fired steam-powered power plants within Clark County. First, as both NDEP and Clark County correctly note, in April 2011 the State submitted a redesignation request and maintenance plan for the 1997 8-hour ozone standard, which became complete by operation of law in October 2011. EPA is currently reviewing this submission and commits to work with both agencies to address the State's request for redesignation to attainment. As NDEP correctly notes, EPA determined based on ambient air monitoring data that the ozone nonattainment area within Clark County has attained the 1997 8-hour ozone NAAQS (76 FR 17343, March 29, 2011), which is a prerequisite to redesignation to attainment under section 107(d)(3)(E) of the CAA. A final rule redesignating the Clark County ozone nonattainment area to attainment for the 1997 8-hour ozone NAAQS consistent with section 107(d)(3)(E) of the CAA would eliminate the State's NSR obligations for purposes of the 1997 8-hour ozone NAAQS.

Second, with respect to NDEP's statement that the existing Nevada SIP contains nonattainment provisions and that NDEP is not required to adopt an NSR program if it has adequate, equivalent regulatory provisions, we are aware of several nonattainment NSR provisions in the existing Nevada SIP, including certain provisions in Article 13 of the Nevada Air Quality Regulations (''Point Sources'') and in the Utility Environmental Protection Act in title 58 of the Nevada Revised Statutes. We stand ready to work with NDEP in evaluating the relevant SIP provisions to determine whether they adequately address the State's current NSR obligations with respect to stationary sources under NDEP jurisdiction for the 1997 8-hour ozone NAAQS in Clark County.

III. Final Action

For the reasons provided in our proposed rule and above in response to comments, pursuant to sections 110(k) and 301(a) of the Clean Air Act, EPA is finalizing a limited approval and limited disapproval of new and amended regulations that govern applications for, and issuance of, permits for stationary sources under the jurisdiction of the Clark County Department of Air Quality. Specifically, EPA is finalizing a limited approval and limited disapproval of the new and amended regulations listed in table 1 above as a revision to Clark County portion of the Nevada SIP.

EPA is taking this action because, although we find that the new and amended rules meet most of the applicable requirements for such NSR programs and that the SIP revisions improve the existing SIP, we have also found certain deficiencies that prevent full approval.

Specifically, our limited disapproval of the minor NSR permit program in Section 12.1 is based on the following deficiencies: (1) The absence of a means for determining whether the construction or modification of a stationary source will result in a violation of applicable portions of the control strategy or interference with attainment or maintenance of the 2006 24-hour $PM_{2.5}$ NAAQS and the 2008 Lead NAAQS; (2) inappropriate language regarding federal enforceability of permits issued under Section 12.1; (3) the absence of provisions to ensure that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy; (4) inappropriate exemptions for sources identified in a separate rule that is not SIP-approved (Section 12.5); (5) the absence of applicability provisions that cover sources of $PM_{2.5}$ or $PM_{2.5}$ precursor emissions; and (6) the absence of provisions to ensure that the air quality impacts of stationary sources are not underestimated due to stack heights that exceed good engineering practice or unacceptable air dispersion modeling techniques.

Our limited disapproval of the PSD permit program in Section 12.2 is based on the following deficiencies: (1) Definitions for the terms ''allowable emissions,'' ''baseline actual emissions,'' ''net emissions increase,'' ''major modification,'' and ''regulated NSR pollutant'' that are not entirely consistent with EPA's definitions in 40 CFR 51.166; (2) a provision governing adjustment of PALs to incorporate requirements that become effective during the term of a PAL that is not entirely consistent with EPA's requirements; and (3) the absence of provisions to ensure that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.

Finally, our limited disapproval of the nonattainment NSR program in Section 12.3 is based on the following deficiencies: (1) Provisions governing offsets and calculation of emission reduction credits that do not ensure the integrity of offset calculations and that reference a separate rule that is not SIP-approved (Section 12.7) for important criteria governing these calculations; (2) definitions for the terms ''net emissions increase,'' ''major modification,'' and ''regulated NSR pollutant'' that are not entirely consistent with EPA's definitions in 40 CFR 51.165; (3) provisions governing interpollutant trades that do not satisfy EPA's criteria for approval of such trades; (4) the absence of provisions to ensure that the air quality impacts of stationary sources are not underestimated due to stack heights that exceed good engineering practice or unacceptable air dispersion modeling techniques; and (5) the absence of provisions to ensure that approval of any construction or modification must not affect the responsibility of the owner or operator to comply with applicable portions of the control strategy.

The intended effect of this limited approval and limited disapproval action is to update the applicable state implementation plan with current State rules for permitting of stationary sources,[9] and to set the stage for remedying deficiencies in these permitting rules. With respect to those deficiencies that relate to the nonattainment NSR requirements of part D, title I of the Act, mandatory sanctions will apply to the Clark County nonattainment area under section 179 of the Clean Air Act unless Nevada submits, and EPA approves, SIP revisions correcting the deficiencies within 18 months of the effective date of this final rule. *See* 40 CFR 52.31. In addition, this limited disapproval action

[9] Final approval of the rules in table 1 supersedes the rules listed in table 2, above, in the existing Nevada SIP.

triggers an obligation on EPA to promulgate a Federal Implementation Plan addressing the deficient SIP elements unless Nevada submits, and EPA approves, SIP revisions correcting the deficiencies within two years of the effective date of this final rule. We stand ready to work with Clark County to ensure that its upcoming rulemaking processes result in permit programs that fully satisfy CAA requirements.

IV. Statutory and Executive Order Reviews

A. Executive Order 12988, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 128665, entitled ''Regulatory Planning and Review.''

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Burden is defined at 5 CFR 1320.3(b).

C. Regulatory Reduction Act

The Regulatory Flexibility Act (RFA) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

This rule will not have a significant impact on a substantial number of small entities because SIP approvals or disapprovals under section 110 of the Clean Air Act do not create any new requirements but simply approve or disapprove requirements that the State is already imposing. Therefore, because this limited approval/limited disapproval action does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities. Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.,* v. *U.S. EPA,* 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under section 202 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that this limited approval/limited disapproval action does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action takes a limited approval/limited disapproval action on pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (Federalism) and 12875 (Enhancing the Intergovernmental Partnership). Executive Order 13132 requires EPA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it merely takes a limited approval/limited disapproval action on State rules implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This rule is not subject to Executive Order 13045, because it takes a limited approval/limited disapproval action on State rules implementing a Federal standard.

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

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

EPA believes that VCS are inapplicable to this action. Today's action does not require the public to perform activities conducive to the use of VCS.

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

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA lacks the discretionary authority to address environmental justice in this rulemaking. In reviewing SIP submissions, EPA's role is to approve or disapprove state choices, based on the criteria of the Clean Air Act. Accordingly, this action merely takes a limited approval/limited disapproval action on certain State requirements for inclusion into the SIP under section 110 of the Clean Air Act and will not in-and-of itself create any new requirements. Accordingly, it 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.

K. Congressional Review Act

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 rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of 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).

L. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 17, 2012. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects in 40 CFR Part 52

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

Dated: September 28, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

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 DD—Nevada

■ 2. In § 52.1470 in paragraph (c), Table 3 is amended by:

■ a. Revising the entry for ''Section 0.''

■ b. Adding in numerical order entries for ''Section 12.0,'' ''Section 12.1,'' ''Section 12.2,'' ''Section 12.3,'' and ''Section 12.4.''

■ c. Removing the entries for ''Section 1 (''Definitions''): Subsection 1.3,'' ''Section 1 (''Definitions''): Subsection 1.50,'' ''Section 1 (''Definitions''): Subsection 1.78,'' ''Section 1 (''Definitions''): [unnumbered],'' ''Section 1 (''Definitions''): Subsection 1.85,'' ''Section 1 (''Definitions''): Subsection 1.89,'' ''Section 12 (excluding subsections 12.2.18 and 12.2.20),'' ''Section 16: Subsections 16.1–16.9,'' ''Section 58'' and ''Section 59 [excluding subsection 59.2 (''Local Offset Requirements'')]''.

§ 52.1470 Identification of plan.

* * * * *

(c) * * *

TABLE 3—EPA-APPROVED CLARK COUNTY REGULATIONS

County citation	Title/subject	County effective date	EPA approval date	Additional explanation
Section 0	Definitions	5/18/10	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 5/22/12.
*	*	*	*	*
Section 12.0	Applicability, General Requirements and Transition Procedures.	11/3/09	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 2/11/10.
Section 12.1	Permit Requirements for Minor Sources.	11/3/09	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 2/11/10.
Section 12.2	Permit Requirements for Major Sources in Attainment Areas (Prevention of Significant Deterioration).	3/6/12	[Insert **Federal Register** page number where the document begins], 10/18/12.	5/22/12.

TABLE 3—EPA-APPROVED CLARK COUNTY REGULATIONS—Continued

County citation	Title/subject	County effective date	EPA approval date	Additional explanation
Section 12.3	Permit Requirements for Major Sources in Nonattainment Areas.	5/18/10	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 9/01/10.
Section 12.4	Authority to Construct Application and Permit Requirements For Part 70 Sources.	5/18/10	[Insert **Federal Register** page number where the document begins], 10/18/12.	Submitted on 9/01/10.
*	*	*	*	*

* * * * *

[FR Doc. 2012–25545 Filed 10–17–12; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 365, 371, and 375

[Docket No. FMCSA–2012–0322]

FMCSA Policy on the Suspension of Operating Authority for Hostage Load Violations

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

ACTION: Notice of enforcement policy.

SUMMARY: FMCSA provides notice of the Agency's new policy concerning enforcement of its household goods (HHG) motor carrier and broker regulations. FMCSA may take enforcement action when a HHG motor carrier or broker knowingly and willfully fails, in violation of a contract, to deliver or unload at the destination a shipment of HHG for which charges have been estimated and for which payment has been tendered. A motor carrier or broker found holding a HHG shipment hostage may be subject to suspension of registration for a period of not less than 12 months to not more than 36 months.

DATES: This decision is effective October 18, 2012.

FOR FURTHER INFORMATION CONTACT: Brodie Mack, Jr., Commercial Enforcement and Investigations Division, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, (202) 366–8045; email *brodie.mack@dot.gov.*

SUPPLEMENTARY INFORMATION:

Background

The U.S. Department of Transportation (DOT) assumed responsibility for regulating the HHG industry in 1996 from the Interstate Commerce Commission (ICC). Congress terminated the ICC in the ICC Termination Act of 1995 (Pub. L. 104–88, 109 Stat. 803). Consequently, DOT inherited the responsibility of handling consumer complaints regarding deceptive business practices and hostage shipments. In 2000, FMCSA was delegated the responsibility for enforcement of HHG consumer protection in the Motor Carrier Safety Improvement Act of 1999 (MCSIA), Public Law 106–159, 113 Stat. 1748. However, FMCSA lacked the authority to fully address brokers and motor carriers engaged in the practice of holding HHG shipments hostage in violation of a contract. Congress responded by including the ''Household Goods Movers Oversight Enforcement and Reform Act of 2005'' in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). In SAFETEA–LU, Congress specifically addressed (codified at 49 U.S.C. 14915) the problem of persons, including, but not limited to, brokers and motor carriers, who hold HHG shipments hostage. The statute defines a hostage shipment, establishes civil and criminal penalties, and permits the suspension of the operating authority registration of a motor carrier or broker from 12 to 36 months when it holds a shipment hostage.

Policy

Pursuant to 49 U.S.C. 14915, any person, including a motor carrier or broker, that holds a HHG shipment hostage is subject to a $10,000 civil penalty for each violation. Each day the goods are held hostage may constitute a separate violation. In addition with the publication of this policy statement FMCSA may suspend a broker or motor carrier's registration for a period of not less than 12 months or more than 36 months. The suspension of a carrier's or broker's registration extends to and includes any carrier or broker having the same ownership or operational control as the suspended carrier or broker.

FMCSA may suspend a carrier's or broker's registration upon a determination by FMCSA that the carrier or broker knowingly and willfully failed, in violation of a contract, to deliver or unload at the destination of a shipment of HHG for which charges have been estimated and for which payment has been tendered. Pursuant to 49 U.S.C. 13707(b)(3)(A), payment is tendered when a shipper pays: (1) 100 percent of the charges contained in a binding estimate provided by the carrier; (2) not more than 110 percent of the charges contained in a nonbinding estimate provided by the carrier; (3) or in the case of a partial delivery of the shipment, the prorated percentage of the charges.

FMCSA will take action to suspend a carrier's or broker's registration for hostage load violations in accordance with the procedures in 49 U.S.C. 13905. FMCSA may determine that a hostage load violation has occurred based on the results of an investigation, an Agency determination as stated in a final order, or admission by the motor carrier or broker. FMCSA initiates a proceeding to suspend the carrier's or broker's registration by issuing an order to the carrier or broker to show good cause why the registration should not be suspended in accordance with 49 U.S.C. 13905. The order provides notice of the alleged violation, explains how to submit a written response with supporting documentation, and informs the registered entity that failure to respond and demonstrate good cause will result in suspension of its registration.

The Agency Official who issued the order reviews the registered entity's response. After reviewing the response, the Agency Official issues a written decision and may take one of three actions. First, he or she may enter an order suspending the entity's

registration, if the registered entity failed to show good cause why its registration should not be suspended. Second, the Agency Official may enter an order directing the registered entity to come into compliance, if the Agency Official determines that corrective action is more appropriate than suspension. The compliance order informs the carrier or broker that willful failure to comply may result in suspension or revocation of registration. Third, the Agency Official may determine that suspension is not appropriate and enter an order terminating the proceeding. This mirrors the procedure the Agency follows when taking action under 49 U.S.C. 13905 to suspend, amend or revoke operating authority registration generally, for non-HHG motor carriers as well as HHG carriers. *See* 77 FR 46147, 46149 (Aug. 2, 2012).

In determining whether to initiate a registration suspension for hostage load violations FMCSA generally considers a motor carrier's six-year compliance history. The six-year period is consistent with FMCSA's penalty assessment policies regarding ''history of prior offenses'' under 49 U.S.C. 521(b)(2)(D) and ''pattern of violations'' warranting assessment of maximum civil penalties under section 222 of MCSIA, see 69 FR 77828 (Dec. 28, 2004) and 74 FR 14184 (Mar. 30, 2009), and its determinations under 49 U.S.C. 13902 and 13905 on willingness and ability to comply with applicable regulations. See 77 FR 46147, 46144–46149 (Aug. 2, 2012). Accordingly, FMCSA may suspend the registration of a carrier or broker found holding a shipment hostage for a first time for no less than 12 months pursuant to 49 U.S.C. 14915. If a carrier or broker commits a second hostage load violation within 6 years of the first violation, FMCSA may suspend its registration for 24 months. If a carrier or broker commits a third violation within 6 years of the first violation, FMCSA may suspend its registration for 36 months.

Issued on: September 18, 2012.

William A. Bronrott,

Deputy Administrator.

[FR Doc. 2012–25678 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 536

[NHTSA–2010–0131; EPA–HQ–OAR–2010–0799; FRL–9706–5]

RIN 2127–AK79; RIN 2060–AQ54

2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to the final rule regulation which was published in the **Federal Register** of Monday, October 15, 2012 (77 FR 62624). The final rule established fuel economy standards for light-duty vehicles under the Energy Policy and Conservation Act (EPCA), as amended by the Energy Independence and Security Act (EISA), 49 U.S.C. 32901 *et seq.*

DATES: *Effective Date:* This correcting amendment is effective on December 14, 2012.

FOR FURTHER INFORMATION CONTACT: Rebecca Yoon, Office of Chief Counsel, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: (202) 366–2992.

SUPPLEMENTARY INFORMATION:

Background

NHTSA and EPA published in the **Federal Register** of October 15, 2012, final rules to establish coordinated standards to improve fuel economy and reduce greenhouse gas emissions for vehicles manufactured for sale in the United States in model years 2017 and beyond. The final rules, consistent with President Obama's directive to the agencies on May 21, 2010, respond to the country's critical need to reduce oil consumption and address global climate change.

Need for Correction

As published, the final regulations inadvertently misprinted one of the values for ''VMT_u,'' which represents lifetime vehicle miles traveled for the model year and compliance category in which a traded or transferred credit is used for compliance in 49 CFR part 536. The value printed for passenger cars in model year 2011 was ''152,922,'' when the value intended to be printed, consistent with prior rulemakings, is ''150,922.'' To correct the mistake, NHTSA is replacing the value in the table to alleviate any confusion.

List of Subjects in 49 CFR Part 536

Fuel economy, Reporting and recordkeeping requirements.

Accordingly, 49 CFR part 536 is corrected by making the following correcting amendments:

PART 536—TRANSFER AND TRADING OF FUEL ECONOMY CREDITS

■ 1. The authority citation for part 536 continues to read as follows:

Authority: 49 U.S.C. 32903, delegation of authority at 49 CFR 1.50.

■ 2. Revise § 536.4(c) to read as follows:

§ 536.4 Credits.

* * * * *

(c) *Adjustment factor.* When traded or transferred and used, fuel economy credits are adjusted to ensure fuel oil savings is preserved. For traded credits, the user (or buyer) must multiply the calculated adjustment factor by the number of its shortfall credits it plans to offset in order to determine the number of equivalent credits to acquire from the earner (or seller). For transferred credits, the user of credits must multiply the calculated adjustment factor by the number of its shortfall credits it plans to offset in order to determine the number of equivalent credits to transfer from the compliance category holding the available credits. The adjustment factor is calculated according to the following formula:

$$\underline{A} = \frac{\underline{VMT_u} * \underline{MPG_{ae}} * \underline{MPG_{se}}}{VMT_e * MPG_{au} * MPG_{su}}$$

Where:

A = Adjustment factor applied to traded and transferred credits.

VMT_e = Lifetime vehicle miles traveled as provided in the following table for the model year and compliance category in which the credit was earned;

VMT_u = Lifetime vehicle miles traveled as provided in the following table for the model year and compliance category in which the credit is used for compliance;

Model year	Lifetime vehicle miles traveled (VMT)						
	2011	2012	2013	2014	2015	2016	2017–2025
Passenger Cars	150,922	177,238	177,366	178,652	180,497	182,134	195,264
Light Trucks	172,552	208,471	208,537	209,974	212,040	213,954	225,865

MPG_{se} = Required fuel economy standard for the originating (earning) manufacturer, compliance category, and model year in which the credit was earned;

MPG_{ae} = Actual fuel economy for the originating manufacturer, compliance category, and model year in which the credit was earned;

MPG_{su} = Required fuel economy standard for the user (buying) manufacturer, compliance category, and model year in which the credit is used for compliance; and

MPG_{au} = Actual fuel economy for the user manufacturer, compliance category, and model year in which the credit is used for compliance.

Daniel C. Smith,

Senior Associate Administrator for Vehicle Safety, National Highway Traffic Safety Administration, Department of Transportation.

[FR Doc. 2012–25641 Filed 10–17–12; 8:45 a.m.]

BILLING CODE 4910–59–P

Proposed Rules

Federal Register

Vol. 77, No. 202

Thursday, October 18, 2012

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1102; Directorate Identifier 2012–NM–062–AD]

RIN 2120–AA64

Airworthiness Directives; EADS CASA (Type Certificate Previously Held by Construcciones Aeronáuticas, S.A.) 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 EADS CASA (Type Certificate Previously Held by Construcciones Aeronáuticas, S.A.) Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes. This proposed AD was prompted by reports of incorrect electrical polarity connections on engine fire extinguishing discharge cartridges. This proposed AD would require a one-time inspection to identify the correct polarity for each pair of electrical connectors on each engine fire extinguisher cartridge, and repair if necessary. We are proposing this AD to detect and correct incorrect polarity connections, which could prevent the actuation of the discharge cartridge in case of automatic fire detection or manual initiation during a potential engine fire, and could result in damage to the airplane and injury to passengers.

DATES: We must receive comments on this proposed AD by December 3, 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 EADS–CASA, Military Transport Aircraft Division (MTAD), Integrated Customer Services (ICS), Technical Services, Avenida de Aragón 404, 28022 Madrid, Spain; telephone +34 91 585 55 84; fax +34 91 585 55 05; email *MTA.TechnicalService@casa.eads.net;* Internet *http://www.eads.net.* 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: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1112; 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–2012–1102; Directorate Identifier 2012–NM–062–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 2012–0045, dated March 21, 2012 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> Reports have been received of finding wrong electrical polarity connections of engine fire extinguishing discharge cartridges on CASA CN–235 aeroplanes. The results of the subsequent investigation showed that the incorrect discharge cartridge assembly was caused by production line errors.
>
> This condition, if not detected and corrected, could prevent the actuation of the discharge cartridge in case of automatic fire detection or manual initiation in case of engine fire, possibly resulting in damage to the aeroplane and injury to occupants.
>
> To address this potential unsafe condition, EADS CASA (Airbus Military) developed instructions to identify erroneous wiring polarity installation.
>
> For the reasons described above this [EASA] AD requires a one-time inspection to verify proper electrical polarity of wiring of each engine fire extinguisher discharge cartridge and, depending on findings, corrective action [accomplish the repair].

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

Relevant Service Information

EADS CASA has issued Airbus Military All Operator Letter 235–020, dated March 9, 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 6 products of U.S. registry. We also estimate that it would take about 4 work-hours per product to comply with the basic requirements of this proposed AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of the proposed AD on U.S. operators to be $2,040, or $340 per product.

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

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

3. Will not affect intrastate aviation in Alaska; and

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

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:

EADS CASA (Type Certificate Previously Held by Construcciones Aeronáuticas, S.A.): Docket No. FAA–2012–1102; Directorate Identifier 2012–NM–062–AD.

(a) Comments Due Date

We must receive comments by December 3, 2012.

(b) Affected ADs

None.

(c) Applicability

This AD applies to all EADS CASA (Type Certificate previously held by Construcciones Aeronáuticas, S.A.) Model CN–235, CN–235–100, CN–235–200, and CN–235–300 airplanes, certificated in any category, all serial numbers.

(d) Subject

Air Transport Association (ATA) of America Code 26, Fire protection.

(e) Reason

This AD was prompted by reports of incorrect electrical polarity connections on engine fire extinguishing discharge cartridges. We are issuing this AD to detect and correct incorrect polarity connections, which could prevent the actuation of the discharge cartridge in case of automatic fire detection or manual initiation during a potential engine fire, and could result in damage to the airplane and injury to passengers.

(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) Inspection

Within 30 days after the effective date of this AD, do a one-time inspection to identify the correct polarity for each pair of electrical connectors on each engine fire extinguisher cartridge, in accordance with the Instructions of Airbus Military All Operator Letter 235–020, dated March 9, 2012.

(h) Corrective Action

If, during the inspection required by paragraph (g) of this AD, erroneous wiring polarity is detected: Before further flight, repair in accordance with a method approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA; or European Aviation Safety Agency (EASA) (or its delegated agent).

(i) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Branch, ANM–116, 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: Shahram Daneshmandi, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, WA 98057–3356; telephone (425) 227–1112; 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.

(j) Related Information

(1) Refer to MCAI EASA Airworthiness Directive 2012–0045, dated March 21, 2012; and Airbus Military All Operator Letter 235–020, dated March 9, 2012; for related information.

(2) For service information identified in this AD, contact EADS–CASA, Military Transport Aircraft Division (MTAD), Integrated Customer Services (ICS), Technical Services, Avenida de Aragón 404, 28022 Madrid, Spain; telephone +34 91 585 55 84; fax +34 91 585 55 05; email *MTA.TechnicalService@casa.eads.net;* Internet *http://www.eads.net.* 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 5, 2012.

Ali Bahrami,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–25673 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–13–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Parts 1112 and 1218

[CPSC Docket No. CPSC–2010–0028]

RIN 3041–AC81

Safety Standard for Bassinets and Cradles

AGENCY: Consumer Product Safety Commission.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Consumer Product Safety Improvement Act of 2008 (CPSIA requires the United States Consumer Product Safety Commission (Commission or CPSC) to promulgate consumer product safety standards for durable infant or toddler products. These standards are to be ''substantially the same as'' applicable voluntary standards or more stringent than the voluntary standard if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product. The Commission is proposing a safety standard for bassinets and cradles in response to the CPSIA. This constitutes a second round of notice and comment, or supplemental notice of proposed rulemaking, for bassinets and cradles.

DATES: Submit comments by January 2, 2013.

ADDRESSES: Comments related to the Paperwork Reduction Act aspects of the marking, labeling, and instructional literature of the proposed rule should be directed to the Office of Information and Regulatory Affairs, OMB, Attn: CPSC Desk Officer, FAX: 202–395–6974, or emailed to *oira_submission@omb.eop.gov*.

Other comments, identified by Docket No. CPSC–2010–0028, may be submitted electronically or in writing:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *http://www.regulations.gov*. Follow the instructions for submitting comments. To ensure timely processing of comments, the Commission is no longer directly accepting comments submitted by electronic mail (email), except through *www.regulations.gov.* The Commission encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Written Submissions: Submit written submissions in the following way: Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to *http://www.regulations.gov*. Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If furnished at all, such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and insert the docket number, CPSC 2010–0028, into the ''Search'' box and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Patricia Edwards, Project Manager, Directorate for EngineeringSciences, Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone 301–987–2244; email *pedwards@cpsc.gov*.

SUPPLEMENTARY INFORMATION:

A. Background and Statutory Authority

The Consumer Product Safety Improvement Act of 2008, (CPSIA, Pub. L. 110–314), was enacted on August 14, 2008. Section 104(b) of the CPSIA, part of the Danny Keysar Child Product Safety Notification Act, requires the Commission to: (1) Examine and assess the effectiveness of voluntary consumer product safety standards for durable infant or toddler products, in consultation with representatives of consumer groups, juvenile product manufacturers, and independent child product engineers and experts, and (2) promulgate consumer product safety standards for durable infant and toddler products. These standards are to be ''substantially the same as'' applicable voluntary standards or more stringent than the voluntary standard if the Commission concludes that more stringent requirements would further reduce the risk of injury associated with the product. The term ''durable infant or toddler product'' is defined in section 104(f)(1) of the CPSIA as a durable product intended for use, or that may be reasonably expected to be used, by children under the age of 5 years. Bassinets and cradles are specifically identified in section 104(f)(2)(L) as a durable infant or toddler product.

In April 2010, the Commission issued a notice of proposed rulemaking (NPR) for bassinets and cradles. (75 FR 22303, April 28, 2010). Through ongoing consultation and assessment of the standard, both the ASTM standard and the Commission's proposals have evolved since publication of the April 2010 NPR, such that the Commission believes a supplemental notice and opportunity for the public to comment would be beneficial. Thus, in this document, the Commission is proposing a safety standard for bassinets and cradles in a supplemental notice of proposed rulemaking. Pursuant to Section 104(b)(1)(A), the Commission consulted with manufacturers, retailers, trade organizations, laboratories, consumer advocacy groups, consultants, and members of the public in the development of this proposed standard, largely through the ASTM process. The proposed standard is based on the voluntary standard developed by ASTM International (formerly the American Society for Testing and Materials), ASTM F2194–12, ''Standard Consumer Safety Specification for Bassinets and Cradles'' (ASTM F2194–12), with additions and modifications to strengthen the standard. The ASTM standard is copyrighted but can be viewed as a read-only document, only during the comment period on this proposal, at: *http://www.astm.org/cpsc.htm,* by permission of ASTM.

B. The Product

ASTM F2194–12 defines a ''bassinet/cradle'' as a ''small bed designed exclusively to provide sleeping accommodations for infants supported by free standing legs, a wheeled base, a rocking base, or which can swing relative to a stationary base'' and provides that a bassinet/cradle is ''intended to provide sleeping accommodations only for an infant up to approximately 5 months in age or when the child begins to push up on hands and knees, whichever comes first.'' ASTM F2194–12 defines a ''bassinet/cradle accessory'' as ''a supported sleep surface that attaches to a crib or play yard designed to convert

the product into a bassinet/cradle intended to have a horizontal sleep surface while in a rest (non-rocking) position.'' The Commission is proposing modifications to the scope and definition of a bassinet/cradle and bassinet/cradle accessory, as further discussed herein.

C. The Voluntary Standard—ASTM F2194

The voluntary standard for bassinets and cradles was first approved and published by ASTM in 2002, as ASTM 2194, *Standard Consumer Safety Specification for Bassinets and Cradles.* The standard has been revised a number of times since then. The Commission's April 2010 NPR assessed the effectiveness of ASTM F2194–07a$^{\varepsilon 1}$. Since publication of the 2010 NPR, the standard has been revised three times: In 2010, 2011, and, most recently, in 2012. The 2012 version, ASTM F2914–12, was approved on June 1, 2012. The 2012 voluntary standard contains requirements addressing a number of hazards. The requirements include:

1. Compliance with CPSC's regulations at 16 CFR part 1303 (ban of lead in paint), 16 CFR 1500.48 and 16 CFR 1500.49 (sharp points and sharp edges), and 16 CFR part 1501 (small parts), both before and after the product is tested according to the standard.
2. Exposed wood parts on bassinet/cradles, prior to testing, must be smooth and free of splinters.
3. Bassinets/cradles must not present scissoring, shearing, or pinching hazards.
4. Requirements and test method to prevent unintentional folding.
5. Requirements for the permanency of labels and warnings.
6. Prohibition against using wood screws in the assembly of any components that must be removed by the consumer in the normal disassembly of a bassinet/cradle.
7. Limits on how far a corner post assembly may extend.
8. Prohibition against containing an occupant restraint system when the product is used in the bassinet/cradle mode.
9. Performance requirements for the spacing of rigid sided bassinet/cradle components.
10. Performance requirements for the openings of mesh/fabric sided bassinet/cradles to prevent entrapment.
11. Performance requirements and test methods for static load and stability of the bassinet/cradle.
12. Requirements regarding the thickness and dimensions of the sleeping pad.
13. Requirements for the side height of the bassinet/cradle.
14. Requirements and test method for protective components of bassinet/cradle.
15. Fabric-sided enclosed openings requirement and test method involving a torso probe to protect against entrapment in bounded openings in the bassinet/cradle.
16. Performance requirements and test methods for the rock/swing feature of bassinets or cradles.
17. Marking, labeling, and instructional literature requirements.

D. Incident Data

The CPSC's Directorate for Epidemiology reports that there have been 335 incidents reported to the Commission regarding bassinets/cradles from November 2007 through December 2011. The data is drawn from the CPSC's ''Early Warning System'' (EWS), a pilot project initiated in 2007, which draws all data entered into the CPSC's epidemiology databases on a weekly basis. The 335 incidents involved 94 fatalities and 241 nonfatal incidents. (Because the number of emergency department-treated injuries associated with bassinets and cradles was insufficient to derive any reportable national estimates, injury estimates are not presented separately but are instead included within the category ''nonfatal incidents.'').

1. Fatalities

A total of 94 bassinet-related fatalities have been reported from early November 2007 through December 2011. Eight of the 94 deaths are associated with the design aspects of the product. Three of these deaths were due to entrapment and/or hanging that resulted after an infant's body, but not head, slipped through the fabric covering and underlying structural components of a particular brand of convertible bassinets/bedside sleeper that was subsequently recalled for this defect. Two of these three infants were 6 months old, while the third infant was a 4-month-old. Three of the eight deaths are associated with problems dealing with the flatness of the mattress pads used in a bassinet accessory of a play yard. All three of these decedents were 5 months old or younger. One of the three decedents suffocated in the corner of the bassinet when he rolled into that position due to the unlevel mattress pad; the other two decedents were found face down in a dip in the center of the unlevel mattress pad. The rocking feature of a bassinet, which contributed to its non-level resting position, was associated with an additional suffocation death of a 1-month-old infant. The remaining fatality associated with the design of the product occurred when the bassinet bed fell off its stand and allowed the 3-month-old decedent to get pinned between the bassinet and a nearby dresser.

Eighty-two of the deaths were asphyxiations due to the presence of soft or extra bedding in the bassinet, prone placement of the infant, and/or the infant getting wedged between the side of the bassinet and an added mattress or pillow. All but two of the 82 decedents were 5 months old or younger in age; one infant was 7 months old and another was 8 months old. There were four fatalities with not enough information to allow the CPSC to determine the hazard scenario.

2. Nonfatal Injuries

A total of 241 bassinet-related, nonfatal incidents were reported from November 2007 through December 2011. Fifty-two of these incidents reported an injury to an infant using the bassinet or cradle. The majority of the injuries (30 out of 52), were identified as resulting from falls out of the bassinets. Because 28 of the 30 falls were reported through the emergency department-treated injury surveillance system, little or no circumstantial information is available on how the fall occurred. However, the reports do indicate that 76 percent of the injured infants who fell out of bassinets were older than the ASTM-recommended maximum age limit of 5 months, with four infants as old as 9 months of age falling out of bassinets. All of the falls resulted in head and facial injuries.

Overall, there were six bassinet-related injuries that reportedly required hospitalization. Four of them, all serious head injuries, resulted from a fall out of the bassinet. One injury, a leg fracture, resulted from a caregiver unknowingly attempting to lift an infant out of the bassinet while the infant's leg was caught in a structural opening. The remaining hospitalized injury was due to a moldy bassinet pad that caused respiratory illness to the infant.

Two additional serious injuries were reported, but neither of these infants was hospitalized. There was a report of a second-degree burn suffered by an infant from the bassinet's overheated mobile and a report of an arm fracture from an infant's arm getting caught in the bassinet. The remaining injuries were limited mostly to contusions and abrasions.

The remaining 189 reports either indicated that no injury had occurred or provided no information about any injury. However, many of the

descriptions indicated the potential for a serious injury or even death.

3. Hazard Analysis

Based on the incident data, the Commission identified hazard patterns associated with bassinet and cradle incidents. The incidents were grouped into four broad categories:

- Product-related issues;
- Non-product-related issues;
- Recalled product-related issues; and
- Miscellaneous other issues.

(1) Product-related issues: The hazard scenarios in 209 of the 335 incidents (62 percent) reported were attributed to some sort of failure/defect or a potential design flaw in the product itself. This category includes five fatalities and 46 injuries, five of which involved hospitalization. Listed below are the reported problems, beginning with the most frequently reported concerns:

- Lack of *structural integrity,* which includes issues such as instability, loose hardware, collapse of the product, and loose wheels. This issue was reported in 64 (about 19 percent) of the incidents. One death is associated with this issue.
- Reports of infants *falling or climbing out* of bassinets/cradles. This category accounted for most of the bassinet-related injury reports that were received from emergency departments around the United States. While little product-/scenario-specific information was available in these reports, a majority indicated that the victims were over the ASTM-recommended upper age limit of 5 months. This issue was reported in 32 (about 10 percent) of the incidents.
- Problems with *mattress flatness* in bassinet attachments to play yards. Examples include mattresses that would not remain level horizontally because of poorly designed metal rods/other structures that are meant to be positioned underneath the mattress; lack of rigid mattress support; and failure of straps/hooks/bars designed to hold the bassinet attachment inside the play yard. This issue was reported in 31 (about 9 percent) of the incidents and was associated with three deaths.
- Problems with *rocking* bassinets and cradles, with locking or tilting issues that caused the infant to roll/press up against the side/corner of the product and posed a suffocation hazard. This issue was reported in 23 (about 7 percent) of the incidents, including one death.
- Problems with *packaging* of the product that resulted in broken/damaged products during delivery. This issue was reported in 19 (about 6 percent) of the incidents.
- Problems with bassinet *mobiles,* where components overheated, smoked, or sparked. This issue was reported in 13 (about 4 percent) of the incidents.
- *Miscellaneous* other product-related problems, ranging from a tear in the bassinet fabric, to odors, to product assembly/quality issues. Twenty-seven (about 8 percent) of the incidents reported these issues.

(2) Non-product-related issues: Eighty-three of the 335 reports (25 percent) were about incidents that involved no product defect or failure. This category consisted of 82 fatalities, most of which were associated with the use of soft/extra bedding or prone positioning. There was also one nonfatal injury incident that did not involve any product-related issues.

(3) Recalled product-related issues: There were 26 reports (8 percent) that involved recalled products. Some of the reports were received by CPSC staff prior to the recalls being published. There were three fatalities and two injuries due to entrapment and/or hanging of an infant between structural components of the bassinet. Most of the remaining reports were complaints or inquiries from consumers regarding a recalled product.

(4) Miscellaneous other issues: The remaining 17 (5 percent) incident reports were related to miscellaneous other or unspecified issues. Some of these reported concerns from consumers about perceived safety hazards; others described incidents with insufficient specificity for CPSC staff to identify the hazard scenario. There were four fatalities (unknown circumstances) and three injuries, including a hospitalized injury, reported in this category.

In summary, there are five product-related issues associated with incident deaths and/or significant injuries:

- Structural integrity/instability,
- Mattress flatness,
- Rocking,
- Falling or climbing out, and
- Entrapment in fabric sided products (recalled product-related).

In addition, there are multiple deaths associated with the use of soft/extra bedding or prone positioning of the child that are considered non-product related.

4. Recalls

There have been a total of five consumer-level recalls involving bassinets from October 2006 through June 2012.

One recall, involving 46,000 bassinets manufactured from July 2008 through May 2010, pertained to the latching system between the bassinet bed and the frame/stand. The latches that attach the bassinet bed onto the metal frame/stand could appear to be locked in place but still remain unlocked. This allowed the bassinet bed to become detached from the metal frame/stand, causing the bassinet bed to fall and the infant to be injured. There were seven incidents reported to CPSC and the manufacturer. One infant received a bruised cheek when the bassinet bed detached from the metal frame/stand and landed sideways on the floor with the infant inside. (The proposed Removable Bassinet Bed Attachment test, discussed in Sections F and G, would address this hazard.)

Another recall, conducted on February 16, 2011, involved all bassinets manufactured by the company before June 2010. The cross-bracing rails on the bassinet stands were misinstalled, and thus, were not fully locked into position, resulting in the bassinet collapsing, which caused the infant to fall to the floor or fall within the bassinet and suffer injuries. The manufacturer received 10 reports of incidents in which two infants received minor injuries as a result of the collapses, including bruises to the head and shoulder. Consumers were supplied with better instructions and guidance on how to install the cross-braces properly. This was a very design-specific hazard, and CPSC staff has not seen similar incidents from other manufacturers.

The third recall was conducted in December 2009 and involved five models that were bassinet accessories to play yards. This recall involved metal bars used to support the floorboard of the bassinet accessory that came out of the fabric sleeves and created an uneven sleeping surface, posing a risk of suffocation or positional asphyxiation. The manufacturer received no reports of injuries. (The proposed mattress flatness requirement, discussed in Sections F and G, would address this hazard.)

A fourth recall, conducted in May 2009 by the same manufacturer as in the third recall, also involved portable play yards. The convertible play yard included a bassinet accessory and changing station feature and was manufactured before December 1, 2008. This recall involved the play yard's rocking bassinet accessory that was tilting, even when secured by straps in the non-rocking mode, or that stayed tilted without returning to a level sleeping surface while in the rocking mode. These conditions could cause an infant to roll to the corner or side of the bassinet and become wedged in the corner or pressed against the side or bottom of the bassinet, posing a risk of suffocation or positional asphyxiation. The manufacturer and CPSC received 10

reports of infants rolling to one side, including six that had their faces pressed against the side or the bottom of the bassinet. One child reportedly was turning purple and was out of breath when discovered. No other injuries were reported. (The rock/swing angle test, proposed in the 2010 NPR and added to the ASTM standard in its 2012 iteration, would address this hazard.)

The fifth recall, conducted in September 2008, involved 3-in-1 and 4-in-1 convertible bassinets that contained metal bars covered by an adjustable fabric flap attached with Velcro®. The fabric was folded down when the bassinet was converted into a bedside sleeper position. If the Velcro® was not resecured properly when the flap is adjusted, an infant could slip through the opening and become entrapped in the metal bars and suffocate. CPSC learned that on August 21, 2008, a 6½-month-old girl died when she became entrapped and strangled between the bassinet's metal bars. This is the second strangulation death that the CPSC learned of involving the co-sleeper bassinets. On September 29, 2007, a 4-month-old girl became entrapped in the metal bars of the bassinet and died. (The fabric-sided openings test, proposed in the 2010 NPR and added to the ASTM standard in its 2012 iteration, would address this hazard.)

E. April 2010 NPR and Subsequent Changes to the ASTM Voluntary Standard

In April 2010, the Commission approved a proposed rule on bassinets/cradles that referenced the requirements specified in ASTM F2194–07a$^{\varepsilon 1}$ as a mandatory standard for bassinets and cradles, with several modifications to further reduce injuries and deaths. The modifications and edits included the following:

- Updated warnings;
- Stability requirements;
- Performance requirements for fabric-sided products to address entrapment incidents;
- Performance requirements to limit the rocking/swinging angle to 20 degrees and the rest angle of certain rocking/swinging cradles to 5 degrees;
- Requirement to eliminate active restraints;
- Changes to scope and terminology; and
- Performance requirements specifying a mattress flatness angle of 5 degrees to address suffocation incidents on segmented mattresses.

The April 2010 NPR also proposed to include hammocks within in the scope of the standard.

Many of the changes proposed in the April 2010 NPR have been incorporated in some capacity into ASTM F2194–12. Other changes to ASTM F 2194–12 have come about in response to comments to the April 2010 NPR. The Commission proposes to revise two of the proposed changes to the 2010 NPR (involving hammocks and the mattress-flatness requirement), based on review of public comments, further testing and analysis, and discussions with the ASTM task group on bassinets.

1. Proposed Changes in April 2010 NPR Incorporated Into ASME F2194–12

Restraints

The 2010 NPR proposed to prohibit bassinets with restraints that require action on the part of the caregiver to secure the restraint. A commenter requested that bassinets be allowed to have restraints and provided several reasons why they should be allowed. The primary reason that the Commission believes restraints should not be allowed in bassinets is that most bassinet uses do not require a restraint, so consumers have a strong motivation to avoid using restraints, if they are provided. When unused, restraints have been known to entrap and strangle children in similar products, like swings, handheld infant carriers, and bouncers. While none of the bassinet incidents was associated with restraint harness strangulation, this is probably due to the fact that restraints are rare on bassinets and not because they would not pose a hazard if they were present.

The 2012 version of F2194 contains a stronger requirement than that proposed in the April 2010 NPR that prohibits *all* restraints in bassinets. The Commission supports this change to the standard, and notes that it is more conservative than the restraints requirement proposed in the 2010 NPR.

The Prominence of Warnings About Soft Bedding

The 2010 NPR proposed a stronger warning label to address suffocation hazards. The current ASTM standard for bassinets, F2194–12, includes an enhancement of the soft bedding warnings by: (1) Increasing the font size for the suffocation warning label to 0.4 inches or higher; and (2) adding emphasis by stating that ''Infants have suffocated * * *,'' rather than stating ''Infants can suffocate * * *.''

Maximum Rock/Swing and Rest Angles

The Commission's 2010 NPR proposed a maximum rock/swing angle of 20 degrees and a maximum rest angle of 5 degrees for rocking cradles. Several commenters recommended a maximum rock/swing angle of 20 degrees and a maximum rest angle of 7 degrees for rocking cradles. The 5-degree angle was based on the Australian standard for rocking cradles. In the Australian standard, the angle is measured with the CAMI infant dummy placed in the center of the cradle. The intent is to ensure that the rocking cradle returns to a level position and provides a flat sleeping surface for the infant. In ASTM F2194–12, the angle is measured with the CAMI dummy placed to one side of the cradle. The Commission believes that the placement of the CAMI to one side results in a more stringent requirement than the Australian standard. For this reason, a 7-degree rest angle is a reasonable and achievable requirement for bassinets that will address suffocation hazards associated with an angled sleep surface. Therefore, the Commission is not making any recommendations with respect to this issue.

Fabric-Sided Enclosed Openings Test

The performance requirements for fabric-sided products included in F2194–12 to address entrapment incidents are the same as in the 2010 NPR, except for editorial changes made to clarify the requirement and test procedure.

Stability

The stability requirements are intended to ensure that the product does not tip over when pulled on by a 2-year-old male. The 2010 NPR clarified that the stability requirement applies to all manufacturer-recommended use positions, including the position where the locks are engaged to prevent rocking/swinging motion. ASTM incorporated this change in ASTM F2194–11; therefore, it is included in the latest version, ASTM F2194–12.

2. Changes to ASTM F2194 That Arose Out of a Response to Comments Received on the April 2010 NPR

Baby Size Limits

In response to the 2010 NPR, one commenter noted that because ''bassinets provide an important tool for parents to monitor premature babies,'' a target age range for infant occupants may be necessary to enhance the understanding of the developmental milestones used in the warnings. They also suggested that if there is ''a size at which a bassinet becomes unsafe for a baby,'' then that factor should be listed in the product's instructions and warnings.

The 2012 version of the ASTM standard includes a reference to the maximum recommended weight in the FALL HAZARD warning label. The Commission supports this addition to the standard.

Static Load

The static load test is intended to ensure structural integrity even when a child three times the recommended (or 95th percentile) weight uses it. This has been modified following publication of the April 2010 NPR to also test play yard bassinet accessories at all four corners to ensure structural integrity of the product.

Side Height Requirement

This requirement, which is intended to prevent falls, was added to F2194–12 in response to comments to the 2010 NPR. The side height requirement in F2914–12 requires that the bassinet/cradle side height be at least 7½; inches from the top of the uncompressed mattress surface.

3. Revisions to Proposed Changes in 2010 NPR

Hammocks

The Commission's 2010 NPR proposed to include infant hammocks in the scope of the standard. The voluntary standard for bassinets and cradles does not state explicitly whether infant hammocks are included within the scope of the standard. However, the Juvenile Products Manufacturers Association (JPMA) historically has certified some infant hammocks to the bassinet standard because there was not a separate standard for infant hammocks and other inclined sleep products. Including infant hammocks in the scope would effectively ban most infant hammocks currently on the market because, by their nature, they would be unable to meet the performance criteria in the bassinet standard addressing rest angle, segmented mattress flatness angle, and rock/swing angle.

Several comments were received regarding the inclusion of infant hammocks and other inclined sleeping products in the scope of the 2010 NPR. The comments were universally against such inclusion, asserting that this would effectively ban a product that has utility. The comments also opined that banning them might increase hazardous sleeping arrangements, causing consumers to resort to a substitute product such as a car seat or makeshift soft bedding to prop up an infant. The Commission agrees that alternative products or makeshift products would present additional hazards if consumers chose to use them instead of cribs, bassinets, or other common juvenile products intended for sleep.

An inclined sleeper differs from a bassinet in that it is intended to have an inclined sleep surface and it conforms to the contour of the occupant. Most hammocks have mattresses that are also inclined in a manner that elevates the head, as well as conforming to the body contours of the infant. They are also intended to allow swinging or bouncing motions. These special features, especially elevating the head, are sometimes intended to help prevent reflux. Features that allow head elevation, swinging, and bouncing motions distinguish these products from common bassinets and cradles, which generally have flat mattresses with solid or fabric-covered framed sides. The Commission believes that a separate standard targeted specifically to these products will more effectively address any hazards associated with them. Due to the significant progress in the development of a separate voluntary standard to address hammocks and inclined sleeping products, the Commission is not including them within the scope of this proposed rule.

Mattress Flatness

In the 2010 NPR, a mattress flatness performance test for all types of bassinets and cradles was included. The performance requirement specified a mattress flatness angle of 5 degrees to address suffocation incidents on mattresses. The mattress flatness performance requirement that the Commission is proposing in this document only applies to segmented mattresses because the CPSC's review of the data showed that only segmented mattresses used in play yards were involved in incidents. In addition, the Commission determined that an angle of 10 degrees or less would still provide protection; allow for testing variances; and also address design and manufacturability concerns with segmented mattress pads. The Commission's new proposal has additional requirements for two-occupant bassinets. The test method now uses a rigid cylinder to simulate the infant, rather than a soft/deformable CAMI dummy. This change provides more consistent test results. The mattress flatness test is discussed in more detail in Section F.

F. Assessment of ASTM Voluntary Standard and International Standards

The Commission believes that ASTM F2194–12 addresses many of the general hazards associated with durable nursery products, such as lead in paints, sharp edges/sharp points, small parts, wood part splinters, scissoring/shearing/pinching, openings/entrapments, warning labels, and toys. The standard also includes specific requirements for tip stability, unintentional folding of the product, and static load.

From the incident data and hazard patterns associated with bassinets and cradles (as discussed in Section C), the Commission identified six addressable hazards: (1) Suffocation due to the addition of soft bedding; (2) suffocation/positional asphyxia due to excess mattress pad angle; (3) entrapments in fabric-sided openings; (4) suffocation due to excess rock/swing angles; (5) misassembly of removable bassinet beds; and (6) falls and climb-outs. Following is an analysis of the adequacy of ASTM F2194–12 in addressing these hazards.

1. Suffocation Due to the Addition of Soft Bedding. The majority of the deaths associated with bassinets and cradles were asphyxiations due to the presence of soft or extra bedding in the bassinet, prone placement of the infant, and/or the infant getting wedged between the side of the bassinet and an added mattress or pillow.

As mentioned in Section E of this preamble, since publication of the 2010 NPR, ASTM F2194 has been revised to strengthen the suffocation warning. Specifically, ASTM F2194–12, includes an enhancement of the soft bedding warnings by: (1) Increasing the font size for the suffocation warning label to 0.4 inches or higher; and (2) adding emphasis by stating: ''Infants have suffocated * * *,'' rather than indicating: ''Infants can suffocate * * *.''

The Commission supports the strengthening of the suffocation warning label as included in the latest revision of the ASTM voluntary standard and does not believe that there are additional requirements that can be put in place in the standard to address unsafe sleep environments and unsafe sleep practices. The Commission will continue information and education efforts, such as the Safe Sleep campaign, to address suffocation and other serious sleep hazards.

2. Suffocation/Positional Asphyxia Due to Excess Mattress Pad Angle. Bassinets that are commonly sold as accessories to play yards use the floor of the play yard (a segmented mattress pad) as the floor of the bassinet. Seams between segments of folding play yard bassinet accessory mattress pads have been known to create a valley shape in a bassinet sleeping surface in the crease between adjoining segments of the mattress.

An inclined sleeping surface (on a product not intended to provide a contour or other means to contain the child) can contribute to an infant rolling, increasing the likelihood that they will be found face down and become trapped in a significant V-shaped crease. When lying prone in a valley (or V-shaped crease), infants may have more difficulty keeping their airways unobstructed than they would on a flat surface because their faces are trapped in the juncture between adjacent surfaces. Their heads cannot rotate to the side as much as when the sleeping surface is flat. Immature head control and weak neck muscles may not allow them to free their airways. Thus, infant sleeping surfaces need to be as firm, flat, and level as possible because soft, uneven and non-level surfaces may create a higher risk of suffocation than a level surface.

The Commission has identified incidents associated with a sleeping surface (segmented mattress) that is not level or flat. The data include fatal and nonfatal incidents involving play yard attachment bassinets with insufficient mattress support.

In one in-depth investigation (IDI), the product was apparently assembled without two key structural support bars beneath the mattress pad of a bassinet accessory that was intended by the manufacturer to be mounted from the top rails of the play yard. The incident summary states:

A 3 month and 26 day old male victim was found deceased inside a play yard. The ME determined that the cause of the death was asphyxia. The victim was found face down in a crease produced by the mattress. He was pronounced deceased at the hospital.

The Commission notes that requirements to ensure that key structural supports are properly installed by consumers would have helped prevent this incident from occurring. The Bassinet Misassembly Provision NPR, published on August 29, 2012, is a Commission-directed NPR to amend the play yard mandatory standard to include a provision to address the hazards associated with play yard bassinet accessories that can be misassembled. (77 *FR* 52272). However, there has never been a requirement for sleeping surfaces to be flat or even nearly flat, which is the critical feature of the product that constitutes a hazard. A play yard could be designed to position the occupant in a valley, and it would still pass the play yard standard and the misassembly provision. The Commission believes both requirements are necessary to address these hazards: (1) A missing component requirement to prevent installation/use of a bassinet accessory that has a key component missing; and (2) a flatness requirement to ensure segmented mattresses, like those found in bassinet accessories, are flat when assembled according to manufacturer's instructions.

In another IDI, the victim was in a bassinet accessory to a play yard that was also misassembled. The incident summary states:

*A two month old male was found unresponsive in his * * * play yard with no signs of trauma. The child had rolled in the bassinet section causing his face to be placed in the corner of the bassinet. He was lying on a blanket with another blanket on top of him. Investigators who initially measured the bassinet at the scene reported that one side was five inches higher than the other. I observed during my investigation that depending on weight and movement that there will be a variance in height within the unit.*

Other risk factors also may have contributed to the incident (*e.g.,* the placement of the infant to sleep in the prone position and the presence of a blanket under the infant), but the case nonetheless illustrates the potential for non-level sleeping surfaces to contribute to bassinet occupants getting into fatal positions from which they may not be able to remove themselves.

A third fatality involved a victim with serious physical challenges who was placed face down to sleep (both of these are additional risk factors) and was found in a sagging bassinet accessory to a play yard. The incident report states:

The mother was using the elevated playpen platform for her 5 month old male baby's sleeping area. He was born with multiple physical complications including the inability to swallow and would drool constantly. The parents placed the infant in the playpen at night face down and awoke to find he had expired in the middle of the night. The playpen elevated platform showed sagging in the center possibly due to incorrect assembly of the playpen.

In the fourth incident involving a fatality, a baby died in the corner of a tilted bassinet accessory on a play yard. A rod intended to be placed in a pocket at the end of the accessory was left out. When a clip on the corner of the bassinet came off for unknown reasons, the sleeping surface tilted downward, allowing the infant's head to become entrapped. While the incident was included in data used for the final rule briefing package for play yards, it is included here because the manner of death is related to a non-level, segmented mattress.

In addition to the fatal incidents, a nonfatal incident was found to be associated with the same hazard. In this incident, a child in a bassinet accessory of a play yard was observed rolling into seams on the sleep surface, but the child was not injured. The incident report states:

No injury occurred to a five-month-old female, who while asleep in the bassinet section of a portable and collapsible play yard rolled into a seam of the removable changing pad used with the bassinet. The mother of the five-month old noticed that the five month old had a tendency to roll into seams of the mattress pad when it was used with the bassinet.

There is no requirement for mattress flatness in ASTM 2194. The 2010 NPR proposed a mattress flatness requirement that specified a 5-degree maximum tilt angle for segmented sleeping surfaces, like those found in play yard bassinet accessories. The ASTM subcommittee for bassinets believed that the 5-degree maximum angle was not achievable within the tolerances necessary to manufacture play yard bassinet accessories; accordingly, they considered alternative test methods and requirements for sleeping surface flatness in products with segmented mattresses.

In lieu of the 5 degrees proposed in the 2010 NPR for segmented mattresses, the ASTM subcommittee sent out to ballot a requirement that allowed up to 14 degrees on either side of a valley formed at a seam, with higher inclines possible if the sum of the two angles on either side of the valley did not exceed 28 degrees in total. The 14-degree angle was based on an extrapolation of angles formed by dimensions of *average* infant faces. By combining an infant's mandible width with dimensions of nasal protrusion, an isosceles triangle can be created that represents a cross-section of the volume of space beneath the nose. From this cross-section, one can extrapolate both the angle of the valley and the angle of the incline of the surface that would contact a prone infant's face. The angle resulting from the combination of the *average* facial dimensions is 15 degrees, from which the ASTM subcommittee subtracted a single degree for a factor of safety. This ASTM ballot item received many negative votes and was not approved for the standard.

The Commission is uncomfortable using the *average* infant facial dimension as the basis for this requirement. A product that has a 14-degree angle in the valley formed at the seam of the mattress would leave about one-half of the potential occupant population unprotected from suffocation. While the ASTM Committee used an angle resulting from

the combination of *average* facial dimensions, the Commission generally recommends using the smallest users' anthropometrics for justifying requirements of this nature. If the facial measurements of the smallest (5th percentile) infants are used to form the isosceles triangle, the resulting valley is 158 degrees, which yields an 11-degree angle of sleep surface incline from the horizontal on each side. If a single degree is subtracted from this incline angle for a minor factor of safety, the requirement becomes a 10-degree maximum incline from the horizontal. In the Commission's proposed test, each seam of a folding bassinet sleeping surface is tested with a pass/fail criterion of 10 degrees maximum for either side of the valley formed by a weighted cylinder.

In August 2012, ASTM reballoted the mattress flatness test. Several modifications were made to the test procedure, and CPSC staff was involved throughout the development of this requirement. The actual test procedure that was reballotted by ASTM is identical to the Commission's recommendation. However, the test requirement (the pass/fail criteria) is different. In the test procedure, a measurement is taken on each side of each seam of the mattress (for a total of 6 or 8 measurements per bassinet). As mentioned, the Commission is proposing a test requirement of 10 degrees maximum for each measurement taken. Under the ASTM ballot, 10 degrees or less for all measurements would pass, more than 14 degrees for one or more measurements would fail, and any angle measurements between 10 and 14 degrees would require a two-step process where the test lab would take two additional measurements, average them, and then use 10 degrees as the final pass/fail delineator.

With regard to the test method itself, the 2010 NPR's method for testing flatness used a CAMI dummy to weight the surface prior to measuring the side angles of the valley formed in the sleeping surface. However, the CPSC and the ASTM subcommittee prefer a rigid cylinder to help increase the reliability of the test across test laboratories. This is because CAMI dummies tend to vary slightly with age because of the nature of their construction. CPSC staff tested a variety of cylinder diameters and lengths and found that small differences in the footprint of the test cylinder were not critical to differentiating hazardous from nonhazardous products. The most critical factor was the design of the mattress support structure. An exact replica of the human form is not necessary for this type of screening, and the benefits of using standardized, readily available test methods are appreciated by industry. As previously mentioned, the test procedure that the Commission is proposing is identical to what ASTM recently balloted.

3. Entrapments in fabric-sided openings. Three deaths associated with bassinets and cradles were due to entrapment and/or hanging that resulted after an infant's body, but not head, slipped through the fabric covering and underlying structural components of a particular brand of convertible bassinets/bedside sleepers of a particular brand of convertible bassinets/bedside sleepers. These incidents occurred in one manufacturer's bassinet that was recalled on August 28, 2008.

As discussed in Section E, since publication of the 2010 NPR, ASTM has revised the bassinet standard to include a fabric-sided enclosed openings test. The test, as added to the 2012 version of the standard, is very close to what was included in the 2010 NPR. Thus, the Commission is not recommending any further changes relating to this hazard.

4. Suffocation due to excess rock/swing angles. Bassinets and cradles with locking or tilting issues that caused the infant to roll/press up against the side/corner of the product pose a suffocation hazard. There have been several nonfatal incidents and one fatality associated with a rocking bassinet. In the fatal incident, a 1-month-old was found pressed up against the fabric side of a bassinet. It is not known whether the lock, which was designed to prevent rocking, was engaged properly, or wasn't functioning correctly.

As discussed in Section E, since publication of the Commission's 2010 NPR, ASTM has included a rock/swing angle requirement in its standard. The requirement specifies a maximum of 20 degrees for the swing angle and 7 degrees for the rest angle. The Commission believes that this requirement adequately addresses the hazard. Thus, the Commission is not proposing any further changes to the standard relating to this hazard.

5. False latching/stability of removable bassinet beds. The Commission is aware of several incidents involving bassinets beds that were designed to be removed from their stand, four of which have IDIs. During the incidents, the bed portion of the unit was not completely locked or properly attached to its stand. The bed portion of the unit appeared to be stable, giving the caregivers a false sense of security. For various reasons, the bed portion fell or tilted off of its stand. In one case, a 3-month-old infant was killed. The Commission was also informed by Health Canada of a second death. In email correspondence from Health Canada staff, the following was reported:

> *It strongly appears the bassinet was not attached to the base when the infant was put down for a nap. When the infant was found, the bassinet was perpendicular to the base and had fallen into the base opening at an angle suspending the infant. The straps and hooks attaching the bassinet to the base were not snapped in.*

There have also been nonfatal incidents involving bassinet beds that tipped over or fell off their base/stand when they were not properly locked/latched to their base/stand, or the latch failed to engage as intended. In May 2012, there was a recall of 46,000 bassinets that could appear to latch to the stand when they actually had not latched. (*http://www.cpsc.gov/cpscpub/prerel/prhtml12/12173.html*).

The reason that removable bassinet designs need inherent stability (or obvious instability) is consumers will sometimes avoid activating lock or latch mechanisms if it appears that the bassinet bed is stable when placed on its stand/base. Consumers may do this because the locks or latches seem redundant or because they are worried about making noise when activating locks or latches around a sleeping infant. Locks and latches also accidentally may give feedback that they are locked when they are not. This constitutes a ''false latching'' situation. Because of these foreseeable use patterns, this requirement will make bassinets with a removable bed portion inherently stable or have visible indicators to show when the bassinet bed is not properly attached to the stand.

Commission staff has been actively involved in an ASTM task group that is currently developing requirements to address the hazards associated with bassinets with removable bed portions. To date, the language that the task group drafted has yet to be balloted. The Commission proposes adding a new requirement for the NPR, based on what the ASTM task group has developed to date. The proposed requirement allows multiple options to pass. These options will either ensure that the bed portion of the unit is inherently stable when it is placed on the stand unlatched, or it will give obvious feedback that the unit is not latched or stable. One option allows the unit to give an extreme appearance of instability by being tilted 20 degrees or more. The 20-degree

minimum is twice the allowable deviation from horizontal that staff recommends for sleeping surface flatness. This angle was extrapolated from an IDI report involving a caregiver who noticed that a bassinet was tilted. From photographs of the incident product, the ASTM task group assigned to examine the problem estimated that the unit produced about a 17-degree angle, which they felt would be reasonable to round up to 20 degrees for the standard. A sleeping surface at 20 degrees from the horizontal seems severe enough that consumers would notice that it was not level. This proposed requirement is slightly less than the angle proposed to address similar hazards in the play yard standard (*i.e.,* 30 degrees from the horizontal), but the ASTM subcommittee reasoned that bassinets are different in structural design and materials and will appear to be misassembled more easily than the suspended and segmented mattress supports used in play yards.

In addition to the aforementioned options, a bassinet that has a removable bed would also pass the requirement if it has a visual indicator to alert a caregiver that the bassinet bed is not properly locked onto the stand. Or, the bassinet would also pass the requirement if it can pass the standard's stability test while in an unlocked position.

6. Falls and Climb-Outs. The majority of the nonfatal injuries (30 out of 52, or 58 percent) were identified as falls from the bassinets. Because 28 of the 30 falls were reported through the emergency department-treated injury surveillance system, little or no information is available on how the falls occurred. However, the reports do indicate that 76 percent of the injured infants who fell out of bassinets were older than the ASTM-recommended maximum age limit of 5 months, with four infants as old as 9 months of age. All of the falls resulted in head and facial injuries.

The Commission believes the new side height requirement in ASTM F2194–12, which requires a bassinet side to be at least 7.5 inches above the mattress surface, as well as the proposed removable bassinet requirements, will help address fall hazards.

In addition to the requirements for mattress flatness and removable bassinet bed attachments, the Commission is proposing changes to the scope of the standard and a revised test method for stability.

Scope

In order to clarify which products are covered under the scope of the proposed standard and to ensure more complete coverage of sleep products, the Commission is proposing the following with respect to the scope of the ASTM standard. The scope would encompass products with an incline of 10 degrees or less, but not products with a greater than 10-degree angle. This would include cradle swings within the scope, which, by definition, recline less than 10 degrees. The Commission proposes including products that can be supported by a stationary frame/standard, such as carriage attachments to strollers and Moses baskets, only when they are used with a stationary or rocking stand. (A Moses basket is a portable cradle, typically made from wicker or cloth, with no legs or a stand.) Finally, the Commission proposes to specify that the standard covers products *primarily* used to provide sleeping accommodations. This would expand the scope beyond products *only* used to provide sleeping accommodations. This would ensure, for example, that a bassinet sold with a toy mobile that is meant to entertain an infant who is lying in the bassinet would still fall within the scope of the standard.

Stability Test Dummy

During evaluations of the test methods for removable bassinet beds, Commission staff made comparisons of the stability of products weighted with the newborn CAMI dummy (7.45 lbs) as opposed to the infant CAMI dummy (17.4 lbs). ASTM F2194–12 contains a stability requirement that uses the heavier infant CAMI dummy. There is no rationale included in the ASTM standard for why the heavier dummy was specified in the stability requirement. Use of the newborn CAMI, which is readily available to test labs and represents the 50th percentile newborn, would result in a more conservative stability test. In addition, bassinets are intended for use with newborns. For these reasons, the Commission is proposing a revised test procedure for bassinet stability, which uses a newborn CAMI instead of an infant CAMI.

International Standards

The Commission reviewed Canadian, European, and Australian standards for bassinets and/or cradles. Many of the requirements found in the 2012 ASTM standard can also be found in some of these international standards.

The European Standard, EN 1130–1: 1996, ''Furniture—Cribs and Cradles for Domestic Use,'' has several requirements not found in ASTM F2194–12. Most of these additional requirements address hazards associated with cribs intended for use with older children (in excess of the 5-month recommended maximum age for bassinets). Thus, they are not applicable to bassinets.

The scope of the European Standard, EN 12790–2009, ''Child Use and Care Articles—Reclined Cradles,'' includes inclined bassinets/cradles, car seat carriers, hammocks, and bouncers. Some of the general requirements could apply, but because the scope of the product is not the same, most of the requirements are not applicable to bassinets.

The Australian/New Zealand standard (AS/NZS 4385:1996) contains requirements for rocking and swinging angles that were used to develop some of the requirements in ASTM F2194. The ASTM rock/swing rest angle performance requirement, while based on AS/NZS 4385:1996, contains a more severe test method than that in AS/NZS 4385:1996, due to the placement of the CAMI dummy. This is discussed more fully in Section E.

The Canadian standard (SOR 86–962: 2010) includes requirements for cribs and non-full-size cribs. This standard does not distinguish between a bassinet and non-full-size cribs. As a result, many of the requirements are not applicable for this NPR. However, the Canadian standard was used to develop the ASTM requirement for bassinet side height.

The Commission believes that the current ASTM F2194–12 standard is the most comprehensive of the standards to address the incident hazards. There are some individual requirements in various foreign standards that are more stringent than ASTM; however, many of these requirements do not address the identified hazards in the incident data reported to the CPSC.

G. Description of Proposed Changes to ASTM Standard

The proposed rule would create a new part 1218 titled, ''Safety Standard for Bassinets and Cradles.'' The proposal would establish ASTM F2194–12, ''Standard Consumer Safety Specification for Bassinets and Cradles,'' as a consumer product safety standard, but with certain changes. These proposed changes include a revision to an existing test method (the bassinet stability test method), two additional new requirements and associated test methods (for mattress flatness and removable bassinet bed attachments), and a revised scope and associated definitions or references to support these additions. They are detailed herein.

1. Clarifying the Scope of the Standard and Associated Definitions (Sections 1.3, 3.1.1, and 3.1.2)

The Commission is proposing to revise the scope of ASTM F2194–12 and corresponding terminology to better define which products fall within or outside the scope of the standard. The current text of ASTM F2194–12 provides that the ''consumer safety performance specification covers products intended to provide sleeping accommodations only for an infant up to approximately 5 months in age, or when the child begins to push up on hands and knees, whichever comes first.'' The Commission is proposing to change the scope and definition of a ''bassinet/cradle''—from products meant exclusively for sleeping—to those intended *primarily* for sleeping. This would ensure that a bassinet sold with a toy mobile that is meant to entertain an infant who is lying in the bassinet, for instance, would still fall within the scope of the standard.

The Commission is also proposing to amend the definitions of ''bassinet/cradle'' and ''bassinet/cradle accessories'' to specify that the sleeping surface of these products, while in a rest (non-rocking or swinging) position, is intended to be less than or equal to 10 degrees from horizontal. This change would complement the definition of ''inclined sleeper'' in the draft ASTM inclined sleeper standard, which defines the ''inclined sleeper'' as having more than a 10-degree sleep surface incline. Thus, the following are covered under the standard: Cradle swings with inclines less than or equal to 10 degrees from horizontal while in rest position; carriage baskets/bassinets that are removable from the stroller base, when the carriage basket/bassinet meets the definition of ''bassinet/cradle'' found in the standard; bassinet/cradle attachments to cribs or play yards, when in bassinet/cradle-use mode. The following would not fall under the scope of the bassinet/cradle standard: Products used in conjunction with an inclined infant swing or stroller and products that are intended to provide an inclined sleep surface (defined as greater than 10 degrees from horizontal while in the rest (non-rocking) position).

2. Segmented Mattress Flatness Requirement and Test Method (Sections 6.9 and 7.10)

In order to address the hazard of suffocation/positional asphyxia due to an excess mattress pad angle, the Commission is recommending performance requirements and a test method for the minimum flatness of segmented mattress surfaces. This requirement applies only to segmented mattresses, such as those seen in a bassinet accessory to a play yard. The Commission recommends that the segmented mattresses commonly used in play yards shall not create an angle greater than 10 degrees when tested using a 17-pound cylinder to simulate the weight of a 6-month-old infant.

3. New Performance Requirement and Associated Definitions To Address Hazards Associated With the Stability of Removable Bassinet Beds (Sections 3.1.3, 3.1.17, 3.1.18, 3.1.19, 3.1.20, 6.10, 7.11)

In order to address hazards associated with misassembly of removable bassinet bed and falls, the Commission is recommending performance requirements and a test method for products that have bassinet beds that attach to an elevated stand. The requirements apply to removable bassinet beds that are designed to separate from the stand/base without the use of tools. The Commission is proposing that if a removable bassinet bed is not properly attached or assembled to its base, it must meet one of the following requirements:

- The base/stand shall not support the bassinet (*i.e.,* the bassinet bed falls from the stand so that it is in contact with the floor); or
- The lock/latch shall automatically engage under the weight of the bassinet bed (without any other force or action); or
- The stand/base shall not be capable of supporting the bassinet bed within 20 degrees of horizontal; or
- The bassinet shall contain a visual indicator mechanism that shall be visible on both sides of the product; or
- The bassinet bed shall not tip over and shall retain the CAMI newborn dummy when subjected to the stability test outlined in the standard.

4. Revised Test Procedure for Bassinet Stability (Sections 2.3 and 7.4.4)

For the reasons described in the previous Section, the Commission is proposing a revised test procedure for bassinet stability that uses a newborn CAMI instead of an infant CAMI.

H. Effective Date

The Administrative Procedure Act (APA) generally requires that the effective date of the rule be at least 30 days after publication of the final rule. 5 U.S.C. 553(d). To allow time for bassinets and cradles to come into compliance, the Commission proposes that the standard would become effective 6 months after publication of a final rule in the **Federal Register**. The Commission invites comment on how long it will take bassinet and cradle manufacturers to come into compliance with the rule.

I. Regulatory Flexibility Act

Introduction

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires agencies to consider the impact of proposed rules on small entities, including small businesses. Section 603 of the RFA requires that the Commission prepare an initial regulatory flexibility analysis and make it available to the public for comment when the notice of proposed rulemaking is published. The initial regulatory flexibility analysis (IRFA) must describe the impact of the proposed rule on small entities and identify any alternatives that may reduce the impact. Specifically, the IRFA must contain:

- A description of, and where feasible, an estimate of the number of small entities to which the proposed rule will apply;
- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and legal basis for, the proposed rule;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities subject to the requirements, and the type of professional skills necessary for the preparation of reports or records; and
- An identification, to the extent possible, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

In addition, the IRFA must contain a description of any significant alternatives to the proposed rule that would accomplish the stated objectives of the proposed rule and, at the same time, reduce the economic impact on small businesses.

The Market

Bassinets and cradles are typically produced and/or marketed by juvenile product manufacturers and distributors, or by furniture manufacturers and distributors, some of which have separate divisions for juvenile products. The Commission believes that there are currently at least 55 suppliers of bassinets and/or cradles to the U.S. market; 24 are domestic manufacturers, and 11 are domestic importers. An additional 14 domestic firms have unknown bassinet/cradle supply

sources; three of those firms are retailers and nine specialize in bedding, some of which is sold with bassinets or cradles. There are also six foreign firms supplying the U.S. market: Five manufacturers and one importer who imports from foreign companies and distributes from outside of the United States.

Bassinets and cradles from 12 of the 55 firms have been certified as compliant by the JPMA, the major U.S. trade association that represents juvenile product manufacturers and importers. Firms supplying bassinets or cradles would be certified to the ASTM voluntary standard F2194–10, while firms supplying play yards with bassinet/cradle attachments would also have to meet F406–11b. Nine additional firms claim compliance with the relevant ASTM standard for at least some of their bassinets and cradles.

According to a 2005 survey conducted by the American Baby Group (*2006 Baby Products Tracking Study*), 64 percent of new mothers own bassinets; 18 percent own cradles; and 39 percent own play yards with bassinet attachments. Approximately 50 percent of bassinets, 56 percent of cradles, and 18 percent of play yards were handed down or purchased second-hand. Thus, about 50 percent of bassinets, 44 percent of cradles, and 82 percent of play yards were acquired new. This suggests annual sales of about 1.3 million bassinets ($.5 \times .64 \times 4.1$ million births per year); 325,000 cradles ($.44 \times .18 \times 4.1$ million); and 1.3 million play yards with bassinet attachments ($.82 \times .39 \times 4.1$ million). This yields a total of approximately 3 million units sold per year that could be affected by the proposed bassinet/cradle standard.

Reason for Agency Action and Legal Basis for Proposed Rule.

The Danny Keysar Child Product Safety Notification Act, section 104 of the CPSIA, requires the CPSC to promulgate a mandatory standard for bassinets/cradles that is substantially the same as, or more stringent than, the voluntary standard. CPSC worked closely with ASTM to develop the new requirements and test procedures that have been added to the voluntary standard since 2010. These new requirements address several known hazard patterns that will help to reduce injuries and deaths in bassinets and cradles, and they have resulted in the current voluntary standard, F2194–12, upon which the proposed rule is based.

However, the Commission proposes adding two new requirements to F2194–12, as well as modifying the scope and the test CAMI dummy used in the existing stability test. The first new requirement would address suffocation and positional asphyxia hazards that have occurred as a result of problems with segmented mattress flatness in play yard bassinet accessories. The second would address the stability of bassinets with removable bassinet beds, particularly the attachment mechanisms. The Commission also proposes modifying the scope (and some of the terminology) to ensure that inclined sleepers (including infant hammocks) would no longer be covered under the bassinet/cradle standard, unless they recline to 10 degrees or less. The expanded scope would also include Moses baskets and stroller carriage accessories when used in conjunction with a stationary stand. These modifications would also help eliminate gaps in product coverage (*i.e.,* most products that may be used for infant sleep will be included under at least one durable nursery product standard). Finally, the Commission proposes that the CAMI newborn dummy be used for stability testing because it more closely resembles the characteristics of bassinet users than the CAMI infant dummy in F2194–12.

4. Requirements of the Proposed Rule

The Commission proposes adopting the voluntary ASTM standard for bassinets and cradles (F2194–12) with a new mattress flatness requirement, a new stability requirement for bassinets with removable beds, a revised scope, and a modified CAMI dummy for the existing stability requirement. Some of the more significant requirements of the current voluntary standard for bassinets and cradles (ASTM F2194–12) are listed below. The requirements that were added to the ASTM voluntary standard or modified since the 2010 NPR are italicized.

- Spacing of rigid-side components—intended to prevent child entrapment between both uniformly and non-uniformly spaced components, such as slats. *This has been modified for clarity to remove duplicative test references.*
- Openings for mesh/fabric—intended to prevent the entrapment of children's fingers and toes, as well as button ensnarement.
- Static load test—intended to ensure structural integrity even when a child three times the recommended (or 95th percentile) weight uses it. *This has been modified to also test play yard bassinets in all four corners.*
- Stability requirements—intended to ensure that the product does not tip over when pulled on by a 2-year-old male. *ASTM adopted the revised test requirements included in the 2010 NPR (includes testing with locks/latches engaged).*
- Sleeping pad thickness and dimensions—intended to minimize gaps and the possibility of suffocation due to excessive padding. *F2194–12 allows thicker mattresses for rigid-sided products because a thicker mattress does not pose the same suffocation hazard when used in rigid-sided, rather than soft-sided, products.*
- Tests of locking and latching mechanisms—these are intended to prevent unintentional folding while in use.
- Suffocation warning label—intended to help prevent soft bedding incidents. *F2194–12 requires the warning to use a larger font than the 2010 NPR.*
- *Fabric-sided openings test—intended to prevent entrapments. This test was included in the 2010 NPR and has been adopted in F2194–12 with a few editorial changes.*
- *Rock/swing angle requirement—intended to address suffocation hazards that can occur when latch/lock problems and excessive rocking or swinging angles press children into the side of the bassinet/cradle. The 2010 NPR recommended a maximum rocking angle of 20 degrees and a maximum rest angle of 5 degrees. ASTM F2194–12 adopts the maximum deflection angle of 20 degrees, but includes a maximum rest angle of 7 degrees with a more severe test condition where the CAMI doll is positioned at the side, rather than the center, of the bassinet/cradle.*
- *Occupant restraints—intended to prevent incidents where unused restraints have entrapped and strangled children. The 2010 NPR proposed that only passive restraints be allowed. ASTM F2194–12 is even stricter, allowing no restraints to be used in a bassinet/cradle configuration.*
- *Side height requirement—intended to prevent falls. This requirement, which is new to F2194–12, arose from the comments to the 2010 NPR. A bassinet/cradle side height of 7½ inches from the top of the uncompressed mattress is now required.*

The voluntary standard also includes: (1) Torque and tension tests to ensure that components cannot be removed; (2) requirements for several bassinet/cradle features to prevent entrapment and cuts (minimum and maximum opening size, small parts, hazardous sharp edges or points, and edges that can scissor, shear, or pinch); (3) requirements for the permanency and adhesion of labels; (4) requirements for instructional literature; and (5) corner post extension requirements intended to prevent

pacifier cords, ribbons, necklaces, or clothing that a child may be wearing from catching on a projection.

The Commission proposes modifying the scope, using the more appropriate infant CAMI dummy for stability testing, and adding new mattress flatness and attachment of removable bassinet bed requirements to ASTM F2194–12. As part of these changes, there would also be several new or revised definitions, including ''bassinet/cradle,'' ''bassinet/cradle accessory,'' and ''bassinet bed.'' Following is a discussion of the impact of each of these changes.

a. Scope

There are three major proposed changes to the scope of the bassinet/cradle standard:

1. Specification that it is to cover products *primarily* used to provide sleeping accommodations. This expands the scope beyond products *only* used to provide sleeping accommodations.

2. Products with an incline of 10 degrees or less would be included, while products with a greater than 10 degree incline would not. ASTM and CPSC have developed this demarcation across product standards to help ensure complete coverage of sleep products. This would include cradle swings which, by definition, recline less than 10 degrees from horizontal.

3. Specification that it includes products that can be supported by a stationary frame/stand. This would bring in carriage attachments to strollers and Moses baskets *only* when used with a stationary or rocking stand.

These scope changes may affect suppliers in several ways. First, they would provide additional clarity to suppliers regarding which products would be covered under what standards. Reduced confusion means less time reviewing, testing, and making necessary modifications. Second, ''cradle swings,'' defined by the infant swings standard, F2088–11a, as an infant swing intended for use by a child lying flat (*i.e.,* horizontal), would be covered under both the bassinet standard and the infant swings standard. The Commission believes that cradle swings currently on the market should be able to meet the proposed standard for bassinets without additional modifications. Third, Moses baskets and carriage attachments to strollers would now be subject to the bassinet/cradle standard when used in conjunction with a separate stand. However, this would apply only to Moses baskets and carriages that are produced and sold by the same company that makes the stand, and therefore, are intended to be used together. Firms that supply bassinet/cradle stands, as well as either Moses baskets or carriage attachments for strollers, would need to ensure that their Moses baskets and/or carriage attachments meet the bassinet/cradle standard when attached to the stand(s). This would likely require some redesign, most notably to meet the side height and stability requirements, and it would affect 10 known firms. Alternatively, they could stop supplying the stands.

b. Stability Testing With Newborn CAMI Dummy

Because bassinets and cradles are intended to be used by very young children, it is appropriate that the smaller newborn CAMI dummy be used for stability testing. The heavier (17.5 pound) infant CAMI currently used for stability testing in F2194–12 could make these products more stable when tested than they actually would be in a real-world situation. Based on preliminary Commission testing, it appears that most bassinet/cradles will be able to pass this revised test procedure without modification. However, at least one product failed stability testing with the newborn CAMI and passed with the infant CAMI. It is possible that a few products may require modifications to meet the revised stability test procedure. It is likely to affect only a few manufacturers, but it is unlikely to require product redesign. Affected firms would most likely increase the stability of their product by widening the structure, making the bassinet bed deeper, or making the base heavier. If meeting the modified requirement necessitates a change to the hard tools used to manufacture the bassinet, the cost could be more significant.

c. Mattress Flatness

The Commission is proposing the addition of a mattress flatness requirement and test method to the standard, as well. The mattress flatness requirement is primarily aimed at incidents involving bassinet/play yard combination products that tend to use segmented mattresses. These incidents suggest that products with mattresses that have multiple seams could pose a suffocation hazard. Based on Commission testing, it appears that the play yard bassinet attachments of many suppliers (both compliant and noncompliant with F2194–10) would pass this requirement without any modifications. Those that do require modifications would need to increase the mattress support in their bassinets. This could be accomplished, for example, by retrofitting their play yard bassinets to use longer rods or a better-fitting mattress shell. The cost of such a retrofit is unknown and would likely vary from product to product; however, it should be less expensive than a product redesign. Based on this information, it appears that at least a few play yard bassinets may require modifications, which could include product redesign. However, it is believed that most firms would opt for the less expensive option of retrofitting their existing designs.

d. Removable Bassinet Beds

Finally, the Commission proposes adding a new requirement and test method to address the attachment of removable bassinet beds. There are several manufacturers with bassinet designs that allow for the bassinet bed to be removed from the stand easily (*i.e.,* without the use of tools) and used separately. In many cases, the bassinet bed sits securely on the stand without any attachment mechanism. In other cases, clips or locks may be used to ensure that the stand retains the bassinet bed during use. Incidents have arisen where the attachments have either failed or have not been used, rendering the bassinet bed unstable. Therefore, CPSC, in conjunction with an ASTM task group, has developed a requirement and test methods to address the potential instability of some removable bassinet beds when used with a stand.

There are several firms supplying bassinets with removable bassinet beds to the U.S. market. The majority will not need modifications to meet the proposed requirement. However, at least four firms will need to make changes to one or more of their bassinets. Essentially, the products will need to be modified so that they are either inherently stable (automatically lock or stable even without the locks) or obviously unstable (unsupportable or obviously tilted without locks or a visual indicator that locks not in use). There are numerous ways that firms could meet this new requirement if their product(s) required modification, including redesigning the product entirely. However, it seems likely that many firms would opt for less expensive alternatives, such as more sensitive locks that activate with little pressure (*i.e.,* with just the weight of the bassinet).

Other Federal or State Rules

The Commission is in the process of implementing sections 14(a)(2) and 14(i)(2) of the Consumer Product Safety Act (CPSA), as amended by the CPSIA.

Section 14(a)(2) of the CPSA requires every manufacturer of a children's product that is subject to a children's product safety rule to certify, based on third party testing, that the product complies with all applicable safety rules. Section 14(i)(2) of the CPSA requires the Commission to establish protocols and standards (i) for ensuring that a children's product is tested periodically and when there has been a material change in the product, (ii) for the testing of representative samples to ensure continued compliance, (iii) for verifying that a product tested by a conformity assessment body complies with applicable safety rules, and (iv) for safeguarding against the exercise of undue influence on a conformity assessment body by a manufacturer or private labeler.

Because bassinets/cradles will be subject to a mandatory standard, they will also be subject to the third party testing requirements of section 14(a)(2) of the CPSA when the mandatory standard and the notice of requirements become effective.

Impact on Small Businesses

There are approximately 55 firms currently known to be marketing bassinets and/or cradles in the United States. Under U.S. Small Business Administration (SBA) guidelines, a manufacturer of bassinets or cradles is small if it has 500 or fewer employees, and importers and wholesalers are considered small if they have 100 or fewer employees. Based on these guidelines, 38 are small firms—19 domestic manufacturers, 8 domestic importers, and 11 firms with unknown supply sources (including 9 specializing in bedding). The remaining firms are five large domestic manufacturers, three large domestic importers, three large retailers with unknown supply sources, and six foreign firms. There may be additional unknown small bassinet/cradle suppliers operating in the U.S. market.

Small manufacturers. The expected impact of the proposed standard on small manufacturers will differ based on whether their bassinets/cradles are already compliant with F2194–10. Firms whose bassinets and cradles meet the requirements of F2194–10 are likely to continue to comply with the voluntary standard as new versions are published. In addition, they are likely to meet any new standard within 6 months because this is the amount of time JPMA allows for products in their certification program to shift to a new standard. Many of these firms are active in the ASTM standard development process, and compliance with the voluntary standard is part of an established business practice. Therefore, it is likely that firms supplying bassinets and cradles that comply with ASTM F2194–10 (which went into effect for JPMA certification purposes in November 2010) would also likely comply with F2194–12 by January 2013, even in the absence of a mandatory standard.

It is possible that the direct impact for manufacturers whose products are likely to meet the requirements of ASTM F2194–12 (10 of 19 firms) could be significant for one or more firms if they must redesign their bassinets to meet the proposed rule. While none of these manufacturers would be newly covered due to the proposed change in scope, seven would be affected by the mattress flatness requirement (*i.e.,* they produce play yards with bassinet attachments), and at least two (and possibly four) may be affected by the removable bassinet bed stability requirement. For the most part, the bassinets/cradles and bassinet cradle attachments supplied by these firms will be able to meet the staff-recommended changes to ASTM F2194–12, without modification. In cases where modifications are necessary, they would most likely opt to retrofit their products, rather than undertake an expensive redesign. However, it is possible that some products may require redesign, particularly to meet the new removable bassinet bed stability requirement; therefore, costs could be significant in some cases.

Meeting ASTM F2194–12's requirements could necessitate product redesign for at least some bassinets/cradles that are believed not to be compliant with F2194–10 (9 of 19 firms). Two of these firms produce either Moses baskets or carriage stroller attachments along with separate stands, and therefore, they are included only because of the proposed change in scope. (Since no Moses baskets or carriage attachments for strollers are currently tested to the ASTM bassinets/cradles standard, it is assumed that none would meet ASTM F2194–12 without modifications). The remaining seven firms could require redesign, regardless of the staff-recommended modifications. A redesign would be minor if most of the changes involve adding straps and fasteners or using different mesh or fabric, but it could be more significant if changes to the frame are required, including changes to side height. One manufacturer estimated that a complete play yard redesign, including engineering time, prototype development, tooling, and other incidental costs, would cost approximately $500,000. The Commission believes that a bassinet redesign would tend to be comparable. Consequently, the proposed rule could potentially have a significant direct impact on small manufacturers whose products do not conform to F2194–10. However, any direct impact might be mitigated if costs are treated as new product expenses that can be amortized.

It is possible that some firms supply bassinets/cradles that are compliant with F2194–10, even though they are not certified or marketed as compliant. The Commission has identified many such cases with other products. To the extent that some of these firms may supply compliant bassinets/cradles and have developed a pattern of compliance with the voluntary standard, the direct impact of the proposed standard will be less significant than described above. There are also two small firms with unknown supply sources, none of which appear to comply with F2194–10 (one is covered by the proposed rule due to the expanded scope). If these firms are manufacturers, they may also require redesign to meet the proposed standard.

In addition to the direct impact of the proposed standard described above, there are indirect impacts. These impacts are considered indirect because they do not arise directly as a consequence of the bassinet/cradle rule's requirements. Nonetheless, they could be significant. Once the rule becomes final and the notice of requirements is in effect, all manufacturers will be subject to the additional costs associated with the third party testing and certification requirements. This will include any physical and mechanical test requirements specified in the final rule; lead and phthalates testing is already required, and hence, not included here.[1]

One manufacturer estimated that testing to the ASTM voluntary standard runs around $1,000 per model sample, although they noted that the costs could be lower for some models where the primary difference is fabric rather than structure. Testing overseas could potentially reduce some testing costs, but this may not always be practical.

On average, each small domestic manufacturer supplies eight different models of bassinets/cradles and/or play yards with bassinet/cradle accessories to the U.S. market annually. Therefore, if third party testing were conducted every year on a single sample for each model, third party testing costs for each

[1] Bassinet and cradle suppliers already must third party test their products to the lead and phthalate requirements. Therefore, these costs are left out of the analysis above.

manufacturer would be about $8,000 annually. Based on a review of firm revenues, the impact of third party testing to ASTM F2194–12 is unlikely to be significant if only one bassinet/cradle sample per model is required. However, if more than one sample would be needed to meet the testing requirements, third party testing costs could have a significant impact on a few of the small manufacturers.

Small Importers

As with manufacturers of compliant bassinets/cradles, the four small importers of bassinets/cradles currently in compliance with F2194–10 could experience significant direct impacts as a result of the proposed rule, if product redesign is necessary. In the absence of regulation, these firms would likely continue to comply with the voluntary standard as it evolves and likely the final mandatory standard as well. Any increase in production costs experienced by their suppliers may be passed on to them.

Importers of bassinets/cradles would need to find an alternate source if their existing supplier does not come into compliance with the requirements of the proposed rule, which may be the case with the four importers of bassinets/cradles believed not to be in compliance with F2194–10 (two of which are covered by the proposed rule due to the expanded scope). Some could respond to the rule by discontinuing the import of their noncompliant bassinets/cradles, possibly discontinuing the product line altogether. However, the impact of such a decision could be mitigated by replacing the noncompliant bassinets/cradles with compliant bassinets/cradles. Deciding to import an alternative product would be a reasonable and realistic way to offset any lost revenue.

As is the case with manufacturers, all importers will be subject to third party testing and certification requirements, and consequently, they will experience costs similar to those for manufacturers if their supplying foreign firm(s) does not perform third party testing. The resulting costs could have a significant impact on a few small importers who must perform the testing themselves if more than one sample per model were required.

Bedding Suppliers. There are nine known small firms specializing in the supply of bedding, including bedding for bassinets and cradles. Each firm sells basic bassinet or cradle shells, covered with their bassinet and cradle bedding. While it is clear that these firms do not manufacture the structural parts of the bassinets or cradles themselves, it is unclear whether they purchase them domestically or overseas. Regardless, these firms will be affected by the proposed rule in a manner similar to importers.

Because none of these firms is believed to supply bassinets or cradles in compliance with F2194–10, they would need to find an alternate source if their existing supplier does not come into compliance with the requirements of the proposed rule. Unlike most importers, however, they would not have the option of replacing a noncompliant bassinet/cradle with another product. While they could opt to sell the bedding without the associated bassinet/cradle, this is the standard method of sale, and it might make it more difficult to compete in the bassinet/cradle market.

As with manufacturers and importers, these firms will also be subject to third party testing and certification requirements, and they will experience costs similar to those for manufacturers if their supplying firm(s) does not perform third party testing. The resulting costs could have a significant impact on some of these small bassinet/cradle suppliers who must perform the testing themselves.

Alternatives

Under the Danny Keysar Child Product Safety Notification Act, section 104 of the CPSIA, one alternative that would reduce the impact on small entities is to make the voluntary standard mandatory with no modifications. Doing so would eliminate the impact on the six small firms that would be newly covered under the bassinet/cradle standard due to the proposed change in scope. These firms all supply Moses baskets or carriages, along with stationary stands; the Commission believes that these products require additional safety features when used for sleeping purposes. Adopting the voluntary standard without modifications could also reduce the impact on other small manufacturers and importers whose ASTM-compliant bassinets/cradles would require modifications due to the proposed changes. However, because of the severity of the incidents associated with instability and mattress tilt, the Commission does not recommend this alternative.

A second alternative would be to set an effective date later than the proposed 6 months that is generally considered sufficient time for suppliers to come into compliance with a proposed rule. Setting a later effective date would allow suppliers additional time to modify and/or develop compliant bassinets/cradles and spread the associated costs over a longer period of time.

The Commission invites comments describing the possible impact of this rule on manufacturers and importers, as well as comments containing other information describing how this rule will affect small businesses.

J. Environmental Considerations

The Commission's regulations address whether we are required to prepare an environmental assessment or an environmental impact statement. If our rule has ''little or no potential for affecting the human environment'' it will be categorically exempted from this requirement. 16 CFR 1021.5(c)(1). The proposed rule falls within the categorical exemption.

K. Paperwork Reduction Act

This proposed rule contains information collection requirements that are subject to public comment and review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). In this document, pursuant to 44 U.S.C. 3507(a)(1)(D), we set forth:

- A title for the collection of information;
- A summary of the collection of information;
- A brief description of the need for the information and the proposed use of the information;
- A description of the likely respondents and proposed frequency of response to the collection of information;
- An estimate of the burden that shall result from the collection of information; and
- Notice that comments may be submitted to the OMB.

Title: Safety Standard for Bassinets and Cradles.

Description: The proposed rule would require each bassinet and cradle to comply with ASTM F 2194–12, ''Standard Consumer Safety Specification for Bassinets and Cradles.'' Sections 8 and 9 of ASTM F 2194–12 contain requirements for marking, labeling, and instructional literature. These requirements fall within the definition of ''collection of information,'' as defined in 44 U.S.C. 3502(3).

Description of Respondents: Persons who manufacture or import bassinets/cradles.

Estimated Burden: We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN

16 CFR Section	Number of respondents	Frequency of responses	Total annual responses	Hours per response	Total burden hours
1218	55	5	275	1	275

Our estimates are based on the following:

Section 8.1.1 of ASTM F 2194–12 requires that the name of the manufacturer, distributor, or seller and either the place of business (city, state, and mailing address, including zip code) or telephone number, or both, be marked clearly and legibly on each product and its retail package. Section 8.1.2 of ASTM F 2194–12 requires a code mark or other means that identifies the date (month and year, at a minimum) of manufacture.

There are 55 known entities supplying bassinets to the U.S. market. All 55 firms are assumed to use labels already on both their products and their packaging, but they might need to make some modifications to their existing labels. The estimated time required to make these modifications is about 1 hour per model. Each entity supplies an average of eight different models of bassinets; therefore, the estimated burden associated with labels is 1 hour per model × 55 entities × 5 models per entity = 275 hours. We estimate the hourly compensation for the time required to create and update labels is $27.55 (U.S. Bureau of Labor Statistics, ''Employer Costs for Employee Compensation,'' March 2012, Table 9, total compensation for all sales and office workers in goods-producing private industries: *http://www.bls.gov/ncs/*). Therefore, the estimated annual cost to industry associated with the labeling requirements is $7,576.25 ($27.55 per hour × 275 hours = $7,576.25). There are no operating, maintenance, or capital costs associated with the collection.

Section 9.1 of ASTM F2194–12 requires instructions to be supplied with the product. Bassinets and cradles are products that generally require assembly, and products sold without such information would not be able to compete successfully with products supplying this information. Under the OMB's regulations (5 CFR 1320.3(b)(2)), the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the ''normal course of their activities'' are excluded from a burden estimate, where an agency demonstrates that the disclosure activities required to comply are ''usual and customary.'' Therefore, because we are unaware of bassinets or cradles that generally require some installation, but lack any instructions to the user about such installation, we tentatively estimate that there are no burden hours associated with section 9.1 of ASTM F2194–12 because any burden associated with supplying instructions with bassinets and cradles would be ''usual and customary'' and not within the definition of ''burden'' under the OMB's regulations.

Based on this analysis, the proposed standard for bassinets would impose a burden to industry of 275 hours at a cost of $7,576.25 annually.

In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. § 3507(d)), we have submitted the information collection requirements of this rule to the OMB for review. Interested persons are requested to submit comments regarding information collection by November 19, 2012, to the Office of Information and Regulatory Affairs, OMB (see the **ADDRESSES** section at the beginning of this notice).

Pursuant to 44 U.S.C. 3506(c)(2)(A), we invite comments on:

- Whether the collection of information is necessary for the proper performance of the CPSC's functions, including whether the information will have practical utility;
- The accuracy of the CPSC's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to reduce the burden of the collection of information on respondents, including the use of automated collection techniques, when appropriate, and other forms of information technology; and
- The estimated burden hours associated with label modification, including any alternative estimates.

L. Preemption

Section 26(a) of the CPSA, 15 U.S.C. 2075(a), provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury, unless the state requirement is identical to the federal standard. Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to the Commission for an exemption from this preemption under certain circumstances. Section 104(b) of the CPSIA refers to the rules to be issued under that section as ''consumer product safety rules,'' thus implying that the preemptive effect of section 26(a) of the CPSA would apply. Therefore, a rule issued under section 104 of the CPSIA will invoke the preemptive effect of section 26(a) of the CPSA when it becomes effective.

M. Certification and Notice of Requirements (NOR)

Section 14(a) of the CPSA imposes the requirement that products subject to a consumer product safety rule under the CPSA, or to a similar rule, ban, standard, or regulation under any other act enforced by the Commission, must be certified as complying with all applicable CPSC-enforced requirements. 15 U.S.C. 2063(a). Section 14(a)(2) of the CPSA requires that certification of children's products subject to a children's product safety rule be based on testing conducted by a CPSC-accepted third party conformity assessment body. Section 14(a)(3) of the CPSA requires the Commission to publish a notice of requirements (NOR) for the accreditation of third party conformity assessment bodies (or laboratories) to assess conformity with a children's product safety rule to which a children's product is subject. The proposed rule for 16 CFR part 1218, ''Safety Standard for Bassinets and Cradles,'' when issued as a final rule, will be a children's product safety rule that requires the issuance of an NOR.

On May 24, 2012, the Commission published in the **Federal Register** the proposed rule, *Requirements Pertaining to Third Party Conformity Assessment Bodies,* 77 FR 331086, which, when finalized, would establish the general requirements and criteria concerning testing laboratories. These include the requirements and procedures for CPSC acceptance of the accreditation of a laboratory to test children's products in support of the certification required by section 14(a)(2) of the CPSA. The proposed rule at 16 CFR part 1112,

Requirements Pertaining to Third Party Conformity Assessment Bodies, lists the children's product safety rules for which the CPSC has published NORs for laboratories. In this document, the Commission is proposing to amend the list in 16 CFR part 1112, once that rule becomes final, to include the bassinet standard, once finalized, along with the other children's product safety rules for which the CPSC has issued NORs.

Laboratories applying for acceptance as a CPSC-accepted third party conformity assessment body to test to the new standard for bassinets and cradles would be required to meet the third party conformity assessment body accreditation requirements in 16 CFR part 1112, *Requirements Pertaining to Third Party Conformity Assessment Bodies,* once that rule becomes final. When a laboratory meets the requirements as a CPSC-accepted third party conformity assessment body it can apply to the CPSC to have 16 CFR part 1218, Safety Standard for Bassinets and Cradles included in its scope of accreditation of CPSC safety rules listed for the laboratory on the CPSC Web site at *www.cpsc.gov/labsearch.*

The final NOR will base the CPSC laboratory accreditation requirements on the performance standard set forth in the final rule for the safety standard for bassinets and cradles and the test methods incorporated within that standard. The Commission may recognize limited circumstances in which the Commission will accept certification based on product testing conducted before the Commission's acceptance of accreditation of laboratories for testing bassinets and cradles (also known as retrospective testing) in the final NOR. The Commission seeks comments on any issues regarding the testing requirements of the proposed rule for bassinets and cradles and the accompanying proposed NOR.

N. Request for Comments

This proposed rule is part of a rulemaking proceeding under section 104(b) of the CPSIA to issue a consumer product safety standard for bassinets and cradles. We invite all interested persons to submit comments on any aspect of the proposed rule. In particular, the Commission invites comments regarding the reliability of proposed 16 CFR 1218.2(b)(7)(ii)(C) (allowing the option of making the sleep surface of the bassinet bed at least 20 degrees off from a horizontal plane when the bassinet bed is in an unlocked position as a means of meeting the stability requirement) with respect to notifying consumers that the bassinet bed is dangerously unstable as opposed to intentionally designed to rest at an angle. Comments should be submitted in accordance with the instructions in the **ADDRESSES** section at the beginning of this notice.

List of Subjects

16 CFR Part 1112

Administrative practice and procedure, Audit, Consumer protection, Reporting and recordkeeping requirements, Third party conformity assessment body.

16 CFR Part 1218

Consumer protection, Imports, Incorporation by reference, Infants and Children, Labeling, Law Enforcement, and Toys.

For the reasons discussed in the preamble, the Commission proposes to amend Title 16 of the Code of Federal Regulations Chapter II as follows:

PART 1112—REQUIREMENTS PERTAINING TO THIRD PARTY CONFORMITY ASSESSMENT BODIES

1. The authority citation for part 1112 continues to read as follows:

Authority: Pub. L. 110–314, section 3, 122 Stat. 3016, 3017 (2008); 15 U.S.C. 2063.

2. In § 1112.15, add paragraph (b)(33) to read as follows:

§ 1112.15 When can a third party conformity assessment body apply for CPSC acceptance for a particular CPSC rule and/or test method?

* * * * *

(b) * * *

(33) 16 CFR part 1218, Safety Standard for Bassinets and Cradles.

3. Add part 1218 to read as follows:

PART 1218—SAFETY STANDARD FOR BASSINETS AND CRADLES

Sec.
1218.1 Scope.
1218.2 Requirements for bassinets and cradles.

Authority: The Consumer Product Safety Improvement Act of 2008, Pub. L. 110–314, section 104, 122 Stat. 3016 (August 14, 2008).

§ 1218.1 Scope.

This part establishes a consumer product safety standard for bassinets and cradles.

§ 1218.2 Requirements for bassinets and cradles.

(a) Except as provided in paragraph (b) of this section, each bassinet and cradle must comply with all applicable provisions of ASTM F 2194–12, Standard Consumer Safety Specification for Bassinets and Cradles, approved on June 1, 2012. The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. You may obtain a copy from ASTM International, 100 Bar Harbor Drive, P.O. Box 0700, West Conshohocken, PA 19428; *http://www.astm.org/cpsc.htm.* You may inspect a copy at the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814, telephone 301–504–7923, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal regulations/ibr_locations.html.*

(b) Comply with the ASTM F 2194–12 standard with the following additions or exclusions:

(1) Instead of complying with section 1.3 of ASTM F 2194–12, comply with the following:

(i) 1.3 This consumer safety performance specification covers products primarily intended to provide sleeping accommodations for an infant up to approximately 5 months in age, or when the child begins to push up on hands and knees, whichever comes first. Products used in conjunction with an inclined infant swing or stroller, or products that are intended to provide an inclined sleep surface (head-to-toe direction) of greater than 10° from horizontal, while in the rest (non-rocking) position, are not covered by this specification.

Note to Paragraph (b)(1)(i): Cradle swings, with an incline less than or equal to 10° from horizontal while in the rest (non-rocking) position, are covered under the scope of this standard. A sleep product that has an inclined sleeping surface (intended to be greater than 10° from horizontal while in the rest (non-rocking) position) does not fall under the scope of this standard. Strollers that have a carriage/bassinet feature are covered by the stroller/carriage standard when in the stroller use mode. Carriage baskets/bassinets that are removable from the stroller base are covered under the scope of this standard when the carriage basket/bassinet meets the definition of a bassinet/cradle found in 3.1.1. Bassinet/cradle attachments to cribs or play yards, as defined in 3.1.2 or 3.1.12, are included in the scope of the standard when in the bassinet/cradle use mode.

(ii) [Reserved]

(2) Add ''CAMI Newborn Dummy (see Fig. 1A). Drawing numbers 126–0000 through 126–0015 (sheets 1 through 3), 126–0017 through 126–0027, a parts list entitled ''Parts List for CAMI Newborn Dummy,'' and a construction manual entitled ''Construction of the Newborn

Infant Dummy'' (July 1992). Copies of the materials may be inspected at NHTSA's Docket Section, 400 Seventh Street SW., Room 5109, Washington, DC, or at the Office of the Federal Register, 800 North Capitol Street NW., suite 700, Washington, DC.'' to ''2.3 Other References'' and use the following figure:

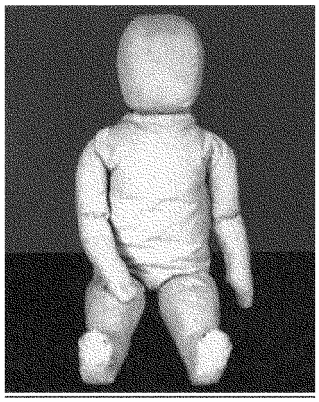

FIG. 1A CAMI Newborn Dummy

(3) Instead of complying with section 3.1.1 of ASTM F 2194–12, comply with the following:

(i) 3.1.1 *Bassinet/cradle,* n—small bed designed primarily to provide sleeping accommodations for infants, supported by free-standing legs, a stationary frame/stand, a wheeled base, a rocking base, or which can swing relative to a stationary base; while in a rest (non-rocking or swinging) position, a bassinet/cradle is intended to have a sleep surface less than or equal to 10° from horizontal.

(ii) [Reserved]

(4) Instead of complying with section 3.1.2 of ASTM F 2194–12, comply with the following:

(i) *Bassinet/cradle accessory,* n—a supported sleep surface that attaches to a crib or play yard designed to convert the product into a bassinet/cradle intended to have a sleep surface less than or equal to 10° from horizontal while in a rest (non-rocking or swinging) position.

(ii) [Reserved]

(5) Instead of complying with section 3.1.3 of ASTM F 2194–12, comply with the following:

(i) 3.1.3 *conspicuous, adj*—describes a label or indicator that is visible, when the bassinet/cradle is in a manufacturer's recommended use position, to a person standing near the bassinet/cradle at any one position around the bassinet/cradle but not necessarily visible from all other positions.

(ii) [Reserved]

(6) In addition to complying with section 3.1.16 of ASTM F 2194–12, comply with the following:

(i) 3.1.17 *bassinet bed, n*—the sleeping area of the bassinet, containing the sleep surface and side walls.

(ii) 3.1.18 *removable bassinet bed, n*—A bassinet bed that is designed to separate from the base/stand without the use of tools.

(iii) 3.1.19 *false lock/latch visual indicator, n*—a warning system, using contrasting bright colors, lights, or other similar means designed to visually alert caregivers when a removable bassinet bed is not properly locked onto its stand/base.

(iv) 3.1.20 *intended use orientation,* n—The bassinet bed orientation (*i.e.,* the position where the head and foot ends of the bassinet bed are located), with respect to the base/stand, as recommended by the manufacturer for intended use.

(7) In addition to complying with section 6.8 of ASTM F 2194–12, comply with the following:

(i) 6.9 *Segmented Mattress Flatness*—If the bassinet or bassinet accessory has a folding and/or segmented mattress, any angle when measured in section 7.10 shall be less than or equal to 10 degrees.

(ii) 6.10 *Removable Bassinet Bed Attachment*—Any product containing a removable bassinet bed with a latching or locking device intended to secure the bassinet bed to the stand/base, shall comply with 6.10.1, 6.10.2, 6.10.3, 6.10.4 or 6.10.5 when tested in accordance with 7.11.

(A) 6.10.1 The base/stand shall not support the bassinet bed (*i.e.,* the bassinet bed collapses from the stand and contacts the floor).

(B) 6.10.2 The lock/latch shall automatically engage under the weight of the bassinet bed (without any other force or action).

(C) 6.10.3 The sleep surface of the bassinet bed shall be at least 20° off from a horizontal plane when the bassinet bed is in an unlocked position.

(D) 6.10.4 The bassinet shall provide a false latch/lock visual indicator(s) that is conspicuous, at a minimum, on the two longest sides of the product.

(E) 6.10.5 The bassinet bed shall not tip over and shall retain the CAMI newborn dummy.

(8) Instead of complying with section 7.4.4 of ASTM F 2194–12, comply with the following:

(i) 7.4.4 Place the CAMI Newborn Dummy on the sleeping pad in the center of the product face up with the arms and legs straightened.

(A) *Rationale.* The newborn CAMI dummy represents a 50th percentile newborn infant, which is a more appropriate user of a bassinet than the CAMI infant dummy, which represents a 50th percentile 6-month-old infant.

(B) [Reserved].

(ii) [Reserved].

(9) In addition to complying with section 7.9 of ASTM F 2194–12, comply with the following:

(i) 7.10 *Segmented Mattress Flatness Test.*

(A) 7.10.1 Angle measurement for bassinets intended for a single occupant.

(B) 7.10.1.1 Establish a horizontal reference plane by placing an inclinometer, with an accuracy capable of 0.5° minimum resolution, on the floor of the testing area and zeroing it.

(C) 7.10.1.2 Assemble the product according to the manufacturer's instructions. If the product has more than one mode, assemble in the bassinet mode(s). Disable the rocking/swinging feature if the product is equipped with such a feature.

(D) 7.10.1.3 Place the infant test cylinder, as shown in Fig. 13, in the center of the 1st seam (the seam

between an end panel and its adjacent panel), as shown in Fig. 14, and allow the cylinder to come to rest in the seam.

Note to Paragraph (b)(9)(i)(D): If the cylinder begins to roll out of the seam, place a stop(s) on the mattress surface against the cylinder to prevent movement. The stop(s) shall not influence the angle measurement and shall have a total weight no greater than 0.25 lbs.

(E) Figure 13. Infant Test Cylinder.

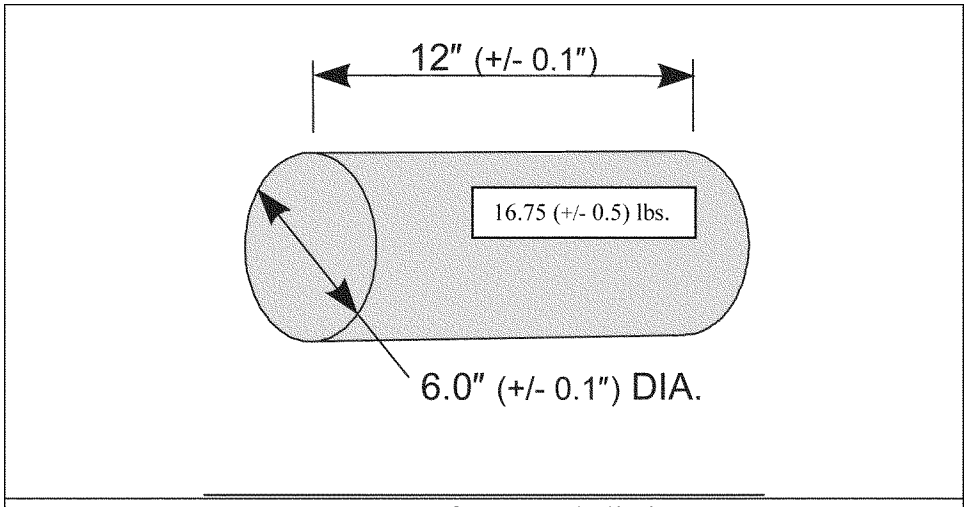

FIG. 13. Infant Test Cylinder

(F) Figure 14. Cylinder placement on mattress seam.

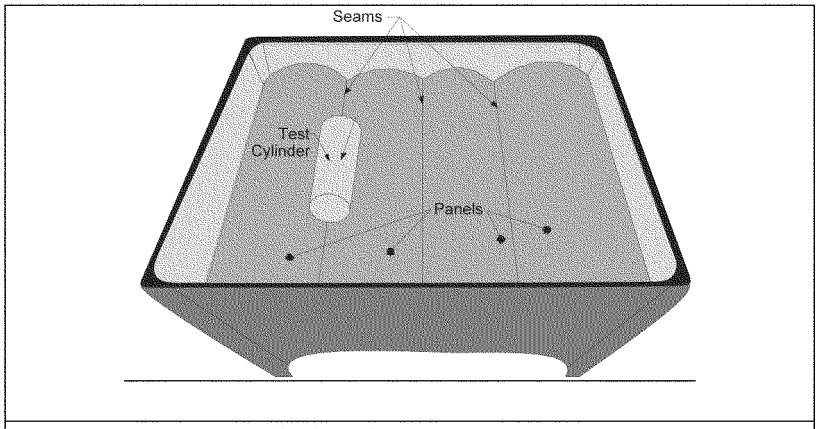

FIG. 14. Cylinder placement on mattress seam

(G) 7.10.1.4 Place a 6″ x 4″ x ½″ (152 x 101.6 x 12.7 mm) nominal thickness steel block weighing 3.3 lbs. (+/− 0.2 pounds) on the mattress panel in front of the cylinder with the 6″ length of the block in line with the center line of the cylinder as shown in Fig. 15. Place the block within ½″; (12.7 mm) of the cylinder. If the block slides and touches the cylinder, this is allowable.

(H) 7.10.1.4.1 Where the play yard bassinet size constraints do not allow for placement of the steel block in front of the cylinder, move the cylinder off center, enough to allow placement of the block, as outlined above in 7.10.1.4.

(I) 7.10.1.5 Place the inclinometer in the center of the block, and measure the angle formed with the horizontal along the line that is perpendicular to the longitudinal axis of the cylinder, as shown in Fig. 16. Ensure the inclinometer does not touch the mattress surface.

Note to Paragraph (b)(9)(i)(I): If needed, an additional level block of negligible mass, no greater than 0.2 lb, may be placed atop the steel block in order to elevate the inclinometer, such that it does not touch the mattress surface.

(J) Figure 15. Steel block in front of the cylinder for a single occupant bassinet.

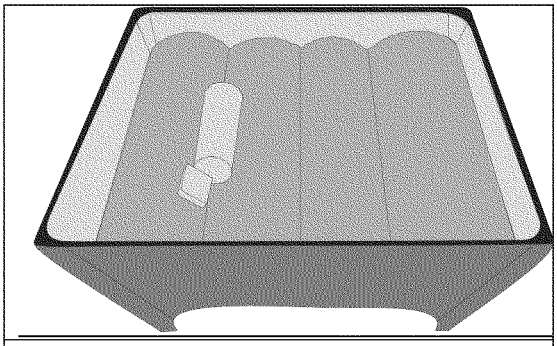

FIG. 15. Steel block in front of the cylinder for a single occupant bassinet

(K) Figure 16. Inclinometer on steel block in front of the cylinder for a single occupant bassinet.

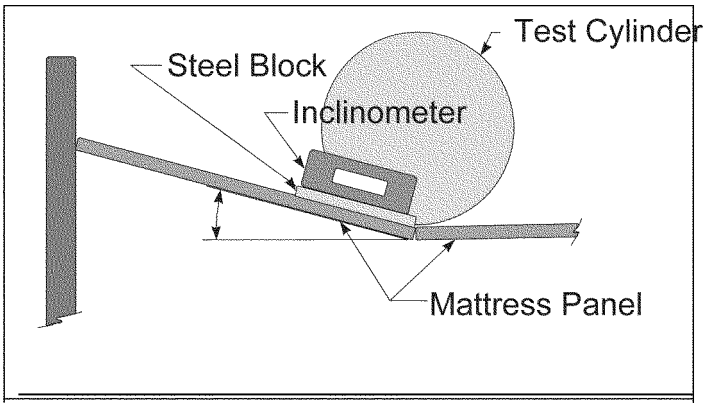

FIG.16. Inclinometer on steel block in front of the cylinder for a single occupant bassinet

(L) 7.10.1.6 Record the angle measurement.

(M) 7.10.1.7 Repeat 7.10.1.4–7.10.1.5 on the opposite side of the seam and record the measurement.

(N) 7.10.1.8 Remove the cylinder from the bassinet.

(O) 7.10.1.9 Repeat 7.10.1.3–7.10.1.8 on each remaining seam of the mattress and record the angles.

(P) 7.10.2 Angle measurement for bassinets intended for two occupants:

(Q) 7.10.2.1 Establish a horizontal reference plane by placing an inclinometer, with an accuracy capable of 0.5° minimum resolution, on the floor of the testing area and zeroing it.

(R) 7.10.2.2 Place one at a time, two identical newborn test cylinders (A and B), as shown in Fig. 17 in the occupant retention areas, as shown in Fig. 18, and allow them to come to rest in the seam.

Note to Paragraph (b)(9)(i)(R): If the cylinder begins to roll out of the seam place a stop(s) on the mattress surface against the cylinder to prevent movement. The stop(s) shall not influence the angle measurement and shall have a total weight no greater than 0.25 lbs.

(S) Figure 17. Newborn Test Cylinder

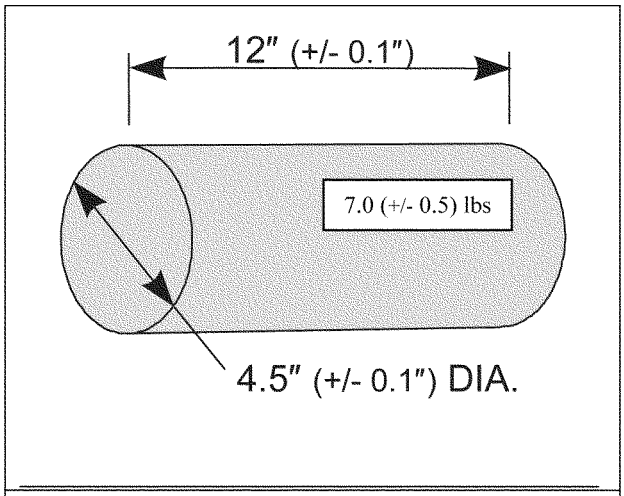

FIG. 17. Newborn Test Cylinder

(T) Figure 18. Placement of cylinders for a 2 occupant bassinet.

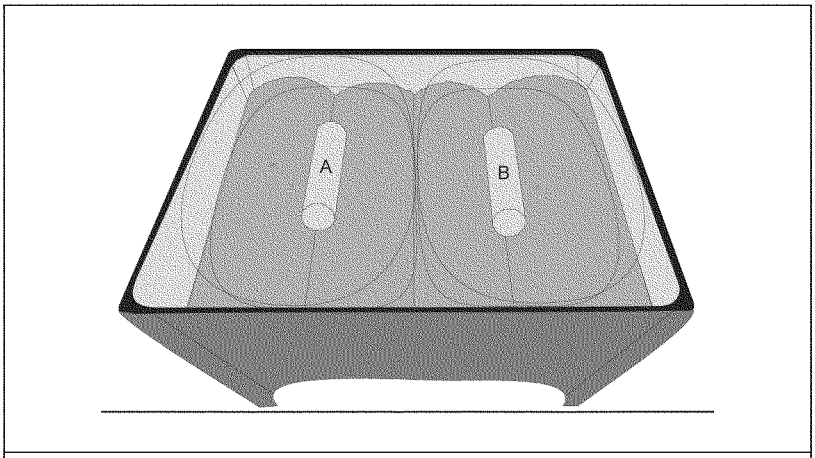

FIG. 18. Placement of cylinders for a 2 occupant bassinet

(U) 7.10.2.3 Apply a 10.0 ± 0.5 lb compression force simultaneously with a force gauge onto the center of each cylinder, and hold for 10 seconds.

(V) 7.10.2.4 Place a 6″ x 4″ x ½″ (152 x 101.6 x 12.7 mm) nominal thickness steel block weighing 3.3 lbs. (+/− 0.2 pounds) on the mattress panel in front of cylinder A with the 6″ length of the block in line with the center line of the cylinder, as shown in Fig. 19. Place the block within ½″ (12.7 mm) of the cylinder. If the block slides and touches the cylinder, this is allowable.

(W) 7.10.2.4.1 Where the play yard bassinet size constraints do not allow for placement of the steel block in front of the cylinder, move the cylinder off center enough to allow placement of the block as outlined above in 7.10.2.4.

(X) 7.10.2.5 Place the inclinometer on the block, and measure the angle formed with the horizontal along the line that is perpendicular to the longitudinal axis of cylinder A, as shown in Fig. 20. Ensure that the inclinometer does not touch the mattress surface.

Note to Paragraph (b)(9)(i)(X): If needed, an additional level block of negligible mass, no greater than 0.2 lb, may be placed atop the steel block in order to elevate the inclinometer, such that it does not touch the mattress surface.

(Y) Figure 19. Steel block in front of the cylinder for a 2-occupant bassinet.

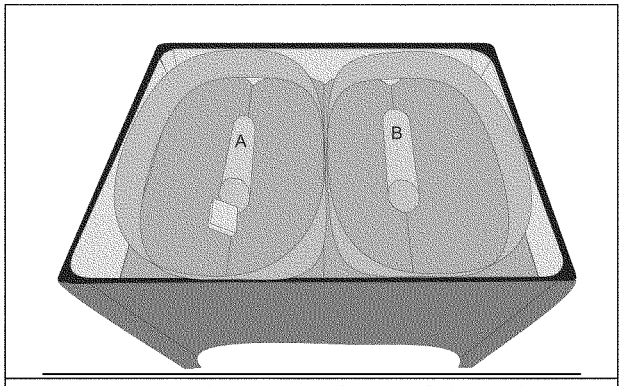

FIG. 19. Steel block in front of the cylinder for a 2-occupant bassinet

(Z) Figure 20. Inclinometer on Steel block in front of the cylinder for a 2-occupant bassinet.

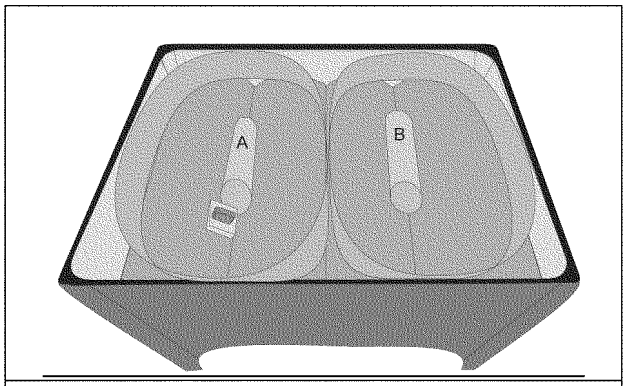

FIG. 20. Inclinometer on Steel block in front of the cylinder for a 2-occupant bassinet

(AA) 7.10.2.6 Record the angle measurement.

(BB) 7.10.2.7 Repeat 7.10.2.4–7.10.2.5 on the opposite side of the cylinder and record the measurement.

(CC) 7.10.2.8 Repeat the angle measurements 7.10.2.4–7.10.2.7 for cylinder B and record the measurement.

(DD) 7.10.2.9 Remove both cylinders and then place them in the occupant retention areas such that the side of the cylinders are in contact with the inside wall as shown in Fig. 21.

(EE) 7.10.2.10 Apply a 10.0 ± 0.5 lb compression force simultaneously with a force gauge onto the center of each cylinder and hold for 10 seconds.

(FF) Figure 21. Two cylinders (A and B) in contact with the inside wall.

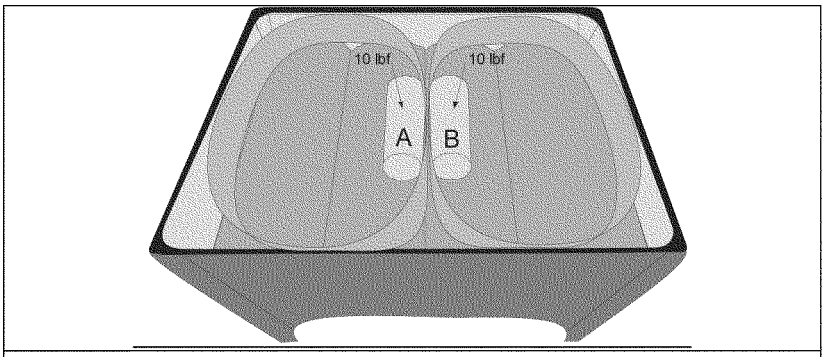

FIG. 21. Two cylinders (A and B) in contact with the inside wall

(GG) 7.10.2.11 Place 6″ x 4″ x ½″ (152 x 101.6 x 12.7 mm) nominal thickness steel block weighing 3.3 lbs. (+/− 0.2 pounds) on the mattress panel on one side perpendicular to the longitudinal axis of the cylinder, with the centerline of the block adjacent to the midpoint of the cylinder. Place the block within ½″ (12.7 mm) of the cylinder. If the block slides and touches either the inside wall or the cylinder, this is allowable.

(HH) 7.10.2.12 Place the inclinometer in the center of the block, and measure the angle formed with the horizontal along the line that is perpendicular to the longitudinal axis of cylinder A as shown in Fig. 22.

(II) 7.10.2.13 Record the angle measurement.

(JJ) 7.10.12.14 Place a 6″ x 4″ x ½″ (152 x 101.6 x 12.7 mm) nominal thickness steel block weighing 3.3 lbs. (+/− 0.2 pounds) on the mattress panel on one side perpendicular to the longitudinal axis of the cylinder, with the centerline of the block adjacent to the midpoint of the cylinder. Place the block within ½″ (12.7 mm) of the cylinder. If the block slides and touches the cylinder, this is allowable.

(KK) 7.10.12.15 Place the inclinometer in the center of the block, and measure the angle formed with the horizontal along the line that is perpendicular to the longitudinal axis of cylinder B, as shown in Fig. 23.

(LL) 7.10.2.16 Record the angle measurement.

(MM) Figure 22. Angle measure in front of Cylinder A.

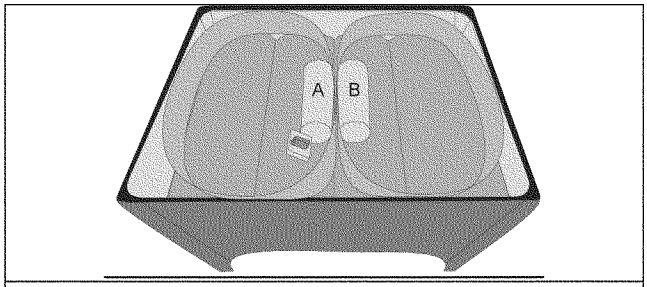

FIG.22 Angle measure in front of Cylinder A

(NN) Figure 23. Angle measure in front of Cylinder B.

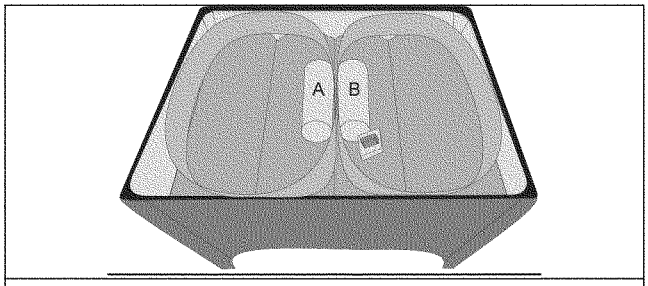

FIG. 23. Angle measure in front of Cylinder B

(OO) *Rationale.* (*1*) The cylinder used in 7.10.1 was copied from a European standard for baby walkers (EN 1273:2005) and appears to be based on the weight and torso dimensions of a child between 6 and 8 months old. *This represents the heaviest intended occupant, which will result in a more conservative test.*

(*2*) Because bassinet accessories intended for multiple births will have a shorter useful range of utility, the larger cylinder used in 7.10.2 was too heavy to represent the intended user population. The smaller cylinder used in 7.10.2 was based on the weight of an infant, matched to the height of the test cylinder in 7.10.1.

(ii) [Reserved].

(10) In addition to the changes to ASTM F 2194–12 in paragraph (b)(10) of this section comply with the following:

(i) 7.11 *Removable Bassinet Bed Attachment Tests.*

(A) 7.11.1 Assemble the bassinet/cradle base/stand only, in accordance with manufacturer's instructions.

(B) 7.11.2 Place the base/stand in one of the manufacturer's recommended use positions.

(C) 7.11.3 Place the base/stand and the inclinometer on a flat level horizontal surface (0 +/− 0.5°) to establish a test plane. Zero the inclinometer.

(D) 7.11.4 Remove the mattress pad from the bassinet bed.

Note to Paragraph (b)(10)(i)(D): For mattresses that are integral with the mattress support, do not remove the mattress and perform all angle measurements for 7.11 on a 6 by 6 by ⅜-in. nominal aluminum block placed on the center of the mattress.

(E) 7.11.5 Place the bassinet bed on the base/stand in the intended use orientation without engaging any latch or lock mechanism. If the bassinet bed can rest on the base/stand in its intended use orientation in more than one lateral unlocked position (see Figure 24), the unit shall be evaluated in the lateral position most likely to fail the requirements outlined in 6.10.

(F) Figure 24: Bassinet Bed Resting on Stand, Showing Possible Alternate Lateral Positions.

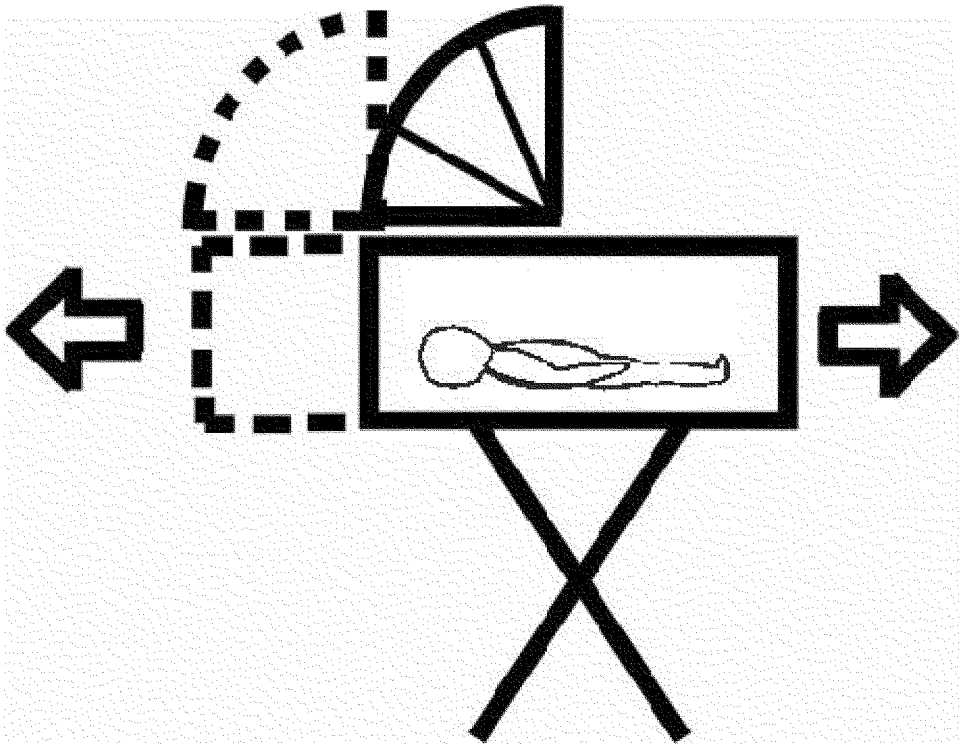

Figure 24: Bassinet Bed Resting on Stand, Showing Possible Alternate Lateral Positions

(G) 7.11.5.1 If the base/stand supports the bassinet bed, place the inclinometer on the mattress support at the approximate center of the mattress support. Care should be taken to avoid seams, snap fasteners, or other items that may affect the measurement reading. Record the angle measurement.

(H) 7.11.5.2 If the base/stand supports the bassinet bed and the angle of the mattress support surface is less than 20 degrees of horizontal, evaluate whether the bassinet has a visual indicator per 6.10.4.

(I) 7.11.5.3 If the base/stand supports the bassinet bed, and the angle of the mattress support surface is less than 20 degrees of horizontal, and the bassinet does not contain a false latch/lock indicator, test the unit in accordance with sections 7.4.2–7.4.7.

(J) 7.11.6 Repeat 7.11.3 through 7.11.5.3 for all of the manufacturer's base/stand positions.

(K) 7.11.7 If the product design allows, repeat 7.11.2 through 7.11.6 with the bassinet bed rotated 180° from the normal use orientation.

(*1*) *Rationale.* This test requirement addresses fatal and nonfatal incidents involving bassinet beds that tipped over or fell off their base/stand when they were not properly locked/latched to their base/stand or the latch failed to engage as intended. Products that appear to be in an intended use position when the lock or latch is not properly engaged can create a false sense of security by appearing to be stable. Unsecured or mis-aligned lock/latch systems are a hidden hazard because they not easily seen by consumers due to being located beneath the bassinet or covered by decorative skirts. In addition, consumers will avoid activating lock/latch mechanisms for numerous reasons if a bassinet bed appears stable when placed on a stand/base. Because of these foreseeable use conditions, this requirement has been added to ensure that bassinets with a removable bassinet bed feature will be inherently stable or it is obvious that they are not properly secured.

(*2*) Section 6.10 allows bassinet bed designs that:

(*i*) Cannot be supported by the base/stand in an unlocked configuration,

(*ii*) Automatically lock and cannot be placed in an unlocked position on the base/stand,

(*iii*) Are clearly and obviously unstable when the lock/latch is misaligned or unused,

(*iv*) Provide a visual warning to consumers when the product is not properly locked onto the stand/base, or

(*v*) Have lock/latch mechanisms that are not necessary to provide needed stability.

(ii) [Reserved].

Dated: October 4, 2012.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2012–24896 Filed 10–17–12; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 161

[Docket No. USCG–2011–1024]

RIN 1625–AB81

Vessel Traffic Service Updates, Including Establishment of Vessel Traffic Service Requirements for Port Arthur, Texas and Expansion of VTS Special Operating Area in Puget Sound

AGENCY: Coast Guard, DHS.

ACTION: Proposed rule; correction.

SUMMARY: This document contains a correction to the notice of proposed rulemaking published in the **Federal Register** on September 10, 2012 (77 FR 55439), which proposes to revise and update the Vessel Traffic Service regulations in 33 CFR part 161.

DATES: Comments and related material must either be submitted to our online

docket via *http://www.regulations.gov* on or before December 10, 2012, or reach the Docket Management Facility by that date.

ADDRESSES: You may submit comments identified by docket number USCG–2011–1024 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* 202–493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is 202–366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section in the notice of proposed rulemaking published in the **Federal Register** on September 10, 2012 (77 FR 55439) for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: Lieutenant Commander Patricia Springer, CG–7413, U.S. Coast Guard, telephone 202–372–2576; email *Patricia.J.Springer@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Ms. Renee V. Wright, Program Manager, Docket Operations, telephone 202–366–9826.

SUPPLEMENTARY INFORMATION:

Background

On September 10, 2012, the Coast Guard published a notice of proposed rulemaking (NPRM) (77 FR 55439) which proposes to revise certain Vessel Traffic Service (VTS) regulations in 33 CFR part 161. The proposed revisions include adding the Maritime Mobile Service Identifiers (MMSI) for Louisville and Los Angeles/Long Beach.

In the Regulatory Analysis of the NPRM, we said that we do not expect these revisions to result in additional costs to the public or industry (77 FR 55441). After publication of that NPRM, however, the Coast Guard realized that revising Table 161.12(c) for the purpose of adding an MMSI number for VTS Louisville and Los Angeles/Long Beach would impose Automatic Identification System (AIS) equipment costs for owners and operators of the vessel type identified in § 164.46(a)(3) and that operate in either of these two VTS areas. That action was not intended, and is the subject of a separate rulemaking project.[1]

Need for Correction

Although the Coast Guard highly encourages the use of AIS in U.S. navigable waters, it was not the Coast Guard's intention, through this proposed rulemaking, to apply the AIS carriage requirements that are set forth in § 164.46 to vessels operating within VTS Louisville and Los Angeles/Long Beach waters. Currently, under existing Part 161, Note 1 to Table 161.12(c), the AIS broadcast and carriage requirements set forth in §§ 161.21 and 164.46 apply to each VTS location identified in Table 161.12(c) that are denoted with an MMSI number. Because the addition of VTS Louisville's and Los Angeles/Long Beach MMSI numbers to Table 161.12(c) would inadvertently impose AIS carriage requirements to certain categories of vessels operating in these VTS areas, the Coast Guard is making a conforming correction to Note 1 to Table 161.12(c) by adding, at the end of Note 1, the words ''except for Louisville and Los Angeles/Long Beach.''

The following correction is issued based on authority under 33 U.S.C. 1223, 1231; 46 U.S.C. 70114, 70119; Public Law 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

Correction

The proposed regulatory text of the notice of proposed rulemaking entitled ''Vessel Traffic Service Updates, Including Establishment of Vessel Traffic Service Requirements for Port Arthur, TX and Expansion of VTS Special Operating Area in Puget Sound,'' published September 10, 2012, is corrected as follows:

§ 161.12 [Corrected]

In proposed rule FR Doc. 2012–22164 published on September 10, 2012 (77 FR 55439), make the following correction: On page 55446, in the last sentence of Note 1 of Table 161.12(c), remove the period, and add, in its place, the words ''except for Louisville and Los Angeles/Long Beach.''

Dated: October 9, 2012.

Kathryn A. Sinniger,

Chief, Office of Regulations and Administrative Law, U.S. Coast Guard.

[FR Doc. 2012–25239 Filed 10–17–12; 8:45 am]

BILLING CODE 9110–04–P

[1] On December 16, 2008, the Coast Guard published a Notice of Proposed Rulemaking entitled ''Vessel Requirements for Notices of Arrival and Departure, and Automatic Identification System.'' In this NPRM, the Coast Guard proposes to expand AIS applicability to all U.S. navigable waters. (73 FR 76295).

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[Docket No. FRA–2011–0007, Notice No. 1]

RIN 2130–AC26

National Highway-Rail Crossing Inventory Reporting Requirements

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to require railroads to submit information to the U.S. DOT National Highway-Rail Crossing Inventory about highway-rail crossings and pathway crossings over which they operate. These amendments, which are required by the Rail Safety Improvement Act of 2008 (RSIA), would require railroads to submit information about previously unreported and new public and private highway-rail crossings and pathway crossings to the U.S. DOT National Highway-Rail Crossing Inventory and to periodically update the Inventory.

DATES: Written comments must be received by December 17, 2012. Comments received after that date will be considered to the extent possible without incurring additional expense or delay. FRA anticipates being able to resolve this rulemaking without a public hearing. However, if FRA receives a specific request for a public hearing prior to November 19, 2012, a hearing will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

FRA intends to hold a technical symposium during this comment period, in order to facilitate discussion on the technical implications associated with the electronic submission of data to the Crossing Inventory. The date and location of the technical symposium will be announced through issuance of a separate notice in the **Federal Register**.

ADDRESSES: Interested parties may submit comments identified by docket number FRA–2011–0007 by any of the following methods:

- *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, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or

• *Online:* Comments may be filed through the Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket name and docket number or Regulatory Identifier Number (RIN) for this rulemaking (2130–AC26). Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or visit the Docket Management Facility, U.S. Department of Transportation, 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 FURTHER INFORMATION CONTACT: Ronald Ries, Staff Director, Grade Crossing Safety and Trespass Prevention, Office of Safety Analysis, FRA, 1200 New Jersey Avenue SE., Mail Stop 25, Washington, DC 20590 (telephone: 202–493–6299), *ronald.ries@dot.gov;* or Kathryn Shelton, Office of Chief Counsel, FRA, 1200 New Jersey Avenue SE., Mail Stop 13, Washington, DC 20590 (telephone: 202–493–6063), *kathryn.shelton@dot.gov.*

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

FRA is proposing amendments to 49 CFR Part 234 which would require railroads to submit information to the U.S. DOT National Highway-Rail Crossing Inventory (Crossing Inventory) about both public and private highway-rail crossings and pathway crossings over which they operate. These proposed amendments are intended to further FRA's efforts to improve existing data on the characteristics of the Nation's public, private, and pathway crossings and are intended to implement section 204(a) of the RSIA. Consistent with the statute, FRA is proposing to require that railroads submit initial reports to the Crossing Inventory, including current information about warning devices and signage, for each previously unreported and new public and private highway-rail crossing and pathway crossing, and that railroads periodically update that information, including the submission of updated ownership information after the sale of a crossing.

FRA has estimated the costs of this rule, evaluated over a 20-year period and using a discount rate of 7 percent. For the 20-year period analyzed, the estimated quantified cost that would be imposed on industry totals $2.1 million with a present value (PV, 7 percent) of $1.5 million. FRA considered the industry costs associated with requiring railroads to establish and maintain an inventory for all public and private highway-rail crossings and pathway crossings. Many railroads have already implemented components of the proposed rule. FRA estimates that as many as 50 percent of all highway-rail crossings are currently updated in the Crossing Inventory. The requirements that are expected to impose the largest burdens relate to the collection of recent information and to the periodic update of the inventory.

The table below presents the estimated costs associated with the proposed rulemaking.

20-YEAR COST FOR PROPOSED RULE

Initial Update of Inventory	$874,280
Periodic Update of Inventory	646,856
Total	1,521,136

Future costs are discounted to present value using a 7 percent discount rate.

FRA anticipates that this rulemaking will increase the accuracy, precision, completeness, and utility of railroad records and will improve the Crossing Inventory. This would allow FRA to identify highway-rail crossings and pathway crossings not currently recorded in the existing voluntary crossing inventory. FRA believes that such clarification in the inventory would help offset costs associated with the rulemaking by simplifying the reporting process. FRA conducted a break-even analysis of the rule and believes that potential benefits from the proposal would likely equal or exceed total costs.

II. Statutory Background

The proposed rule is intended specifically to implement Section 204(a) of RSIA, Public Law 110–432, Division A, which was enacted October 16, 2008, and generally to increase safety at highway-rail crossings and pathway crossings. *See* 49 U.S.C. 20160. (National crossing inventory). Section 20160 of title 49 of the United States Code (Section 20160) requires the Secretary of Transportation (Secretary) to establish reporting requirements for railroad carriers related to public and private highway-rail grade crossings and pathway crossings. Specifically, Section 20160 mandates that the Secretary issue regulations requiring railroad carriers to report certain information, including current information about warning devices and signage, related to new and previously unreported public, private, and pathway crossings to the Crossing Inventory. In addition, Section 20160 mandates that the Secretary issue regulations requiring railroad carriers to periodically update certain information submitted to the Secretary about public, private, and pathway crossings through which they operate or public, private, and pathway crossings that are located on trackage over which they operate. In accordance with Section 20160, additional updates would also be required, pursuant to such regulations, whenever a railroad carrier sells all, or a portion of, a public, private, or pathway crossing. However, until these implementing regulations are issued, Section 20160 provides that the Secretary may enforce the Crossing Inventory policy, procedures, and instructions that were in effect on October 16, 2008. The Secretary delegated the responsibility for carrying out the mandates of Section 20160 to the FRA Administrator. 49 CFR 1.49(oo).

III. History of the Crossing Inventory Program

In August 1972, the U.S. Department of Transportation (DOT) submitted a Report to Congress entitled, ''*Railroad-*

Highway Safety Part II: Recommendations for Resolving the Problem.'' The primary goal of this report was to provide recommendations for actions that would lead to a significant reduction in accidents, fatalities, personal injuries, and property damage at highway-rail crossings. In this Report to Congress, DOT recommended the establishment of an information system consisting of a national database of all highway-rail crossings in the Nation. Although various local, State, and Federal agencies had collected and maintained information about highway-rail crossings, most information systems or databases were fragmented and incomplete because all information was submitted on a voluntary basis. However, site-specific information was needed to provide for a systematic approach for the planning and evaluation of highway-rail crossing safety improvement programs at both the State and Federal level.

Therefore, DOT recommended that the FRA: (1) Issue requirements for the railroads to assign and display identification numbers at all highway-rail crossings based on a uniform national standard to be prescribed by DOT, (2) arrange with the railroads to provide site-specific inventory data for all crossings on their respective lines, and (3) update the inventory periodically by following the procedures and standards established jointly by FRA and the Federal Highway Administration (FHWA) in conjunction with railroad and State representatives.

In accordance with these recommendations, the Crossing Inventory was developed in the early 1970s through the cooperative efforts of FHWA, FRA, the Association of American Railroads, individual States, and individual railroads. Each highway-rail crossing was surveyed—public and private, grade-separated and at-grade—and data was recorded on an inventory form. The resulting inventory contained data on the location of the crossing, the amount and type of highway and train traffic, traffic control devices, and other physical elements of the crossing.

As a result of these efforts, the Crossing Inventory has become a national database of highway-rail crossings, both at-grade and grade-separated, that is used by railroads, States, and others to obtain information about the physical and operating characteristics of individual crossings. The Crossing Inventory is intended to provide a uniform inventory database which can be merged with highway-rail crossing collision files and used to analyze information for planning and implementation of crossing improvement programs by public and private agencies responsible for highway-rail crossing safety, as well as the railroad industry and academia. However, in order for the Crossing Inventory to serve as an effective database, States and railroads need to exchange information with each other and promptly update the crossing data records as changes occur. Therefore, FRA has historically acted as a clearinghouse for the exchange of crossing data between these entities.

The Crossing Inventory receives information from individual railroads and States to form a composite record for each crossing. This composite record has many purposes, as it can be used to predict the likelihood of an accident at a specific crossing. Armed with this information, States, law enforcement organizations, the Federal Government, and others can focus their efforts on crossings that have a high risk of collisions and implement measures, such as improved warning systems, enhanced enforcement, and community awareness.

As with any information system from which decisions are made, the incorporation of accurate and timely data into the Crossing Inventory is key. If the data is suspect, then verification is usually required before resources may be committed. Verification requires additional resources and may delay the implementation of improvements that could reduce the probability of a collision. Therefore, an instructions and procedures manual (commonly referred to as the ''Inventory Guide'') was issued and then revised over the years, as changes were made to the inventory form, in order to establish procedures for submitting data to the Crossing Inventory.

IV. Proposed Revisions to Inventory Guide and Inventory Form

As part of this rulemaking, FRA proposes to make certain revisions to the existing Inventory Guide and to the existing Form FRA F 6180.71, which is used to report data to the Crossing Inventory (and is commonly referred to as the ''Inventory Form''). The Inventory Guide and the Inventory Form have been placed in the docket for public review. For example, FRA proposes to require railroads to complete the entire Inventory Form for previously unreported and new public crossings, in order to satisfy the legislative intent of Section 20160 to improve the Crossing Inventory by obtaining critical data for public crossings. Most of the remaining changes proposed have, however, resulted from ongoing discussions with Crossing Inventory subject matter experts representing a wide array of crossing safety stakeholders over several years. Nonetheless, FRA seeks comments on the draft revised Inventory Form (Draft Inventory Form) and draft revised Inventory Guide (Draft Guide), both of which have been placed in the docket, from all interested parties.

FRA proposes to pare down the Inventory Guide to focus primarily on providing instructions for completing the Inventory Form. With respect to the Draft Guide, FRA specifically seeks comment on the following items:

- With respect to the Instructions provided in the Header of the Draft Inventory Form, FRA seeks comment on whether the proposed Instructions are helpful and should be retained. It should be noted, however, that FRA intends to remove the incorrect mailing address that is provided in the proposed Instructions.
- With respect to item C in the Header of the Draft Inventory Form, Reason for Update, FRA seeks comment on whether railroads and States should be given the option to select more than one reason for submitting data to the Crossing Inventory. With respect to this item, FRA also seeks comment on whether a separate category should be retained for crossings that are located on an abandoned segment of track since the abandoned status of the underlying track segment may not necessarily determine whether the crossing is still in use.
- With respect to item D in the Header of the Draft Inventory Form, DOT Crossing Inventory Number, FRA seeks comment on whether the current practice of allowing railroads to assign a single Inventory Number to a group of crossings in a railroad yard or an area belonging to a private company, a port, or a dock area should be retained.
- With respect to items 17 and 18 in Part I of the Draft Inventory Form, box 17 (Crossing Type) has been revised by removing the category for pedestrian crossings, in order to draw a clear distinction between public and private crossings. However, box 18 (Crossing Purpose) has been added to the Draft Inventory Form, so that railroads and States can identify highway-rail crossings, pedestrian crossings located within railway stations and other pedestrian/pathway crossings. FRA seeks comment on the proposed change to box 17, and the addition of box 18, on the Draft Inventory Form.
- With respect to item 4 in Part II of the Draft Inventory Form, Type and Number of Tracks, FRA seeks comment on the definitions provided for the various types of track listed, including

the definition for ''spur/lead'' track. Are spur/lead tracks generally used for storage purposes?

• With respect to item 5 in Part II of the Draft Inventory Form, Train Detection, FRA seeks comment on whether it would be advisable to collect data on the number of tracks that are equipped with the various types of train detection.

• With respect to item 2D in Part III of the Draft Inventory Form, Advance Warning Signs, FRA seeks comment on whether the Inventory Form should reflect the actual number of signs posted at the crossing, as opposed to the number of posts or masts bearing advance warning signs.

• With respect to the various types of train-activated warning devices listed in item 3 in Part III of the Draft Inventory Form, FRA seeks comment on whether railroads should be required to submit interim updates to the Crossing Inventory after implementation of one or more of each type of warning device.

• With respect to item 3A in Part III of the Draft Inventory Form, Gate Arms, FRA seeks comment from all interested parties on whether States should be assigned the responsibility for updating this data field.

• With respect to item 3D in Part III of the Draft Inventory Form, Post-Mounted Flashing Light Assemblies, FRA seeks comment on whether the Inventory Form should be revised to reflect the presence of side lights that might also have been installed on the post-mounted flashing light assemblies for the benefit of highway users on an approaching parallel roadway.

• With respect to item 3F in Part III of the Draft Inventory Form, Original Installation Date of Current Active Warning Devices, FRA seeks comment from all interested parties on whether the Crossing Inventory should collect data on the installation date of active warning devices that will be installed after the effective date of any regulation that may be issued through this rulemaking effort.

• With respect to item 2 in Part V of the Draft Inventory Form, Functional Classification of Road at Crossing, FRA seeks comment on whether the ''Local Access'' functional classification code should be changed to ''Local'', in order to be consistent with the official functional classification codes that are contained in the FHWA's Highway Performance Monitoring System (HPMS) Manual.

• With respect to item 10 in Part V of the Draft Inventory Form, Regularly used by Hazmat Vehicles, FRA seeks comment on how to define ''regular use'' of crossings by vehicles transporting hazardous materials in commerce.

• With respect to item 11 in Part V of the Draft Inventory Form, Regular Emergency Services Route, FRA seeks comment on how the term ''regular emergency services route'' should be defined.

A copy of the Draft Guide and a Draft Inventory Form have been placed in the docket for this rulemaking and FRA seeks comment on their content. With respect to the Draft Guide, FRA specifically seeks comment on the proposed Crossing Inventory Responsibility Table in Appendix B, which assigns responsibility for updating specific data fields on the Draft Inventory Form to either the State or Railroad.

V. Section-by-Section Analysis

Section 234.1 Scope

FRA proposes to expand part 234 to include a new subpart F, entitled: Highway-Rail Crossing Inventory Reporting. For this reason, FRA proposes to revise paragraph (a) of this section by including a reference to the proposed Crossing Inventory reporting and updating requirements for railroads.

Subpart F—Highway-Rail Crossing Inventory Reporting

Section 234.401 Definitions

This section contains proposed definitions of terms used in this subpart, listed alphabetically. Additional explanation for some of the proposed definitions is provided below.

''Class I'' would have the meaning assigned by regulations of the Surface Transportation Board (STB), which may be found at 49 CFR part 1201, General Instructions 1–1, Classification of carriers. To ensure that the definition of ''Class I'' as used in this proposed subpart incorporates any changes that the STB may make after the publication of this subpart, this definition would include any revision to the regulations as applied by the STB, which would include modifications in the class threshold based on revenue deflator adjustments.

Consistent with Section 20160's definition of ''crossing'', ''highway-rail crossing'' would be defined to mean the location where one or more railroad tracks intersect with a public highway, road, street, or private roadway, including associated sidewalks and pathways, either at-grade or grade-separated. For purposes of the Crossing Inventory, railroad tracks that lie within the same pair of crossing warning devices will be considered a single highway-rail crossing. For example, an intersection of a roadway with three tracks (*e.g.,* two mainline and one spur) where the mainline tracks are equipped with flashing lights and the spur track is equipped with crossbucks would be considered, for purposes of the Crossing Inventory, two crossings with two separate crossing inventory numbers. One highway-rail crossing would consist of the mainline tracks that lie between the flashing lights, while the other highway-rail crossing would consist of the spur track which is equipped with crossbucks.

''Operating railroad'' would be defined to mean any railroad that operates one or more trains through a highway-rail crossing or pathway crossing. Thus, for purposes of this subpart, a railroad would be considered an operating railroad even if the railroad does not own the highway-rail crossing or pathway crossing through which it travels, or the railroad is not responsible for maintaining the warning devices at the highway-rail or pathway crossing. As this definition implies, there may be multiple operating railroads for a single highway-rail crossing or pathway crossing.

Consistent with Section 20160, a ''pathway crossing'' would be defined to mean a pathway that has all of the following characteristics: (1) Is explicitly authorized by a public authority or an operating railroad; (2) is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others; (3) is not associated with a public highway, road, or street, or a private roadway; and (4) that crosses one or more railroad tracks either at grade or grade-separated. However, an area where pedestrians trespass, even routinely, is not considered to be a pathway crossing.

Pathways that are contiguous with, or separate but adjacent to, highway-rail crossings are presumed to be part of the highway-rail crossing and are not considered separate crossings. However, pathways that are located at least 25 feet from the location where a highway, road, or street intersects with one or more railroad tracks are generally considered to be separate pathway crossings. Accordingly, separate Inventory Numbers should be assigned to such crossings. (The proposed rule defines ''Inventory Number'' as ''the number assigned to a highway-rail crossing or pathway crossing in the Crossing Inventory'').

''Primary operating railroad'' would be defined to mean the operating railroad responsible for submitting data to, and/or updating data in, the Crossing Inventory for a particular highway-rail crossing or pathway crossing. Generally,

the primary operating railroad would be the operating railroad that owns the highway-rail crossing (or pathway crossing) or maintains the warning devices at the highway-rail crossing (or pathway crossing). In the event that there is more than one operating railroad that owns the highway-rail crossing (or pathway crossing) or maintains the warning devices at the highway-rail crossing (or pathway crossing), the largest operating railroad with the most rail traffic over the crossing at issue should accept the primary operating railroad designation. Absent an agreement between or among operating railroads delineating each railroad's respective reporting and/or updating responsibilities pursuant to the requirements set forth in proposed § 234.405, FRA proposes to hold each operating railroad liable for the reporting and updating requirements set forth in this subpart.

''Private crossing'' would be defined to mean a highway-rail crossing that is not a public crossing. Therefore, private crossings would include intersections of roadways and railroads that are not open to public travel or not maintained by a public authority. Typical types of private crossings include farm crossings, industrial plant crossings, and residential access crossings.

''Public crossing'' would be defined to mean a highway-rail crossing where the roadway is under the jurisdiction of and maintained by a public authority and open to public travel. All roadway approaches must be under the jurisdiction of the public roadway authority and no roadway approach may be on private property. FRA acknowledges that this proposed definition contains different criteria for determining the public nature of a highway-rail crossing than the existing definition of ''public highway-rail grade crossing'', contained in 49 CFR part 222 related to the use of locomotive horns and quiet zones. However, this proposed definition is consistent with the definition of the term ''public grade crossing'' in 23 CFR 924.3, which is widely used by States for Highway Safety Improvement Program planning and funding purposes. Based on the generally accepted usage of this definition by States, FRA believes it is logical to use this definition for Crossing Inventory reporting purposes as well.

With respect to crossings in States where a State agency (such as a State Department of Transportation, State Highway Department, Public Utility Commission, or State Commerce Commission) has been empowered to make determinations as to whether individual crossings are public or private, the determinations of that State agency will govern the public/private classification of highway-rail crossings in the State for purposes of the Crossing Inventory.

''Temporary crossing'' would be defined to mean a highway-rail crossing created to serve a specific activity for a temporary time period not to exceed six months. For example, highway-rail crossings that provide access to construction sites would fall into this category. Given their temporary nature, Inventory Numbers are not assigned to temporary crossings and FRA is not proposing to require railroads to report such crossings to the Crossing Inventory.

Section 234.403 Submission of Data to the Crossing Inventory, Generally

Proposed paragraph (a) of this section would require use of the Inventory Form to submit data to the Crossing Inventory, in accordance with the requirements of proposed § 234.405. Prior to the effective date of this subpart, FRA will continue to accept hard copy submissions of the current Inventory Form from all railroads and States. However, as of the effective date of any final rule issued as a result of this rulemaking effort, FRA proposes to allow only Class II and Class III railroads, as well as States, to either use the Draft Inventory Form (a draft form has been placed in the docket for review and comment) or to submit data electronically to the Crossing Inventory. Proposed instructions for submitting hard copies of the Inventory Form can be found in the Draft Guide, while proposed instructions for submitting data electronically to the Crossing Inventory can be found in the draft Electronic Submission Instructions. The Draft Guide and the draft Electronic Submission Instructions have been placed in the public docket for this rulemaking. FRA seeks comment on the content of both of these documents.

As explained in the Draft Guide, FRA intends to discontinue use of the GX32 software program for submitting electronic data to the Crossing Inventory. FRA proposes to replace the GX32 software program with a secure web-based application. FRA also proposes to allow railroads and states to use multiple submission formats (.xml, .mdb, .xls, and .xlsx), in addition to the web-based application. (Please refer to the draft Electronic Submission Instructions that have been placed in the public docket for more information.) Since FRA proposes to require that Class I railroads submit crossing data to the Crossing Inventory electronically, Class I railroads would need to make the necessary adjustments to their existing electronic data systems in order to facilitate compatibility with the proposed electronic file formats and data specifications contained in the draft Electronic Submission Instructions. Therefore, FRA intends to hold a technical symposium during this NPRM's comment period for all interested parties, particularly those involved in the technical aspects of the actual electronic submission of data to the Crossing Inventory, to discuss the technical implications of using only these formats (.xml, .mdb, .xls, and .xlsx). FRA will publish a separate notice in the **Federal Register** providing the logistics of such a meeting once the details are finalized. The proposed changes include changes to the content of the form (new field and expanded codes) and to the specified type of file allowed for submission.

Proposed paragraph (b) of this section would require completion of the Inventory Form, in accordance with the instructions contained within the Draft Guide. As explained in the Draft Guide, one Inventory Form should be submitted to the Crossing Inventory for each public, private or pathway crossing. The Draft Guide contains exceptions to this general rule related to crossings located in railroad yards or areas belonging to private companies, ports, or dock areas and crossings located within railroad stations. Where there is more than one crossing in a railroad yard or a private railroad yard belonging to a private company, a port, or a dock area, the primary operating railroad may choose to submit one Inventory Form that would assign one Inventory Number to all (or a group) of the crossings within the private property limits. Alternatively, the primary operating railroad may submit one Inventory Form that would assign one Inventory Number to each individual crossing located within private property limits. (See Draft Guide discussion of item D in the Header of the Draft Inventory Form, DOT Crossing Inventory Number.) FRA believes this approach is consistent with current generally accepted practice in the industry, but seeks comment on whether this exception should be retained, as the decision to assign one Inventory Number to a group of crossings instead of a single crossing cannot be revised once the Inventory Number has been assigned.

The Draft Guide contains a similar exception for multiple pathway crossings that are contained within a railroad station. Therefore, the primary operating railroad may choose to submit one Inventory Form that would assign

one Inventory Number to all (or a group) of the pathway crossings at a railway station. Alternately, the primary operating railroad may submit one Inventory Form that would assign one Inventory Number to each individual pathway crossing located within a railroad station. FRA also seeks comment on this proposed exception.

Paragraph (c) proposes to require Class I railroads to submit all crossing data to the Crossing Inventory electronically. Since most Class I railroads already submit crossing data to the Crossing Inventory electronically, FRA does not believe that this proposed requirement would be unduly burdensome. In accordance with paragraph (a) of this section, Class II and Class III railroads, as well as States, may choose to submit their crossing data to the Crossing Inventory electronically or submit hard copies of the Inventory Form. An explanation of the proposed file formats and data specifications can be found in the draft Electronic Submission Instructions, a copy of which has been placed in the docket for review and comment by all interested parties. FRA seeks comment as to whether additional railroads should be required to submit crossing data to the Crossing Inventory electronically.

As noted above, FRA intends to discontinue use of the GX32 software product, which currently allows States and railroads to submit revised data to the Crossing Inventory electronically through use of a computer disk or the Internet. FRA intends to discontinue use of the GX32 software and replace it with a secure web-based application that provides similar functionality, yet facilitates instantaneous updates to crossing data. Therefore, any pending changes using GX32 software would need to be submitted prior to implementation of the web-based system. FRA also intends to transition the official Crossing Inventory database to the new web-based application. Therefore, railroads that are currently using the GX32 software product to submit crossing data electronically to the Crossing Inventory or who are submitting data electronically via other means would be required to make adjustments to their existing electronic data systems to ensure such systems will work with the revised Crossing Inventory database. Accordingly, FRA seeks comment as to the feasibility of Class I railroads being able to make the necessary adjustments to their existing electronic data systems (or to develop new electronic data systems) that would allow for compliance with the draft Electronic Submission Instructions, as well as compliance with the timeframes proposed in § 234.405 for reporting previously unreported and new highway-rail crossings and pathway crossings.

As noted above, FRA intends to hold a technical symposium during this NPRM's comment period for all interested parties, particularly those involved in the actual electronic submission of data to the Crossing Inventory, to discuss the technical implications of using only certain specified submission formats (.xml, .mdb, .xls, and .xlsx). FRA will publish a separate notice in the **Federal Register** providing the logistics of such a meeting once the details are finalized.

Section 234.405 Submission of Initial Data and Periodic Updates to the Crossing Inventory

Proposed paragraph (a) of this section would require the submission of data to the Crossing Inventory for previously unreported crossings. Specifically, proposed paragraph (a)(1) is intended to implement paragraph (a)(1) of Section 20160, which requires railroad carriers to report to the Secretary ''current information, including information about warning devices and signage * * * concerning each previously unreported crossing through which it operates or with respect to the trackage over which it operates.'' Proposed paragraph (a)(1) would require that each primary operating railroad submit a completed Inventory Form (or its electronic equivalent) to the Crossing Inventory, in accordance with proposed § 234.403, for each previously unreported public, private, and pathway crossing through which it operates no later than six months after the effective date of any final rule implementing this requirement. This requirement would apply to previously unreported at-grade and grade-separated crossings, but would not apply to temporary crossings. For purposes of proposed paragraph (a) of this section, ''previously unreported'' crossings would be public, private, and pathway crossings that have not been reported to the Crossing Inventory as of the effective date of any final rule implementing this requirement.

Proposed paragraph (a)(1) would further require that the completed Inventory Form (or its electronic equivalent) reference the assigned Inventory Number for the crossing. If the primary operating railroad does not already have an Inventory Number that can be assigned to a previously unreported crossing, an Inventory Number will need to be obtained for the crossing. Instructions for obtaining an Inventory Number can be found in the Draft Guide. Once an Inventory Number has been placed on an Inventory Form (or its electronic equivalent) and submitted to the Crossing Inventory, the Inventory Number will be permanently assigned to the crossing.

Historically, since submission of crossing information to the Crossing Inventory was voluntary, the primary operating railroad would submit a partially completed copy of the Inventory Form to the applicable State authority, so that the State authority could provide the remaining data and submit the completed Inventory Form to the Crossing Inventory for processing. Given existing constraints on the scope of FRA's statutory authority, this NPRM does not propose to require States to submit crossing information to the Crossing Inventory. While FRA would encourage State agencies to participate fully in the submission of updated information to the Crossing Inventory, FRA has refrained from proposing regulatory language that would require railroads to submit copies of their Inventory Forms to the applicable State authorities for completion. However, this proposed rule would require railroads to complete data fields on the Inventory Form that have historically been completed by State authorities for each previously unreported public highway-rail at-grade crossing in order to satisfy the legislative intent of Section 20160 to improve the Crossing Inventory by obtaining critical data for public crossings. FRA expects that railroads will seek input from State authorities with respect to certain data fields. FRA seeks comment on this proposal.

Therefore, as stated in proposed paragraph (a) of this section, as well as the Draft Guide, railroads would be required to obtain Inventory Numbers from FRA and to assign a specific Inventory Number to each previously unreported public, private, or pathway crossing (unless the proposed exception for multiple crossings located in railroad yards, within railway stations, or areas belonging to private companies, ports, or dock areas would be applicable). Railroads would then be required to provide information for all of the data fields on the Inventory Form for each previously unreported public highway-rail at-grade crossing and to submit the completed Inventory Form (or its electronic equivalent) to the Crossing Inventory no later than six months after the effective date of any final rule that may be issued as a result of this rulemaking. In accordance with generally accepted practice, however, railroads would only be required to provide information for the data fields in the Header and Part I of the Draft

Inventory Form for previously unreported private highway-rail crossings, pathway crossings, and grade-separated crossings. FRA has not historically collected data associated with Parts II–V of the Inventory Form for these crossings.

Proposed paragraph (a)(2) of this section would require operating railroads, other than the primary operating railroad, to confirm that a completed Inventory Form (or its electronic equivalent) was timely submitted to the Crossing Inventory in accordance with proposed paragraph (a)(1) of this section. If the operating railroad discovers that one or more previously unreported public, private or pathway crossings (except a temporary crossing) over which it operates was not timely reported to the Crossing Inventory, proposed paragraph (a)(2) of this section would require that the operating railroad provide written notification of the unreported crossing to the FRA Associate Administrator for Railroad Safety/Chief Safety Officer (Associate Administrator). This provision is being proposed in order to implement 49 U.S.C. 20160(a)(2), which requires railroad carriers to ''ensure that the [current information, including information about warning devices and signage, concerning each previously unreported crossing] has been reported to the Secretary by another railroad carrier that operates through the crossing.''

At a minimum, the proposed written notification requirement contained in paragraph (a)(2) of this section would require operating railroads to provide the latitudinal and longitudinal coordinates for each previously unreported public, private, or pathway crossing for which a completed Inventory Form (or its electronic equivalent) was not timely submitted to the Crossing Inventory. While State agencies have historically submitted latitudinal and longitudinal coordinates to the Crossing Inventory, railroads provide this data to FRA for rail-equipment train accident reporting purposes. Therefore, FRA believes that this proposed requirement will not be unduly burdensome. FRA seeks comment on this proposal.

FRA proposes to hold each operating railroad liable, including the primary operating railroad, for each unreported public, private, and pathway crossing for which written notification was not timely provided to the FRA Associate Administrator, in accordance with proposed paragraph (a)(2) of this section. However, in order to facilitate compliance with this proposed requirement, FRA proposes to establish an automated FRA email notification system that would notify participating States and railroads whenever public, private, or pathway crossings are added to the Crossing Inventory. FRA seeks comment from all interested parties on whether this proposed notification system would be useful.

Proposed paragraph (a)(3) of this section would allow an entity other than the primary operating railroad to submit a completed Inventory Form (or its electronic equivalent) to the Crossing Inventory for one or more previously unreported public, private, or pathway crossings, in order to satisfy the proposed reporting requirements contained in paragraph (a)(1) of this section. This proposed provision is intended for use by State agencies with jurisdiction over the previously unreported crossings that may wish to submit crossing data to the Crossing Inventory on behalf of the primary operating railroad.

In the event that an entity other than the primary operating railroad would like to submit crossing data to the Crossing Inventory on behalf of the primary operating railroad, proposed paragraph (a)(3) of this section would require that the reporting entity and the primary operating railroad provide written notification to the Associate Administrator of the entity assuming reporting responsibility. Proposed paragraph (a)(3) of this section would further require that any such notification must contain positive identification of the locations that will be covered.

Proposed paragraph (a)(3) of this section is not, however, intended to allow the primary operating railroad to completely transfer its responsibility for timely compliance with the proposed reporting requirements of paragraph (a)(1) of this section to the reporting entity. Therefore, FRA reserves the right to hold the primary operating railroad, as well as the reporting entity liable, as appropriate, for failure to timely comply with the reporting requirements of paragraph (a)(1) of this section. Other operating railroads could potentially also be held liable for the failure to comply with the reporting requirements of paragraph (a)(1) of this section, if they fail to provide written notification of the unreported crossing in accordance with paragraph (a)(2) of this section.

Proposed paragraph (b) of this section would require the submission of data to the Crossing Inventory for new public and private highway-rail crossings and pathway crossings, including new grade-separated crossings. For purposes of this paragraph, ''new'' crossings would be public, private, and pathway crossings that were not in existence prior to the effective date of any final rule implementing this proposal. Proposed paragraph (b) of this section would not, however, apply to temporary crossings.

Proposed paragraph (b)(1) of this section would require that each primary operating railroad submit a completed Inventory Form (or its electronic equivalent) to the Crossing Inventory for each new public, private, or pathway crossing (except a temporary crossing) through which it operates no later than six months after the crossing becomes operational. If the primary operating railroad does not already have an Inventory Number that can be assigned to the new crossing, an Inventory Number will need to be obtained for the crossing. Instructions for obtaining Inventory Numbers can be found in the Draft Guide. Once an Inventory Number has been assigned to the crossing, proposed paragraph (b)(1) of this section would require that the primary operating railroad submit a completed Inventory Form (or its electronic equivalent) to the Crossing Inventory, in accordance with § 234.403, which references the assigned Inventory Number.

Paragraph (b)(1) of this section has been proposed to implement 49 U.S.C. 20160(a)(1), which states that ''[n]ot later than * * * 6 months after a new crossing becomes operational, * * * each railroad carrier shall—(1) report to the Secretary of Transportation current information, including information about warning devices and signage, as specified by the Secretary, concerning each previously unreported crossing through which it operates or with respect to the trackage over which it operates.''

Proposed paragraph (b)(2) of this section would require operating railroads, other than the primary operating railroad, which operate through a new crossing for which a completed Inventory Form (or its electronic equivalent) has not been submitted to the Crossing Inventory within six months after the crossing becomes operational, to provide written notification of this oversight to the FRA Associate Administrator. This provision has been proposed in order to implement 49 U.S.C. 20160(a)(2), which states that, ''[n]ot later than * * * 6 months after a new crossing becomes operational, * * * each railroad carrier shall—(2) ensure that the [current information, including information about warning devices and signage, concerning each previously unreported crossing] has been reported to the

Secretary by another railroad carrier that operates through the crossing,''

At a minimum, the proposed written notification requirement contained in paragraph (b)(2) of this section would require railroads to provide the latitudinal and longitudinal coordinates for each new public, private, or pathway crossing that was not timely reported to the Crossing Inventory in accordance with paragraph (b)(1) of this section. While State agencies have historically submitted latitudinal and longitudinal coordinates to the Crossing Inventory, railroads provide this data to FRA for rail-equipment train accident reporting purposes. Therefore, FRA believes that this proposed requirement would not be unduly burdensome. FRA seeks comment on this proposal.

FRA proposes to hold each operating railroad, including the primary operating railroad, liable for each new public, private, and pathway crossing (including grade-separated crossings, but excluding temporary crossings) that was not timely reported to the Crossing Inventory, in accordance with paragraph (b)(1) of this section, unless the operating railroad provides written notification to the Associate Administrator of the unreported crossing. In order to facilitate compliance with this proposed requirement, FRA proposes to establish an automated FRA email notification system that would notify participating States and railroads whenever public, private, or pathway crossings are added to the Crossing Inventory. FRA seeks comment on this proposal.

Proposed paragraph (b)(3) of this section would allow multiple operating railroads to assume joint responsibility for submitting data to the Crossing Inventory for new public, private, or pathway crossings, in accordance with the Draft Guide. As stated in the Draft Guide, two or more railroads that have agreed to file their own separate inventory information for the same public, private, or pathway crossing would need to check the box labeled ''Multiple Forms Filed'' in Item no. 7 of Part I of the Draft Inventory Form, in order to notify FRA of their agreement.

Proposed paragraph (b)(4) of this section would allow an entity other than the primary operating railroad to submit a completed Inventory Form (or its electronic equivalent) to the Crossing Inventory, in order to satisfy the proposed reporting requirements contained in paragraph (b)(1) of this section. This proposed provision is intended for use by State agencies with jurisdiction over the new public, private, or pathway crossings that may wish to submit crossing data to the Crossing Inventory on behalf of the primary operating railroad.

In the event that an entity other than the primary operating railroad would like to submit crossing data to the Crossing Inventory on behalf of the primary operating railroad, proposed paragraph (b)(4) would require that the reporting entity and the primary operating railroad provide written notification to the Associate Administrator of the entity assuming reporting responsibility. Proposed paragraph (b)(4) of this section would further require that any such notification include positive identification of the locations that will be covered.

Proposed paragraph (b)(4) of this section is not, however, intended to allow the primary operating railroad to completely transfer its responsibility for timely compliance with the proposed reporting requirements of paragraph (b)(1) of this section to the reporting entity. Therefore, FRA reserves the right to hold the primary operating railroad and the reporting entity, as appropriate, liable for failure to timely comply with the reporting requirements of paragraph (b)(1) of this section. Other operating railroads might also be held liable if they fail to provide written notification of an unreported crossing in accordance with paragraph (b)(2) of this section.

Proposed paragraph (c) of this section would require that the primary operating railroad periodically submit up-to-date and accurate data to the Crossing Inventory for each public, private, and pathway crossing through which it operates, in accordance with the Draft Guide. Submission of these periodic updates would not, however, be required for temporary crossings, since FRA is not proposing to require the reporting of temporary crossings to the Crossing Inventory, or to require periodic updating for grade-separated crossings since changes in crossing characteristics do not appear to have a significant impact on existing risk levels at grade-separated crossings.

Proposed paragraph (c)(1) of this section sets forth a proposed timeframe within which the primary operating railroad would be required to submit updated crossing data for each public, private, and pathway crossing to the Crossing Inventory. This provision has been proposed in order to implement 49 U.S.C. 20160(b)(1)(A), which mandates that railroads periodically ''report to the Secretary current information, including information about warning devices and signage, as specified by the Secretary, concerning each crossing through which it operates or with respect to the trackage over which it operates.''

Proposed paragraph (c)(1) would require that the primary operating railroad submit up-to-date and accurate crossing data for each public, private, and pathway crossing (other than a temporary crossing or a grade-separated crossing) through which it operates at least every three years from the date of the most recent railroad submission (or submission on behalf of a railroad) to the Crossing Inventory or within six months of the effective date of any final rule implementing this requirement, whichever occurs later.

Appendix B to the Draft Guide contains a proposed Crossing Inventory Responsibility Table that assigns responsibility for updating data fields on the proposed Inventory Form to the operating railroad and/or the applicable State agency. In accordance with paragraphs (a)(1) and (b)(1) of proposed § 234.405, railroads would be required to complete all of the data fields on the Inventory Form when initially reporting previously unreported and new public highway-rail at-grade crossings. However, a primary operating railroad would only be required to submit up-to-date and accurate information for the data fields on the Inventory Form that are assigned to the operating railroads by the Crossing Inventory Responsibility Table in Appendix B to the Draft Guide. (All remaining data fields on the Inventory Form would be updated by State authorities on a voluntary basis.) Similarly, even though the primary operating railroad would be required to submit up-to-date and accurate information for all of the data fields in the Header and Part I of the Draft Inventory Form for previously unreported private crossings, previously unreported pathway crossings, new private crossings, and new pathway crossings, the primary operating railroad would only be required to submit up-to-date and accurate information for the data fields in the Header and Part I of the Draft Inventory Form that are assigned to the operating railroad by the Crossing Inventory Responsibility Table in Appendix B to the Draft Guide. FRA seeks comment on the proposed assignment of responsibility for updating data fields on the Inventory Form.

If each applicable railroad-assigned data field in the Crossing Inventory is accurate and up-to-date when the periodic update becomes due, the primary operating railroad should simply update the information contained in the data fields in the Header portion of the Draft Inventory Form (or its electronic equivalent) for the affected crossing, in accordance with the Draft Guide.

Proposed paragraph (c)(2) of this section would require operating railroads, other than the primary operating railroad, that operate through any at-grade public, private, or pathway crossing (other than a temporary crossing or a grade-separated crossing) for which up-to-date and accurate information has not been submitted to the Crossing Inventory in accordance with paragraph (c)(1) of this section to provide written notification of this oversight to the Associate Administrator. This provision proposes to implement 49 U.S.C. 20160(b)(1)(B), which mandates that railroads periodically ''ensure that [current information, including information about warning devices and signage] has been reported to the Secretary by another railroad carrier that operates through the crossing.''

As was the case with proposed paragraph (c)(1) of this section, FRA proposes to exercise the discretion granted to the Secretary to determine the intervals by which periodic updates must be submitted to the Crossing Inventory. Accordingly, the proposed written notification requirement contained in paragraph (c)(1) of this section would not take effect unless up-to-date and accurate information was not submitted to the Crossing Inventory for a public, private, or pathway crossing (other than a temporary crossing or a grade-separated crossing) at least three years from the date of the most recent railroad submission or within six months after the effective date of any final rule implementing this requirement, whichever occurs later.

At a minimum, the written notification that would be required by proposed paragraph (c)(2) of this section must include the Inventory Number for each public, private, or pathway crossing that has not been updated. FRA proposes to hold each operating railroad, including the primary operating railroad, liable for each Crossing Inventory record, for public, private, or pathway crossings (other than a temporary crossing or a grade-separated crossing) over which the railroad operates, that has not been updated in accordance with paragraph (c)(1) of this section, unless written notification of the outdated record is provided to the Associate Administrator by the operating railroad in accordance with proposed paragraph (c)(2) of this section. However, in order to facilitate compliance with this proposed requirement, FRA proposes to establish an automated FRA email notification system that would notify participating States and railroads whenever changes have been made to the Crossing Inventory data associated with certain specified public, private, or pathway crossings. FRA seeks comment on whether this proposed notification system would be useful.

Proposed paragraph (c)(3) of this section would allow two or more operating railroads to assume joint responsibility for submitting periodic updates to the Crossing Inventory in accordance with the Draft Guide. As stated in the Draft Guide, two or more operating railroads that have agreed to file their own separate inventory information for the same public, private, or pathway crossing would need to check the box labeled ''Multiple Forms Filed'' in Item no. 7 of Part I of the Draft Inventory Form, in order to notify FRA of their agreement.

Proposed paragraph (c)(4) of this section would allow an entity other than the primary operating railroad to submit up-to-date and accurate crossing data to the Crossing Inventory, in order to satisfy the proposed periodic updating requirements contained in paragraph (c)(1) of this section. In the event that an entity other than the primary operating railroad assumes responsibility for submitting the required updates for a particular crossing, proposed paragraph (c)(4) would require that the reporting entity and the primary operating railroad provide written notification to the FRA Associate Administrator of the entity assuming the periodic updating responsibility. This paragraph would further require that any such notification must contain positive identification of the locations that will be covered.

Proposed paragraph (c)(4) of this section is not, however, intended to allow the primary operating railroad to completely transfer its responsibility for timely compliance with the proposed periodic updating requirements in paragraph (c)(1) of this section. Therefore, FRA reserves the right to hold the primary operating railroad and the reporting entity, as appropriate, liable for failure to timely comply with the periodic updating requirements of paragraph (c)(1) of this section Other operating railroads might also be held liable if they fail to provide written notification of outdated Inventory records for public, private, or pathway crossings over which they operate, in accordance with paragraph (c)(2) of this section.

Paragraph (d) of this section contains proposed updating requirements related to the sale of a public, private, or pathway crossing. With respect to the sale of all or part of any public, private, or pathway crossing, proposed paragraph (d) of this section would require the selling railroad to submit an Inventory Form (or its electronic equivalent) that reflects the crossing sale to the Crossing Inventory. This proposed provision is intended to implement 49 U.S.C. 20160(b)(2), which requires that railroads that sell a crossing report to the Secretary, within three months of such sale, current information, concerning the change in ownership of the crossing or part of the crossing.

Accordingly, proposed paragraph (d) of this section would require the submission of updated crossing data to the Crossing Inventory, no later than three months after the date of sale, in accordance with proposed § 234.403 and the Draft Guide. Pursuant to the Draft Guide, the selling railroad would simply be required to update the Crossing Inventory by revising either the Primary Operating Railroad data field (item one in Part I of the Draft Inventory Form) or the Operating Railroad data field (item 8 in Part I of the Draft Inventory Form) to reflect the change in ownership. The selling railroad should not, however, attempt to close the crossing record in the Crossing Inventory, since the crossing will remain in use and its assigned Inventory Number will remain the same.

With respect to certain specified changes in crossing characteristics, involving crossing closure, change in crossing surface, or change in warning device at a public, private, or pathway crossing, proposed paragraph (e)(1) of this section would require that the primary operating railroad submit an Inventory Form (or its electronic equivalent), which reflects updated information in all applicable data fields, to the Crossing Inventory, in accordance with the Draft Guide and § 234.403 of this part, within three months after the implementation date of the change. For purposes of this provision, a ''change in warning device'' means a change in the type of warning device installed at the crossing, as opposed to the modification of an existing crossing warning device. Therefore, upgrades from crossbuck signs to crossbuck and STOP signs would be considered a ''change in warning device'' that would trigger the update requirements contained in this section. Another example of a ''change in warning device'' that would trigger the proposed updating requirements would be the addition of cantilevered lights to a crossing that is already equipped with post-mounted flashing lights. Other changes in warning devices that would trigger the proposed updating requirement would include the installation of a crossbuck, yield, or stop sign, flashing lights, conventional

gates, and 4-quadrant gates at a grade crossing. FRA seeks comment on whether the 3-month period for reporting these changes in crossing characteristics should be shortened. Also, FRA seeks comment on whether this list of changes to crossing characteristics, which would trigger a requirement to submit updated data to the Crossing Inventory, adequately reflects the spectrum of significant changes to crossing characteristics that should be reported to the Crossing Inventory shortly after implementation, or whether this list of changes to crossing characteristics should be expanded to include significant changes to train counts and train speed as well, or other relevant factors.

Proposed paragraph (e)(2) of this section would allow an entity other than the primary operating railroad to submit updated crossing data to the Crossing Inventory, in order to satisfy the proposed reporting requirements contained in paragraph (e)(1) of this section. In the event that an entity other than the primary operating railroad assumes responsibility for submitting the required updates for a particular crossing to the Crossing Inventory, proposed paragraph (e)(2) of this section would require that the reporting entity and the primary operating railroad provide written notification to the Associate Administrator of the entity assuming the reporting responsibility. Proposed paragraph (e)(2) of this section would further require that any such notification contain positive identification of the location(s) that will be covered.

Proposed paragraph (e)(2) is not, however, intended to allow the primary operating railroad to completely transfer its responsibility for timely compliance with updating requirements of paragraph (e)(2) of this section. Therefore, FRA reserves the right to hold the primary operating railroad and the reporting entity liable for failure to timely submit updated crossing data to the Crossing Inventory in accordance with the proposed updating requirements of paragraph (e)(1) of this section.

Section 234.407 Recordkeeping

Proposed § 234.407 sets forth the recordkeeping requirements for this subpart that would apply to each railroad subject to this subpart. Proposed paragraph (a) of this section would require each railroad to keep certain records pertaining to its compliance with this subpart. Records may be kept on paper or electronically in a manner that conforms with proposed § 234.409.

Proposed paragraph (b) of this section would require operating railroads, including the primary operating railroad, to keep either a duplicate copy of each Inventory Form that was submitted in hard copy to the Crossing Inventory, or a copy of the electronic confirmation received from FRA after new or updated crossing data has been electronically submitted to the Crossing Inventory.

Proposed paragraph (c) of this section would require that the railroad maintain a list of locations where a copy of any record required to be retained by this subpart is accessible for inspection and photocopying. Proposed paragraph (c) would further require that this list of locations be kept at the office where the railroad's reporting officer conducts his or her official business.

Proposed paragraph (d) of this section would require that each operating railroad retain for at least four years (from the date of submission to the Crossing Inventory) either a duplicate copy of the Inventory Form that was submitted in hard copy by the railroad to the Crossing Inventory or a copy of the email confirmation received from FRA after new or updated crossing data has been electronically submitted to the Crossing Inventory. Records required to be kept must be made available to FRA as provided by statute (49 U.S.C. 20107).

Section 234.409 Electronic Recordkeeping

Proposed § 234.409 contains requirements that would apply to the electronic retention of records required by this subpart.

If a railroad chooses to conduct electronic recordkeeping of records required by this subpart, proposed paragraph (a)(1) of this section would require that the railroad adopt adequate security measures to limit employee access to its electronic data processing system and prescribe which employees will be allowed to create, modify, or delete data from the database.

Proposed paragraph (a)(2) of this section would require the railroad to have a terminal at the office where the railroad reporting officer conducts his or her official business and at each location designated by the railroad as having a copy of any record required to be retained by this subpart that is accessible for inspection and photocopying. In addition, proposed paragraph (a)(3) of this section would require the railroad to have a computer and a facsimile or printer connected to the computer to retrieve and produce records for immediate review.

Proposed paragraph (a)(4) of this section would require the railroad to designate someone who will be authorized to authenticate hard copies produced from the electronic format.

Proposed paragraph (a)(5) would require the railroad to make electronic documents available for FRA inspection during ''normal business hours'' which FRA interprets as the time, any day of the week, when railroads conduct their regular business transactions. Nevertheless, FRA would reserve the right to review and examine the documents prepared in accordance with this subpart at any reasonable time if situations warrant. In addition, in the event that an electronic record kept by the railroad pursuant to this subpart does not comply with the proposed requirements contained in paragraph (a) of this section, proposed paragraph (b) of this section would require that the record be kept on paper in accordance with the recordkeeping requirements contained in § 234.407. In short, each railroad electing to retain its records electronically would be required to ensure the integrity of the information and prevent possible tampering of data, thus ensuring the overall integrity of the inventory.

Appendix A to Part 234—Schedule of Civil Penalties

Appendix A to part 234 contains a schedule of civil penalties for use in connection with this part. FRA intends to revise the schedule of civil penalties when issuing the final rule to reflect revisions made to part 234. Because such penalty schedules are statements of agency policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to submit suggestions to FRA describing the types of actions or omissions for each proposed regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalties may be appropriate, based upon the relative severity of each type of violation.

VI. Regulatory Impact and Notices

A. Executive Order 12866 and 13563 and DOT Regulatory Review Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Order 12866 and 13563 and DOT policies and procedures. *See* 44 FR 11034; February 26, 1979. FRA has prepared and placed in the docket a Regulatory Evaluation addressing the economic impact of this proposed rule.

As part of the regulatory evaluation, FRA has assessed quantitative estimates of the cost streams expected to result from the implementation of this proposed rule. For the 20-year period analyzed, the estimated quantified cost that would be imposed on industry totals $2.1 million with a present value (PV, 7 percent) of $1.5 million. FRA conducted a break-even analysis of the rule and believes that potential benefits from the proposal would likely equal or exceed total costs.

FRA considered the industry costs associated with requiring railroads to establish and maintain an inventory for all public and private highway-rail crossings and pathway crossings. Many railroads have already implemented components of the proposed rule. FRA estimates that as many as 50 percent of all highway-rail crossings currently have up-to-date information in the National Inventory. For more details on the costing, please see the Regulatory Evaluation found in the docket. The requirements that are expected to impose the largest burdens relate to the collection of recent information and to the periodic update of the inventory. The table below presents the estimated costs associated with the proposed rulemaking.

20-YEAR COST FOR PROPOSED RULE

Initial Update of Inventory	$874,280
Periodic Update of Inventory	646,856
Total	1,521,136

Future costs are discounted to present value using a 7 percent discount rate.

As part of the Regulatory Evaluation, FRA has explained what the likely benefits for this proposed rule would be, and provided a break-even analysis. The main benefit derived from the rule would be improved crossing inventory data. This more precise information would better enable FRA, railroads, and any other entity to accurately analyze pertinent data, detect trends, and if needed, initiate crossing-related safety initiatives. In this break-even analysis, FRA determined that if there were a decrease of 0.015 percent of crossing accidents over the twenty-year period the costs associated with the rule would break-even. In the last decade there were over 26,000 collisions at grade crossing, this break-even analysis expects that over a twenty-year period there would be at least 3 fewer incidents due to the proposed rule. FRA anticipates that this rulemaking will increase the precision, completeness, and utility of railroad records and will improve FRA's national crossing inventory. This would allow FRA to identify certain highway-rail crossings and pathway crossings that are not currently recorded in the existing voluntary crossing inventory. FRA believes that such clarification would help offset costs associated with the rulemaking by simplifying the reporting process. FRA believes the value of the anticipated benefits would justify the cost of implementing the proposed rule.

B. Initial Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) and Executive Order 13272 (67 FR 53461; August 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant impact on a substantial number of small entities. Therefore, FRA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the proposed requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of this NPRM. FRA will consider all comments received in the public comment process when making a final determination.

The proposed rule would apply to all railroads which own or maintain public and private highway-rail crossings (both at-grade and grade-separated) as well as pathway crossings. Based on information currently available, FRA estimates that Class III railroads own 28 percent of the total highway-rail crossings. However a number of the Class III railroads are owned by larger holding companies. FRA often treats these holding companies as Class I or Class II railroads as they have more resources than a Class III railroad. Excluding the 113 railroads that are owned by a holding company, the small entities own 17 percent of the total highway-rail crossings. FRA analysis estimates that the cost of the proposed rule would be $2.1 million with a present value (PV, 7 percent) of $1.5 million.

As calculated below, there are 569 Class III railroads that would be considered small for the purposes of this analysis. As explained above, FRA believes that 113 of these railroads should be excluded because they are part of large holding companies that do not meet the criteria established by the U.S. Small Business Administration (SBA) in determining small entities. Therefore there are 456 railroads that comprise around 17 percent of the total highway-rail crossings. All of these railroads would have to make some labor investment to meet the proposed requirements. As these railroads have less mileage, an indicator of fewer crossings, in their system than Class I and Class II railroads, FRA expects them to meet the proposed requirements at a lower overall cost. Thus, although numerous small entities in this sector would likely be impacted, the economic impact on them would likely not be significant. This IRFA is not intended to be a stand-alone document. In order to get a better understanding of the total costs for the railroad industry, which forms the basis for the estimates in this IRFA, or more cost detail on any specific requirement, please see the Regulatory Evaluation that FRA has placed in the docket for this rulemaking.

In accordance with the Regulatory Flexibility Act, an IFRA must contain:

(1) A description of the reasons why the action by the agency is being considered.

(2) A succinct statement of the objectives of, and legal basis for, the proposed rule.

(3) A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.

(4) A description of the projected reporting, record keeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the types of professional skills necessary for preparation of the report or record.

(5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

1. Reasons for Considering Agency Action

The goal of the U.S. DOT Highway-Rail Crossing Inventory is to provide information to all stakeholders in the rail industry (e.g., Federal Government, State Governments, Local Governments, all railroads, public) for the improvement of safety at highway-rail crossings. The improved and more accurate information will help to add to a general pool of information regarding accidents at crossings, which might be able to help prevent future accidents.

RSIA required that all railroads submit an inventory of all existing crossings to the FRA. Although the FRA currently has a national inventory, it has

not been consistently updated. FRA believes that around 99 percent of the crossings that exist are currently in the database, but much of the information on each crossing needs to be updated, and numerous nonexistent crossings need to be removed from the database.

The FRA reviewed RSIA in order to determine the best, most cost efficient and beneficial way to issue the proposed rule. FRA anticipates that the proposed requirements will be accepted by the industry as being as unobtrusive as possible. A team in the FRA carried out a careful review of the mandates in RSIA to incorporate these requirements into these proposed Federal regulations.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The purpose of this rulemaking is to require railroads to submit information for public and private highway-rail crossings and pathway crossings. The proposed rule also sets forth regulations mandating the periodic update of the national crossing inventory. Any crossings that have been sold should also be updated in the inventory.

Section 204 of RSIA has a requirement for a National Crossing Inventory. Congress gave the Secretary of Transportation the authority to prescribe the regulations to implement Section 204. The task of creating the necessary regulation was delegated to the Administrator of the Federal Railroad Administration. This proposed regulation will be codified in Title 49 of the Code of Federal Regulations, Part 234.

3. A Description of, and Where Feasible, an Estimate of Small Entities to Which the Proposed Rule Would Apply

The ''universe'' of the entities to be considered generally includes only those small entities that are reasonably expected to be directly regulated by this action. This proposed rule would affect all railroads that own or maintain public or private highway-rail crossings or pathway crossings.

''Small entity'' is defined in 5 U.S.C. 601. Section 601(3) defines a ''small entity'' as having the same meaning as ''small business concern'' under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of ''small entities'' not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation. The SBA stipulates in its size standards that the largest a railroad business firm that is ''for profit'' may be and still be classified as a ''small entity'' is 1,500 employees for ''Line Haul Operating Railroads'' and 500 employees for ''Switching and Terminal Establishments.'' Additionally, 5 U.S.C. 601(5) defines as ''small entities'' governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes ''small entities'' or ''small businesses'' as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues; and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891, May 9, 2003, codified at Appendix C to 49 CFR, part 209. The $20 million-limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is proposing to use this definition for this rulemaking. Any comments received pertinent to its use will be addressed in the final rule.

Railroads

There are a total of 756 regulated railroads. FRA is excluding 150 railroads from the rulemaking because they do not own any crossings. There are 7 Class I railroads and 12 Class II railroads, all which are not considered to be small. There are a total of 29 commuter/passenger railroads, including Amtrak, with 19 that would be affected by this rule. However, all the affected commuter railroads are part of larger public transportation agencies that receive Federal funds and serve major jurisdictions with populations greater than 50,000.

The level of costs incurred by each railroad should generally vary in proportion to the number of crossings they maintain. For instance, railroads with fewer crossings should have lower overall costs associated with implementing the proposed standards. There are 710 Class III railroads, and of those railroads, only 569 are affected by the rule. However, 113 of these railroads are owned by large holding companies, and are therefore not considered to be small entities for the purposes of this analysis. Hence there are 456 railroads which would be considered to be small entities impacted by this proposed rule. The impact on these small railroads is discussed in the following section.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

For a thorough presentation of cost estimates, please refer to the Regulatory Evaluation, which has been placed in the docket for this rulemaking.

For the purpose of this analysis, FRA broke Class III railroads into two categories. We considered any Class III railroad that had more than 40 crossings to be a Large Class III railroad and any Class III railroad with 40 or less crossings to be a Small Class III railroad. Crossing specialists in FRA's Office of Safety anticipate that the majority of the Large Class III railroads use FRA's web based program, to submit their inventories to the FRA. FRA assumes that the Large Class III railroads would continue to use a web-based program to input their crossing inventories into the national database. FRA believes that the Small Class III railroads would manually send their inventory forms, by either mail or email, to the FRA. FRA also estimates that 50 percent of all railroads in the industry are already in compliance with the proposed rule.

There are 240 Large Class III railroads that would be considered small entities. FRA estimates that each Large Class III railroads would initially task one person for approximately one week to review and update their inventory. Subsequently, FRA estimates that it would take one person two days to update a Large Class III railroads inventory every year. The initial cost associated with Large Class III railroads would be around $900 per railroad. The cost to periodically update their inventory is estimated to be about $350 per railroad. FRA believes that although the Large Class III railroads would be burdened by the proposed regulation, none of these small entities would be significantly impacted.

There are 216 Small Class III railroads that would be considered small entities. FRA estimates that each Small Class III railroad would initially need one person to work 8 hours to review and update each inventory. Subsequently, the periodic inventory update cost would be the same, requiring one person to work 8 hours each year. The initial cost

associated with Small Class III railroads would be $173 per railroad. The cost to periodically update their inventory is $173 per railroad. Again, FRA believes that although all of the Small Class III railroads would be affected by the proposed regulation, none of these small entities would be significantly impacted.

In conclusion, FRA believes that both the Large Class III railroads and the Small Class III railroads, thus a substantial number of small entities (small railroads) would be impacted by the proposed regulation. However, FRA has found that these entities that are directly burdened by the regulation would not have an economic significant impact. FRA believes that the costs associated with the proposed rule are reasonable and would not cause any significant financial impact on their operations.

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is not aware of any relevant Federal rules that may duplicate, overlap or conflict with the proposed rule.

FRA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment process when making a determination.

C. Federalism

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This proposed rule would not have a substantial effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the ''essentially local safety or security hazard'' exception to section 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

D. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR Section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
234.403—Submission of Information to the U.S. DOT Highway-Rail Crossing Inventory (Formerly Voluntary).	50 states & 607 railroads	6,942 forms	30	3,471
	50 states & 607 railroads	257 lists	30	129
	50 states & 607 railroads	1,111 lists	30	556
	50 states & 607 railroads	38,982 records	6	3,898
234.405—Submission of initial data and periodic updates to the U.S. DOT Highway-Rail Crossing Inventory (New Requirement).	607 railroads	450 written notifications	30	225
	50 states & 607 railroads	175 written notifications	30	88
	607 railroads	65 written notifications	30	33
	607 railroads	12 written notifications	30	6
	50 states & 607 railroads	10 written notifications	30	5
	607 railroads	950 written notifications	20	317
	607 railroads	650 written notifications	20	217
	50 states & 607 railroads	525 written notifications	20	175
234.407 Recordkeeping (New Requirement).	607 railroads	5,674 copies	1	95
	607 railroads	2,837 copies	1	47
	607 railroads	607 forms	5	51

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Jackson at 202–493–6073.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Mr. Brogan or Ms. Toone at the following address: *Robert.Brogan@dot.gov; Kimberly.Toone@dot.gov.*

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

E. Environmental Impact

FRA has evaluated this rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The proposed rule will not result in the expenditure, in the aggregate, of $140,800,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this NPRM is not a ''significant energy action'' within the meaning of Executive Order 13211.

H. Trade Impact

The Trade Agreements Act of 1979 (Pub. L. 96–39, 19 U.S.C. 2501 *et seq.*) prohibits Federal agencies from engaging in any standards setting or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. FRA has assessed the potential effect of this NPRM on foreign commerce and believes that its requirements are consistent with the Trade Agreements Act of 1979. The requirements imposed are safety standards, which, as noted, are not considered unnecessary obstacles to trade.

I. Privacy Act

Interested parties should be aware that anyone is able to search the electronic form of all written comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit *http://www.dot.gov/privacy.html.*

List of Subjects in 49 CFR Part 234

Highway safety, Penalties, Railroad safety, Reporting and recordkeeping requirements, State and local governments.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 234—GRADE CROSSING SAFETY

1. The authority citation for part 234 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20152, 20160, 21301, 21304, 21311, 22501 note; Pub. L. 110–432, Div. A., Sec. 202, 28 U.S.C. 2461, note; and 49 CFR 1.49.

2. The heading for part 234 is revised to read as set forth above.

3. Section 234.1 is amended by revising paragraphs (a)(3) and (4) and by adding paragraph (a)(5) to read as follows:

§ 234.1 Scope.

(a) * * *

(3) Requirements for particular identified States to develop State highway-rail grade crossing action plans;

(4) Requirements that certain railroads establish systems for receiving toll-free telephone calls reporting various unsafe conditions at highway-rail grade crossings and pathway grade crossings, and for taking certain actions in response to those calls; and

(5) Requirements for reporting to, and periodically updating information contained in, the U.S. DOT National Highway-Rail Crossing Inventory for public, private, and pathway crossings.

* * * * *

4. Subpart F is added to read as follows:

Subpart F—Highway-Rail Crossing Inventory Reporting

Sec.
234.401 Definitions.
234.403 Submission of data to the Crossing Inventory, generally.
234.405 Submission of initial data and periodic updates to the Crossing Inventory.
234.407 Recordkeeping.
234.409 Electronic recordkeeping.

§ 234.401 Definitions.

As used in this subpart—

Class I has the meaning assigned by regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1–1), as those regulations may be revised and applied by order of the Board (including modifications in class threshold based on revenue deflator adjustments).

Crossing Inventory means the U.S. DOT National Highway-Rail Crossing Inventory.

FRA Associate Administrator means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer.

Highway-rail crossing means the location where one or more railroad tracks intersect with a public highway, road, street, or private roadway, including associated sidewalks and pathways, either at-grade or grade-separated.

Inventory Form means the U.S. DOT Crossing Inventory Form (Form FRA F 6180.71.)

Inventory Guide means the FRA Guide for Preparing Highway-Rail Crossing Inventory Forms in effect at the time of the submission of data to the Crossing Inventory.

Inventory number means the number assigned to a highway-rail crossing or pathway crossing in the Crossing Inventory.

Operating railroad means any railroad that operates one or more trains through a highway-rail crossing or pathway crossing.

Pathway crossing means a pathway that:

(1) Is explicitly authorized by a public authority or a railroad;

(2) Is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others;

(3) Is not associated with a public highway, road, or street, or a private roadway;

(4) Crosses one or more railroad tracks either at grade or grade-separated.

Primary operating railroad means the operating railroad responsible for submitting and/or updating data in the Crossing Inventory for a highway-rail crossing or pathway crossing.

Private crossing means a highway-rail crossing that is not a public crossing.

Public crossing means a highway-rail crossing where the roadway is under the jurisdiction of and maintained by a public authority and open to public travel. All roadway approaches must be under the jurisdiction of the public roadway authority and no roadway approach may be on private property.

Temporary crossing means a highway-rail crossing created to serve a specific activity for a temporary time period not to exceed six months.

§ 234.403 Submission of data to the Crossing Inventory, generally.

(a) Public, private, and pathway crossing data shall be submitted to the Crossing Inventory on the Inventory Form pursuant to the requirements set forth in § 234.405 of this part. Except as provided in paragraph (c) of this section, the Inventory Form may be submitted in hard copy or electronically.

(b) The Inventory Form shall be completed in accordance with the Inventory Guide. A copy of this guide may be obtained from the Office of Railroad Safety, RRS–23, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. A copy of this guide can also be viewed or downloaded from the FRA Web site at (FRA Web site address to be inserted).

(c) Each Class I railroad shall submit the data required by paragraph (a) of this section to the Crossing Inventory electronically.

§ 234.405 Submission of initial data and periodic updates to the Crossing Inventory.

(a) *Initial Submission for Previously Unreported Crossings.* (1) *Duty of Primary Operating Railroad.* Each primary operating railroad shall submit a completed Inventory Form, or its electronic equivalent, to the Crossing Inventory for each previously unreported public, private, and pathway crossing (except a temporary crossing) through which it operates, no later than (DATE 6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE). The completed Inventory Form, or its electronic equivalent, must reference the assigned Inventory Number for the crossing and the Inventory Form, or its electronic equivalent, must be completed and submitted in accordance with § 234.403 of this part.

(2) *Duty of Operating Railroads.* Each operating railroad, other than the primary operating railroad, which operates through a previously unreported public, private, or pathway crossing (except a temporary crossing) for which a completed Inventory Form, or its electronic equivalent, has not been submitted to the Crossing Inventory in accordance with paragraph (a)(1) of this section, shall notify the FRA Associate Administrator in writing of this oversight. Written notification provided by the operating railroad shall include, at a minimum, the latitudinal and longitudinal coordinates for each previously unreported public, private, or pathway crossing for which a completed Inventory Form, or its electronic equivalent, has not been timely submitted to the Crossing Inventory.

(3) *Reporting by Other Entities on Behalf of the Primary Operating Railroad.* In order to satisfy the reporting requirements of paragraph (a)(1) of this section, an entity other than the primary operating railroad may submit a completed Inventory Form, or its electronic equivalent, to the Crossing Inventory, provided both the reporting entity and the primary operating

railroad provide written notice to the FRA Associate Administrator of the entity assuming reporting responsibility. Any such notification must include a positive identification of the locations that will be covered.

(b) *Initial Submissions for New Crossings.* (1) *Duty of Primary Operating Railroad.* Each primary operating railroad shall submit a completed Inventory Form, or its electronic equivalent, to the Crossing Inventory for each new public, private, or pathway crossing (except a temporary crossing) through which it operates no later than six (6) months after the crossing becomes operational. The completed Inventory Form, or its electronic equivalent, must reference the assigned Inventory Number for the crossing and the Inventory Form, or its electronic equivalent, must be completed and submitted in accordance with § 234.403.

(2) *Duty of Operating Railroads.* An operating railroad, other than the primary operating railroad, which operates through a new public, private, or pathway crossing (except a temporary crossing) for which a completed Inventory Form has not been submitted to the Crossing Inventory within six (6) months after the crossing becomes operational shall notify the FRA Associate Administrator, in writing, of this oversight. Written notification provided by the operating railroad shall include, at a minimum, the latitudinal and longitudinal coordinates for each new and unreported public, private, or pathway crossing through which it operates.

(3) *Joint Reporting by Multiple Operating Railroads.* Two or more operating railroads may agree to assume joint responsibility for the reporting requirement set forth in paragraph (b)(1) of this section by providing written notification of this agreement in accordance with the Inventory Guide.

(4) *Reporting by Other Entities on Behalf of the Primary Operating Railroad.* In order to satisfy the reporting requirements of paragraph (b)(1) of this section, an entity other than the primary operating railroad may submit a completed Inventory Form, or its electronic equivalent, to the Crossing Inventory, provided both the reporting entity and the primary operating railroad provide written notification to the FRA Associate Administrator of the entity assuming reporting responsibility. Any such notification must include positive identification of the locations that will be covered.

(c) *Periodic Updates.* (1) *Duty of primary operating railroad.* Each primary operating railroad shall submit up-to-date and accurate crossing data to the Crossing Inventory for each public, private, and pathway crossing (other than a temporary crossing or a grade-separated crossing) through which it operates, in accordance with the Inventory Guide. Updated crossing data shall be submitted to the Crossing Inventory at least every 3 years from the date of the most recent railroad submission or (DATE 6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE), whichever occurs later.

(2) *Duty of Operating Railroads.* An operating railroad, other than the primary operating railroad, that operates through a public, private, or pathway crossing (other than a temporary crossing or a grade-separated crossing) for which up-to-date and accurate information has not been timely submitted to the Crossing Inventory in accordance with paragraph (c)(1) shall notify the FRA Associate Administrator, in writing, of this oversight. Written notification provided by the operating railroad in accordance with this paragraph shall include, at a minimum, the Inventory Number for each public, private, or pathway crossing(s) that has not been updated.

(3) *Joint Updating by Multiple Operating Railroads.* Two or more operating railroads may assume joint responsibility for submission of the periodic updates required by paragraph (c)(1) of this section by providing written notification of this agreement in accordance with the Inventory Guide.

(4) *Submission of Periodic Updates by Other Entities on Behalf of the Primary Operating Railroad.* In order to satisfy the periodic updating requirements of paragraph (c)(1) of this section, an entity other than the primary operating railroad may submit up-to-date and accurate crossing data to the Crossing Inventory, provided both the reporting entity and the primary operating railroad provide written notification to the FRA Associate Administrator of the entity assuming the periodic updating responsibility. Any such notification shall include positive identification of the locations that will be covered.

(d) *Changes Requiring Submission of Updated Information to the Crossing Inventory, Crossing sale.* Any railroad that sells all or part of a public, private, or pathway crossing shall submit an Inventory Form, or its electronic equivalent, which reflects the crossing sale to the Crossing Inventory. The updated Inventory Form, or its electronic equivalent, shall be submitted to the Crossing Inventory, no later than three (3) months after the date of sale, in accordance with § 234.403 of this subpart.

(e) *Changes Requiring Submission of Updated Information to the Crossing Inventory, Changes in Crossing Characteristics.* (1) Within three (3) months of any crossing closure, change in crossing surface, or change in warning device at any public, private, or pathway crossing, the primary operating railroad shall submit an Inventory Form, or its electronic equivalent, that reflects the change in crossing characteristics to the Crossing Inventory, in accordance with § 234.403 of this subpart. A ''change in warning device'' means the addition of a crossbuck, yield or stop sign, flashing lights, or gates at a public, private, or pathway crossing.

(2) *Submission of Updated Information to the Crossing Inventory by Other Entities on Behalf of the Primary Operating Railroad.* In order to satisfy the reporting requirements of paragraph (e)(1) of this section, an entity other than the primary operating railroad may submit an Inventory Form, or its electronic equivalent, that reflects the change(s) in crossing characteristics to the Crossing Inventory, provided both the reporting entity and the primary operating railroad provide written notification to the FRA Associate Administrator of the entity assuming reporting responsibility. Any such notification shall include positive identification of the location(s) that will be covered.

§ 234.407 Recordkeeeping.

(a) Each railroad subject to this subpart shall keep records in accordance with this section. Records may be kept either on paper or by electronic means in a manner that conforms with § 234.409.

(b) Each operating railroad, including the primary operating railroad, responsible for submitting information to the Crossing Inventory in accordance with this subpart shall, at a minimum, maintain the following information for each required Inventory Form:

(1) A duplicate copy of each Inventory Form submitted in hard copy to the Crossing Inventory; or

(2) A copy of the electronic confirmation received from FRA after electronic submission of crossing data to the Crossing Inventory.

(c) Each railroad shall identify the locations where a copy of any record required to be retained by this subpart is accessible for inspection and photocopying by maintaining a list of such establishment locations at the office where the railroad's reporting officer conducts his or her official business.

(d) Each operating railroad shall retain for at least four (4) years from the

date of submission to the Crossing Inventory all records referred to in paragraphs (a) and (b) of this section. Records required to be kept under this subpart shall be made available to FRA as provided by 49 U.S.C. 20107.

§ 234.409 Electronic recordkeeping.

(a) If a railroad subject to this subpart maintains records required by this subpart in electronic format in lieu of paper, the system for keeping the electronic records must meet all of the following conditions:

(1) The railroad adequately limits and controls accessibility to the records retained in its electronic database system and identifies those individuals who have such access;

(2) The railroad has a terminal at the office where the railroad's reporting officer conducts his or her official business and at each location designated by the railroad as having a copy of any record required to be retained by this subpart that is accessible for inspection and photocopying;

(3) Each such terminal has a computer and either a facsimile machine or a printer connected to a computer to retrieve and produce information in a usable format for immediate review by FRA representatives;

(4) The railroad has a designated representative who is authorized to authenticate retrieved information from the electronic system as a true and accurate copy of the electronically kept record; and

(5) The railroad provides FRA representatives with immediate access to the record(s) for inspection and copying during normal business hours and provides a printout of such record(s) upon request.

(b) If a record required by this subpart is in the form of an electronic record kept by an electronic recordkeeping system that does not comply with paragraph (a) of this section, then the record must be kept on paper in accordance with the recordkeeping requirements contained in § 234.407.

Issued in Washington, DC, on October 12, 2012.

Karen J. Hedlund,

Deputy Administrator.

[FR Doc. 2012–25623 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 395

[Docket No. FMCSA–2011–0373]

Hours of Service of Drivers

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

ACTION: Notice of public listening session.

SUMMARY: FMCSA announces that it will hold a public listening session to solicit information, concepts, ideas, and information on hours-of-service (HOS) requirements for drivers of passenger-carrying commercial motor vehicles (CMVs). Specifically, the Agency would like to know what factors, issues, and data it should consider as it determines preliminarily whether the HOS regulations applicable to these drivers need to be changed to decrease the risk of fatigue-related crashes. The session, which will be held in Santa Barbara, CA, will allow interested persons to present comments, views, and relevant new research that FMCSA should consider in drafting a Notice of Proposed Rulemaking (NPRM). All comments will be transcribed and placed in the docket for FMCSA's consideration. The entire day's proceedings will be webcast.

DATES: The listening session will be held on Tuesday, October 30, 2012, in Santa Barbara, CA. The listening session will be held from 1:15 p.m. until 5:30 p.m., LT, or earlier, if all participants wishing to express their views have done so.

ADDRESSES: The October 30, 2012, meeting will be held at the Fess Parker's Doubletree Resort, 633 East Cabrillo Blvd., Santa Barbara, CA 93103. The hotel telephone number is 1–805–884–8511.

Internet Address for Live Webcast. FMCSA will post specific information on how to participate via the Internet on the FMCSA Web site at *http://www.fmcsa.dot.gov/rules-regulations/topics/hos/HOS-Listening-Sessions.aspx.*

You may submit comments bearing the Federal Docket Management System (FDMS) Docket ID FMCSA–2011–0373 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.
- *Fax:* 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays. The on-line Federal document management system is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the Federal Docket Management System published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: For information concerning the listening session or the live webcast, please contact Ms. Shannon L. Watson, Senior Advisor for Policy, FMCSA, (202) 385–2395.

If you need sign language assistance to participate in this HOS listening session, contact Ms. Watson by Thursday, October 18, 2012, to allow us to arrange for such services. There is no guarantee that interpreter services requested on short notice can be provided.

SUPPLEMENTARY INFORMATION:

I. Background

The HOS requirements for motorcoach operators have not been substantially revised in several decades.

The FMCSA did not include changes to the motorcoach HOS requirements in its April 2003 final rule and subsequent revisions concerning HOS requirements for truck drivers because the Agency did not have enough data and information on motorcoach operations to form the basis of a rulemaking notice. Motorcoach operations differ significantly from trucking operations and the information upon which the Agency relied for its truck drivers' rule did not address the unique fatigue issues associated with the scheduling and operating practices of the motorcoach industry.

The current HOS rules for passenger-carrying operations allow up to 10 hours of driving time following 8 consecutive hours off duty. Driving is prohibited after the operator has accumulated 15 hours of on-duty time following 8 consecutive hours off duty (15-hour rule). The 15-hour window may be extended by off-duty periods, unlike the 14-hour window for drivers of property-carrying vehicles.

With regard to weekly limitations, drivers of passenger-carrying vehicles are subject to a 60- or 70-hour rule but, unlike drivers of property-carrying vehicles, they may not restart their calculations after 34 consecutive hours off duty. At this time, the Agency is moving toward developing a proposal to revise the regulations for hours-of-service for drivers of passenger-carrying CMVs.

II. Meeting Participation and Information FMCSA Seeks From the Public

The listening session is open to the public. Speakers' remarks will be limited to 5 minutes each. The public may submit material to the FMCSA staff at the session for inclusion in the public docket, FMCSA–2011–0373.

The Agency seeks data and answers relating to the following issues and questions. The comments sought below may be submitted in written form at the session and summarized verbally, if desired.

1. *Driving Time.* FMCSA is seeking additional studies or data that examine in greater detail the fatigue and safety differences associated with different driving times.

2. *Duty Time/Driving Window.* FMCSA is soliciting information on patterns of work for night drivers.

3. *Time-On-Task (TOT) Function.* The Agency seeks comment on whether its approach to estimating its TOT function is reasonable given the lack of good exposure data. The Agency is interested in any suggestions for improving its approach for estimating TOT effects, especially information on where it might obtain better data on exposure and other driver characteristics that would enable it to improve its estimation of how or whether crash risk varies over successive hours of daily driving.

4. *Cumulative Fatigue.* The Agency seeks comment on whether its methodology for evaluating cumulative fatigue and its impact on driving performance is reasonable. The Agency also welcomes further information on the effects of cumulative fatigue, particularly in the form of scientific studies or data that would allow better evaluation of cumulative fatigue and its impact on workplace safety, driver safety performance, and productivity.

III. Alternative Media Broadcasts During and Immediately After the Listening Session on October 30, 2012

FMCSA will webcast the listening session on the Internet. Specific information on how to participate via the Internet and the telephone access number will be on the FMCSA Web site at *http://www.fmcsa.dot.gov/rules-regulations/topics/hos/HOS-Listening-Sessions.aspx*.

FMCSA will docket the transcripts of the webcast and a separate transcription of the listening session that will be prepared by an official court reporter.

Issued on: October 11, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–25789 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–EX–P

Notices

Federal Register
Vol. 77, No. 202
Thursday, October 18, 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.

AGENCY FOR INTERNATIONAL DEVELOPMENT

Privacy Act of 1974, System of Records

AGENCY: United States Agency for International Development.

ACTION: Altered system of records.

SUMMARY: The United States Agency for International Development (USAID) is issuing public notice of its intent to alter a system of records maintained in accordance with the Privacy Act of 1974 (5 U.S.C. 552a), as amended, entitled ''USAID–28, Personnel Locator System''. This action is necessary to meet the requirements of the Privacy Act to publish in the **Federal Register** notice of the existence and character of record systems maintained by the agency (5 U.S.C. 522a(e)(4)).

DATES: Public comments must be received on or before November 20, 2012. Unless comments are received that would require a revision; this update to the system of records will become effective on November 30, 2012.

ADDRESSES: You may submit comments:

Paper Comments

- *Fax:* (703) 666–5670.
- *Mail:* Chief Privacy Officer, United States Agency for International Development, 2733 Crystal Drive, 11th Floor, Arlington, VA 22202.

Electronic Comments

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions on the Web site for submitting comments.
- *Email: privacy@usaid.gov*.

FOR FURTHER INFORMATION CONTACT: For general questions, please contact, USAID Privacy Office, United States Agency for International Development, 2733 Crystal Drive, 10th Floor, Arlington, VA 22202. Email: *privacy@usaid.gov*.

SUPPLEMENTARY INFORMATION: The Personnel Locator System is being updated as an Agency-wide system of record to cover all USAID Locator Systems, to include the Emergency Notification System, USAID Web site Modernization to include requests for newsletters via USAID.gov and information collected on Agency Telework forms. This would also include electronic business card applications. USAID Offices, Bureaus, Missions, or Teams, that desire to collect, maintain or store personnel data under the scope of this system of records will be required to undergo a compliance review and register their system with the USAID Privacy Office. The system is being established to collect and maintain USAID organizational information, emergency contact information and professional biographical information. The Personnel Locator System will enable USAID to quickly access information required to reach individuals in the event of an urgent situation, conduct continuity of operations planning exercises, and identify individuals with specialized areas of expertise to facilitate professional contacts.

Dated: August 29, 2012.

William Morgan,

Chief Information Security Officer—Chief Privacy Officer.

USAID–28

SYSTEM NAME:

USAID Personnel Locator System (to include Emergency Notification System, Telework, and Newsletters).

SECURITY CLASSIFICATION:

Sensitive But Unclassified.

SYSTEM LOCATION(S):

United States Agency for International Development, 1300 Pennsylvania Ave. NW., Washington, DC 20523.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records of current employees, contractors, consultants, and partners.

CATEGORIES OF RECORDS COVERED BY THE SYSTEM:

This system contains USAID organizational information. At a solution wide level the system will collect and display First and Last Name, title, USAID Organizational address, building name, room number, bureau, region, mission, country, office telephone numbers, office fax numbers, contact email address, employment mechanism, home address, home phone number, alternate phone number, emergency contact name, emergency contact phone number, emergency contact alternate number, program areas of expertise, foreign language skills, professional affiliations, professional certifications, photograph, region or country-based experience, operational experience and educational experience. The Personnel Locator System is being updated as an Agency-wide system of record to cover all USAID Locator Systems, to include the Emergency Notification System, USAID Web site Modernization to include, requests for newsletters via USAID.gov and information collected on Agency Telework forms. This would also include electronic business card applications.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Privacy Act of 1974 (Pub. L. 93–579), sec. 552a(c), (e), (f), and (p).

PURPOSE(S):

Records in this system will be used:

(1) To develop and maintain current agency personnel locator and professional directory listings,

(2) To identify and notify individuals employed by USAID when an emergency which occurs after hours requires that he/she report or not report for duty,

(3) To maintain and implement emergency plans, including continuity of operations and facility evacuation plans,

(4) To notify, locate, and mobilize individuals as necessary during emergency or other threatening situations,

(5) To notify the designated emergency contact in case of a medical or other emergency event involving an individual,

(6) To identify colleagues by areas of expertise to facilitate mentoring activities with Foreign Service Officers,

(7) To identify colleagues with specialized knowledge and/or expertise to participate in collaborative efforts,

(8) To facilitate this information in the Emergency Notification System,

(9) To facilitate the transmission of Agency Newsletters, and

(10) To identify personnel that are utilizing the Governmental Telework Policy and to support the OMB mandate for telework.

DISCLOSURE TO CONSUMER REPORTING AGENCIES:

These records are not disclosed to consumer reporting agencies.

PURPOSES OF SUCH USES:

USAID may disclose relevant system records in accordance with any current and future blanket routine uses established for its record systems. These may be for internal communications or with external partners.

ROUTINE USE OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE

Disclosure to consumer reporting agencies:

These records are not disclosed to consumer reporting agencies.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic records are maintained in user-authenticated, password-protected systems. All records are accessed only by authorized personnel who have a need to access the records in the performance of their official duties.

RETRIEVABILITY:

Records are retrievable by name, location or any other identifier listed in the categories of records cited above.

SAFEGUARDS:

Additional administrative safeguards are provided through the use of internal standard operating procedures.

RETENTION AND DISPOSAL:

Records will be updated periodically to reflect changes and deleted or destroyed when their use is no longer required.

SYSTEM MANAGER(S) AND ADDRESS:

Personnel Locator System (Emergency Notification System, Telework Program and USAID Web site Modernization), United States Agency for International, Development, 1300 Pennsylvania Avenue NW., Washington, DC 20523.

NOTIFICATION PROCEDURES:

Individuals requesting notification of the existence of records on them must send the request in writing to the Chief Privacy Officer, USAID, 2733 Crystal Drive, 11th Floor, Arlington, Va. 22202. The request must include the requestor's full name, his/her current address and a return address for transmitting the information. The request shall be signed by either notarized signature or by signature under penalty of perjury and reasonably specify the record contents being sought.

RECORD ACCESS PROCEDURES:

Individuals wishing to request access to a record must submit the request in writing according to the ''Notification Procedures'' above. An individual wishing to request access to records in person must provide identity documents, such as government-issued photo identification, sufficient to satisfy the custodian of the records that the requester is entitled to access.

CONTESTING RECORD PROCEDURES:

An individual requesting amendment of a record maintained on himself or herself must identify the information to be changed and the corrective action sought. Requests must follow the ''Notification Procedures'' above.

RECORD SOURCE CATEGORIES:

The records contained in this system will be provided by and updated by the individual who is the subject of the record.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

Meredith Snee,

Privacy Analyst.

[FR Doc. 2012–25607 Filed 10–17–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Forest Service

Information Collection; Advertised Timber for Sale

AGENCY: Forest Service, USDA.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the Forest Service is seeking comments from all interested individuals and organizations on the revision with changes of the currently approved information collection 0596–0066 Advertised Timber for Sale.

DATES: Comments must be received in writing on or before December 17, 2012 to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Comments concerning this notice should be addressed to Lathrop Smith, Forest Management Service Center, 2150 Centre Ave., Bldg. A, Fort Collins, CO 80526–1891.

Comments also may be submitted via facsimile to (970) 295–5755 or by email to: *bidforms@fs.fed.us.*

All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Forest Management Service Center, 2150 Centre Ave., Bldg. A, Fort Collins, CO. Visitors are encouraged to call ahead at (970) 295–5020 and ask for Lathrop Smith to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Lathrop Smith, Forest Management Staff, at (970) 295–5961. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Title: Advertised Timber for Sale.

OMB Number: 0596–0066.

Expiration Date of Approval: April 30, 2013.

Type of Request: Extension with Revision.

Abstract: Pursuant to statutory requirements at 16 U.S.C. 472a, unless extraordinary conditions exist as defined by regulation, the Secretary of Agriculture must (1) advertise sales of all National Forest System timber or forest products exceeding $10,000 in appraised value, (2) select bidding methods that ensure open and fair competition; (3) select bidding methods that ensure the Federal Government receives not less than appraised value of the timber or forest product; and (4) monitor bidding patterns for evidence of unlawful bidding practices.

Pursuant to the Forest Service Small Business Timber Sale Set-Aside Program, developed in cooperation with the Small Business Administration, Forest Service regulations at Title 36 of the Code of Federal Regulations, § 223.84 require Forest Service bid forms to include provisions for small business concerns. The data collected from the bid forms will be used by the Agency to ensure that National Forest System timber will be sold at not less than appraised value, that bidders will meet specific criteria when submitting a bid, and to monitor bidding for evidence of anti-trust violations.

The tax identification number of each bidder is entered into an automated bid monitoring system, which is used to determine if speculative bidding or unlawful bidding practices are occurring and is required to process electronic payments to the purchaser.

Respondents will be bidding on National Forest System timber sales and

Integrated Resource Timber Contracts. Forest Service Sales Officers will mail bid forms to potential bidders, and bidders will return the completed forms, dated and signed, to the Forest Service Sales Officer.

The data gathered in this information collection are not available from other sources.

Forms Associated With This Information Collection

FS–2400–42a—National Forest Timber and Forest Products for Sale (Advertisement and Short-Form Bid): This form will be used for soliciting and receiving bids on short-notice timber sales that are advertised for less than 30 days and less than $10,000 in advertised value. Respondents are bidders on National Forest System timber sales.

FS–2400–14—Bid for Advertised Timber (3 form versions: FS–2400–14UR– Unit Rate Bidding; FS–2400–14WA– Weighted Average Bidding; FS–2400–14TV– Total Value Bidding): These forms will be used for soliciting and receiving bids on Timber Sales that are advertised for 30 days or longer and generally greater than $10,000 in advertised value. These forms implement the same statutes, policies, and regulations and collect similar information from the same applicants. Respondents are the bidders on National Forest System timber and forest product sales.

FS–2400–14BV—Solicitation and Offer For Integrated Resource Contract (2 form versions: FS–2400–14BV– Best Value, Total Value Offer; and FS–2400–14BVU– Best Value, Unit Rate Offer): These forms will be used for soliciting and receiving offers on Integrated Resource Timber Contracts that are advertised for 30 days or longer and generally greater than $10,000 in advertised value.

Forms showing changes to the April 2010 versions currently in use can be viewed on the World Wide Web/Internet site at: *http://www.fs.fed.us/forestmanagement/products/newbidforms.shtm* and at the Forest Management Service Center, 2150 Centre Ave., Bldg. A, Fort Collins, CO. Visitors are encouraged to call ahead at (970) 295–5020 and ask for Lathrop Smith to facilitate entry into the building.

Item	FS–2400–42a	FS 2400–14	FS–2400–14BV
Estimate of Annual Burden	9 hours	34 hours	53 hours.
Type of Respondents	Individuals, large and small businesses, and corporations bidding on National Forest timber sales and Integrated Resource Timber Contracts.		
Estimated Annual Number of Respondents	532	2145	174
Estimated Number of Responses per Respondent	1.4	2.2	1.7
Estimated Total Annual Burden on Respondents	4788 hours	72,930 hours	9222 hours.

Comment Is Invited

Comment is invited on: (1) Whether the proposed collection of information is necessary for the stated purposes or the proper performance of the functions of the agency, including whether the information shall have practical or scientific utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All comments received in response to this notice, including name and address when provided, will be summarized and included in the request for Office of Management and Budget approval. All comments also will become a matter of public record.

Dated: October 10, 2012.

James M. Peña,

Associate Deputy Chief, National Forest System.

[FR Doc. 2012–25590 Filed 10–17–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Supplemental Environmental Impact Statement to the 2011 Final EIS for the Leasing and Underground Mining of the Greens Hollow Federal Coal Lease Tract (UTU–84102)

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare a supplemental environmental impact statement.

SUMMARY: The Manti-La Sal and Fishlake National Forests along with the Bureau of Land Management (BLM), Price Field Office as joint lead agencies announce their intent to prepare a supplemental Environmental Impact Statement (EIS) and Record of Decision to the 2011 Final EIS For the Leasing and Undeground Mining of the Greens Hollow Federal Coal Lease Tract UTU–84102. Supplemental analyses are required to correct deficiencies in the Final EIS.

DATES: Additional scoping will not be conducted in accordance with 40 CFR 1502.9(c)(4). The draft supplemental EIS is expected in late December 2012 and the final supplemental EIS is expected in March 2013. There will be a 45-day comment period after the draft supplemental EIS is issued.

ADDRESSES: Send written comments to Allen Rowley, Forest Supervisor, 115 East 900 North, Richfield, Utah 84701. Comments may also be sent via email to *comments-intermtn-fishlake@fs.fed.us,* or via facsimile to 435–896–9347. Please reference Greens Hollow Supplemental EIS in the subject field.

FOR FURTHER INFORMATION CONTACT: Marianne Orton, Forest Environmental Coordinator, Fishlake National Forest, 115 East 900 North, Richfield, Utah 84701 or phone 435–896–1090. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The proposed Greens Hollow Federal Coal Lease Tract is located on the Manti-La Sal and Fishlake National Forests in Sanpete and Sevier counties, Utah. The surface and coal resources are both federally owned. The Forests administer the surface resources, while the BLM administers the subsurface coal resources. The tract is located on the Muddy Creek and North Fork Quitchupah Creek drainages approximately 10 air miles west of the town of Emery, Utah. The tract is estimated to contain about 56.6 million tons of recoverable coal reserves. The

tract is being considered for competitive coal leasing under BLM regulations at 43 CFR part 3400.

Coal in the tract would be accessed and recovered using underground longwall mining methods, with foreseeable access from existing adjacent leases. The Forest Service and BLM have determined that data are available to meet the Data Adequacy Standards for Federal Coal Leasing, Uinta-Southwestern Utah Coal Region.

The final coal lease tract, as amended by BLM's Tract Delineation Team, encompasses 6,175 acres of Federal coal estate. The proposed lease contains about 6,096 acres of National Forest System (NFS) lands administered by the Manti-La Sal National Forest and about 79 acres of NFS lands administered by the Fishlake National Forest.

A Final EIS for the Leasing and Underground Mining of the Greens Hollow Federal Coal Lease Tract (UTU–84102) was released to the public along with the Record of Decision in December 2011. Subsequently, the decision was made to withdraw the Record of Decision and prepare a Supplemental EIS.

Purpose and Need for Action

The purpose for developing this Supplemental EIS is to clarify the decisions to be made and agency decision authority, analyze the environmental consequences of potential actions to be taken by each agency, make technical corrections, and address agency compliance actions and key resource concerns not previously analyzed in the original 2011 Final EIS. The Supplemental EIS will replace the Final EIS in its entirety. There is a need to comply with current direction regarding management of Inventoried Roadless Areas and unroaded/undeveloped areas, address key resource concerns, and update analysis for aquatic management indicator species and sage-grouse.

The Forest Service and the BLM have identified a need to respond to a federal coal lease-by-application, and assess whether or not to offer certain NFS lands for lease by competitive bid. The purpose of the federal agencies' actions is to facilitate continued development and recovery of federally managed coal resources in an environmentally sound manner. The Proposed Action responds to the federal government's overall policy to foster and encourage private enterprise in the development of economically sound and stable industries, and in the orderly and economic development of domestic resources to help assure satisfaction of industrial, security, and environmental needs.

The BLM is considering the Proposed Action because it would be an integral part of the BLM's coal leasing program under authority of the Mineral Leasing Act of 1920, as ammended by the Federal Coal Leasing Amendments Act of 1976 and supplemented in 1978, and by implementing regulations at 43 CFR 3425, Lease-On-Application. Coal developent is recognized as an appropriate use of public lands within the Wasatch Plateau Coal Field. The BLM will consider the approval of the Proposed Action in a manner that minimizes impacts on or to other resource values (including water and cultural resources), avoids or reduces impact on resources and activities, and prevents unnecessary or undue degradation of public lands.

Proposed Action

The action proposed to meet the purpose and need is for the Forest Service to consent to the BLM offering the Greens Hollow Federal Coal Lease Tract (UTU–84102) for competitive bid. The Forest Service consent decision would include special coal lease stipulations for use and protection of non-mineral interests, and the BLM decision would include stipulations related to the mineral resource.

Lead and Cooperating Agencies

The Bureau of Land Management, Price Field Office, and the Forest Service, Manti-La Sal and Fishlake National Forests, are joint lead agencies for this project. The USDI Office of Surface Mining (OSM) will participate as a cooperating agency.

Responsible Official

The Responsible Official for the Forest Service is Allen Rowley, Manti-La Sal Acting Forest Supervisor and Fishlake Forest Supervisor, 115 East 900 North, Richfield, Utah 84701. The responsible official for the BLM is William Stringer, Green River District Manager, 170 South 500 East, Vernal Utah 84078.

Nature of Decision To Be Made

In accordance with the Federal Coal Leasing Amendments Act of 1975, which amended the Mineral Leasing Act of 1920, and enacting regulations at 43 CFR 3400, the Forest Supervisor for the Manti-La Sal and Fishlake National Forests, will decide whether or not to consent to BLM leasing the subject federal coal lease tract. As part of its consent decision, the Forest Service will identify special coal lease stipulations needed to protect non-mineral resources.

In accordance with the Mineral Leasing Act of 1920, as amended, and contingent on consent of the surface managing agency, the Green River District Manager of the BLM will decide whether or not to offer the tract for competitive leasing and under what terms, conditions, and special stipulations.

Preliminary Issues

This Supplemental EIS will analyze issues relating to the potential for underground mining and associated subsidence and foreseeable surface uses to affect: Geologic resources (including mining-induced subsidence and seismicity); existing and reasonably forseeable surface structures and facilities; surface and ground water resources, including water quantity and water quality; terrestrial and aquatic wildlife resources (including Threatened, Endangered, and special status species); vegetation resources (including Threatened, Endangered, and special status species); heritage resources; paleontological resources; socioeconomics; recreation; visual quality; range; roadless characteristics; and air quality.

Permits or Licenses Required

Should a lease be issued and before any mining activity could commence, the lessee must obtain a coal mining and reclamation permit from the Utah Division of Oil, Gas and Mining consistent with the requirements of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) as codified in 30 CFR 700 to end, and the Utah Coal Rules. Other Federal and State permits would also be required.

Scoping Process

Scoping for this Supplemental EIS was completed in preparation of the previous EIS. The original Notice of Intent (NOI) for the Greens Hollow Coal Lease Tract was printed in the **Federal Register** (Vol. 73, No. 29, pp. 8060–8062) on February 12, 2008. The NOI designated a 45-day comment period ending March 28, 2008, when comments would be most useful. A public notice was also distributed to interested individuals on the BLM, Price Field Office and Manti-La Sal and Fishlake National Forests mailing lists. A legal notice was also sent to local newspapers to notify the general public.

A content analysis of the comments received on the Draft EIS was prepared. A summary of the issues and concerns, grouped by discipline or resource, identified during the scoping process

were analyzed in the EIS, while a more detailed record of responses received were compiled into a scoping report for the project.

Other Public Involvement

The Draft EIS for the Greens Hollow Coal Lease Tract was released and distributed on March 26, 2009. The EPA Notice of Availability (NOA) was published in the **Federal Register** on April 3, 2009, initiating the formal 45-day coment period on the Draft EIS. The BLM NOA appeared in the **Federal Register** on April 6, 2009. The Forest Service Legal Notice of Proposed Action appeared in the local newsapers on April 14 and 15, 2009. The NOA was also posted on the BLM's Environmental Notification Bulletin Board on April 3, 2009. An electronic copy of the Draft EIS was also made available on the BLM's Web site and hard copies were mailed to the project mailing list. Responses to comments on the Draft EIS were included in the Final EIS, Appendix C.

The Final EIS was released to the public on December 14, 2011. The EPA NOA was published in the **Federal Register** on December 23, 2011. On February 13, 2012, an appeal was filed with the Region 4, Regional Forester. Following the appeal, the decision was made to withdraw the Record of Decision and conduct additional analysis.

Dated: October 11, 2012.

Allen Rowley,

Forest Supervisor, Fishlake and Manti LaSal National Forests.

[FR Doc. 2012–25663 Filed 10–17–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Forest Service

Snohomish County Resource Advisory Committee (RAC)

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Snohomish County Resource Advisory Committee (RAC) will meet in Everett, Washington on October 25, 2012. The committee is meeting to review and prioritize 2012 and 2013 Snohomish County RAC Project Proposals for funding.

DATES: The meeting will be held on Thursday, October 25, 2012, from 9 a.m. to 5 p.m.

ADDRESSES: The meeting will be held in the Mt. Baker-Snoqualmie National Forest 4th floor Conference Room, located at the Wall Street Building, 2930 Wetmore Ave., Everett, Washington 98201.

FOR FURTHER INFORMATION CONTACT: Peter Forbes, District Ranger, Darrington Ranger District, phone (360) 436–2301, email *pforbes@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The meeting is open to the public. More information will be posted on the Mt. Baker-Snoqualmie National Forest Web site at *http://www.fs.fed.us/r6/mbs/projects/rac.shtml.*

Comments may be sent via email to *pforbes@fs.fed.us* or via facsimile to (360) 436–1309. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Darrington Ranger District office at 1405 Emens Avenue, Darrington, Washington, during regular office hours (Monday through Friday 8 a.m.–4:30 p.m.).

Dated: October 12, 2012.

Jennifer Eberlien,

Forest Supervisor.

[FR Doc. 2012–25661 Filed 10–17–12; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Proposed collection; comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Rural Business-Cooperative Service's (RBS) intention to request an extension of a currently approved information collection in support of the Intermediary Relending Program (IRP).

DATES: Comments on this notice must be received by December 17, 2012, to be assured of consideration.

FOR FURTHER INFORMATION CONTACT: Lori Washington, Specialty Programs Division, Rural Business-Cooperative Service, U.S. Department of Agriculture, STOP 3225, 1400 Independence Avenue SW., Washington, DC 20250–3225, Telephone (202) 720–9815, Email *lori.washington@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: Intermediary Relending Program.

OMB Number: 0570–0021.

Expiration Date of Approval: February 28, 2013.

Type of Request: Extension of currently approved collection information.

Abstract: The regulations contain various requirements for information from the intermediaries, and some requirements may cause the intermediary to seek information from ultimate recipients. The information requested is necessary for RBS to be able to process applications in a responsible manner, make prudent credit and program decisions, and effectively monitor the intermediaries' activities to protect the Government's financial interest and ensure that funds obtained from the Government are used appropriately. It includes information to identify the intermediary; describe the intermediary's experience and expertise; describe how the intermediary will operate its revolving loan fund; provide for debt instruments, loan agreements, and security; and other material necessary for prudent credit decisions and reasonable program monitoring.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 7.5 hours per response.

Respondents: Non-profit corporations, public agencies, Indian tribes and cooperatives.

Estimated Number of Respondents: 202.

Estimated Number of Responses per Respondent: 12.

Estimated Number of Responses: 2,383.

Estimated Total Annual Burden on Respondents: 17,959 hours.

Copies of this information collection can be obtained from Brigitte Sumter, Regulations and Paperwork Management Branch, Support Services Division at (202) 692–0042.

Comments

Comments are invited on (a) whether the proposed collection of information is necessary for the proper performance of the functions of RBS, including whether the information will have practical utility; (b) the accuracy of RBS's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be

collected; and (d) ways to minimize the burden of the collection of information on 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. Comments may be sent to Brigitte Sumter, Regulations and Paperwork Management Branch, Support Services Division, U.S. Department of Agriculture, Rural Development, 1400 Independence Avenue SW., STOP 0742, 1400 Independence Ave. SW., Washington, DC 20250. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and, where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination write to USDA, Director, Office of Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410, or call (800) 795–3272 (voice) or (202) 720–6382 (TDD). USDA is an equal opportunity provider, employer, and lender.

Dated: October 3, 2012.

Lillian Salerno,

Acting Administrator, Rural Business-Cooperative Service.

[FR Doc. 2012–25682 Filed 10–17–12; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–836]

Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review

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

DATES: *Effective Date:* October 18, 2012.

SUMMARY: On April 11, 2012, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on glycine from the People's Republic of China (PRC) [1] in the **Federal Register**. We revised the preliminary results on June 27, 2012, and issued the results to all interested parties for comment.[2] We have analyzed all comments received by the parties and have made changes to the margin calculation with respect to the sole company subject to this review, Baoding Mantong Fine Chemistry Co. Ltd. (Baoding Mantong), for the final results.

FOR FURTHER INFORMATION CONTACT: Edythe Artman or Angelica Mendoza, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3931 or (202) 482–3019, respectively.

SUPPLEMENTARY INFORMATION:

Period of Review

The period of review is March 1, 2010, through February 28, 2011.

Scope of the Order

The product covered by the order is glycine, which is a free-flowing crystalline material, like salt or sugar. Glycine is produced at varying levels of purity and is used as a sweetener/taste enhancer, a buffering agent, reabsorbable amino acid, chemical intermediate, and a metal complexing agent. This review covers glycine of all purity levels. Glycine is currently classified under subheading 2922.49.4020 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheading is provided for convenience and Customs purposes, the written description of the merchandise subject to the order is dispositive.

Background

On April 11, 2012, the Department published the *Preliminary Results* in the **Federal Register**. The Department provided interested parties with the opportunity to comment on the preliminary results of review and to submit, pursuant to 19 CFR 351.301(c)(3)(ii) and 351.408(c), publicly available information to value factors of production within 20 days after the date of publication of the results. The domestic interested party, GEO Specialty Chemicals, Inc. (GEO), submitted factor-valuation information on May 1, 2012. GEO and the sole respondent in this review,[3] Baoding Mantong, submitted case briefs on May 11, 2012, and Baoding Mantong submitted rebuttal comments on May 16, 2012. Based on the comments received, we made revisions to certain surrogate valuations and the preliminary margin-calculation program for Baoding Mantong. We released the Revised Preliminary Results of review to all interested parties on June 27, 2012.

Both GEO and Baoding Mantong submitted comments and factor-valuation information on the Revised Preliminary Results on July 16, 2012, and rebuttal comments on July 23, 2012. On July 31, 2012, we extended fully the deadline of the final results of review from August 9, 2012, to October 9, 2012.[4]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs and additional comments received by parties to this review are addressed in the memorandum to Paul Piquado, Assistant Secretary for Import Administration, from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, entitled, ''Issues and Decision Memorandum for the Final Results in the Administrative Review of Glycine from the People's Republic of China'' (Decision Memorandum), which is dated concurrently with, and adopted by, this notice. A list of the issues which parties raised, and to which we respond in the Decision Memorandum is attached to this notice as an Appendix. The Decision Memorandum is a public document and is on file electronically *via* Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). Access to IA ACCESS is available to registered users at *http://*

[1] *See Glycine From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review,* 77 FR 21738 (April 11, 2012) (*Preliminary Results*).

[2] *See* Memorandum to the File, through Angelica Mendoza, Program Manager, Antidumping and Countervailing Duty Operations, Office 7, dated June 27, 2012, entitled, ''Revisions to Certain Surrogate Valuations and the Preliminary Margin-Calculation Program for Baoding Mantong Fine Chemistry Co., Ltd.'' (Revised Preliminary Results).

[3] We rescinded this review with respect to 29 other companies after GEO submitted a timely request to withdraw its request for review of these companies. *Preliminary Results,* 77 FR at 21739.

[4] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Edythe Artman, International Trade Compliance Analyst, regarding ''Glycine from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,'' dated July 31, 2012.

iaaccess.trade.gov and in the Central Records Unit (CRU), room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/ia/*. The signed Decision Memorandum and the electronic versions of the Decision Memorandum are identical in content.

Changes Since the Revised Preliminary Results

Based on a review of the record and comments received from parties regarding our preliminary results and Revised Preliminary Results, we have made no changes to the margin calculation for Baoding Mantong in these final results of review. However, following our preliminary results, we asked the company to provide additional information concerning international freight expenses on its constructed-export-price sales. The company did not respond to our request within the applicable deadline and, as a result, we have applied surrogate freight expenses to some constructed-export-price sales for which freight services may have been provided by a non-market-economy carrier.

Separate Rates Determination

In our *Preliminary Results,* we determined that Baoding Mantong met the criteria for separate-rate status. We have not received any information since issuance of the preliminary results that provides a basis for reconsidering this preliminary determination. Therefore, the Department continues to find that Baoding Mantong meets the criteria for a separate rate.

Final Results of the Review

The Department has determined that the following margin exists for the period March 1, 2010, through February 28, 2011:

Exporter	Margin (percent)
Baoding Mantong Fine Chemistry Co., Ltd	453.79

Assessment Rates

Consistent with these final results, and pursuant to section 751(a)(2)(B) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.212(b)(1), the Department will direct U.S. Customs and Border Protection (CBP) to assess antidumping duties on all appropriate entries. The Department will issue appropriate assessment instructions to CBP 15 days after the date of publication of the final results of this review. In accordance with 19 CFR 351.212(b)(1), we have calculated, whenever possible, an exporter/importer (or customer)-specific assessment rate or value for merchandise subject to these reviews as described below. We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review if any exporter/importer-specific assessment rate calculated in the final results of this review is above *de minimis.*

Export Price Sales

With respect to export-price sales for these final results, we divided the total dumping margins (calculated as the difference between normal value and export-price) for each exporter's importer or customer by the total number of units the exporter sold to that importer or customer. We will direct CBP to assess the resulting per-unit dollar amount against each unit of merchandise in each of that importer's/customer's entries during the review period.

Constructed Export Price Sales

For constructed-export-price sales, we divided the total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct CBP to assess the resulting assessment rate against the entered customs values for the subject merchandise on each of that importer's entries during the review period. *See* 19 CFR 351.212(b).

Cash-Deposit Requirements

The following cash-deposit requirements will be effective upon publication of these final results of review for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(2)(C) of the Act: (1) For the exporters listed above, the cash deposit rate will be the rate established in the final results of this review (*i.e.,* Baoding Mantong) (except that if the rate for a particular company is *de minimis, i.e.,* less than 0.5 percent, no cash deposit will be required for that company); (2) for previously investigated or reviewed PRC and non-PRC exporters not listed above that have separate rates, the cash deposit rate will continue to be the exporter-specific rate published for the most recent period; (3) for all PRC exporters of subject merchandise which have not been found to be entitled to a separate rate, the cash deposit rate will be the PRC-wide rate of 155.89 percent; and (4) for all non-PRC exporters of subject merchandise which have not received their own rate, the cash deposit rate will be the rate applicable to the PRC exporters that supplied that non-PRC exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period of review. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective orders (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing this administrative review and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: October 9, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

Appendix

Comment 1: Valuation of Liquid Chlorine
Comment 2: Valuation of Liquid Ammonia
Comment 3: Valuation of Formaldehyde
Comment 4: Valuation of Steam Coal
Comment 5: Valuations of By-Products
Comment 6: Valuation of Surrogate Financial Ratios
Comment 7: Implementation of Verification Findings
Comment 8: Import Data Extracted in Incorrect Currency
Comment 9: Errors in the Calculations of Surrogate Values for Packing Materials

[FR Doc. 2012–25595 Filed 10–17–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–552–802]

Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Amended Final Results and Partial Final Rescission of Antidumping Duty Administrative Review

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

DATES: *Effective Date:* October 18, 2012.

FOR FURTHER INFORMATION CONTACT: Toni Dach, AD/CVD Operations, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1655.

SUPPLEMENTARY INFORMATION:

Background

On September 11, 2012, the Department of Commerce (''Department'') published in the **Federal Register** the final results of the sixth administrative review of the antidumping duty order of frozen warmwater shrimp from the Socialist Republic of Vietnam (''Vietnam'').[1]

On September 17, 2012, the Minh Phu Group,[2] Phu Cuong Jostoco Seafood Corporation, Thuan Phuoc Seafoods and Trading Corporation, and UTXI Aquatic Products Processing Corporation, collectively referred to here as ''Vietnamese Respondents,'' filed timely allegations that the Department made various ministerial errors in the *Final Results* and requested, pursuant to 19 CFR 351.224, that the Department correct the alleged ministerial errors. No other parties in this proceeding submitted comments on the Department's final margin calculations.

Based upon our analysis of the comments and allegations of ministerial errors, we made changes to the antidumping duty margin calculation for Minh Phu Group. Additionally, we made corrections to the exporter company names for the following: (1) UTXI Aquatic Products Processing Corporation; (2) Thuan Phuoc Seafoods and Trading Corporation; and (3) Phu Cuong Jostoco Seafood Corporation. Furthermore, as a result of correcting the clerical errors in the antidumping margin calculation for Minh Phu Group, the antidumping margin for the separate rate respondents was also revised because the separate rate margin was derived from the simple average of the margins of the Minh Phu Group and the Nha Trang Group.[3]

In the *Preliminary Results,*[4] pursuant to the withdrawal of the request for review of BIM Seafood Joint Stock Company (''BIM Seafood''), the Department preliminarily rescinded this review with respect to BIM Seafood. Subsequent to the *Final Results,* the Department discovered that we had inadvertently failed to include the final rescission for BIM Seafood in the *Final Results.* Therefore, we are also rescinding this review with respect to BIM Seafood.

Scope of the Order

For a full description of the products covered by the antidumping duty order on certain frozen warmwater shrimp from Vietnam, *see* Memorandum to Paul Piquado, from Christian Marsh, regarding ''Sixth Antidumping Administrative Review of Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Ministerial Error and Correction Memorandum,'' dated concurrently with this notice (''Ministerial Errors and Correction Memo'').

Amended Final Results

The Act defines ''ministerial error'' as including ''errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.''[5] After analyzing the Vietnamese Respondents' comments, we have determined, in accordance with section 751(h) of the Act and 19 CFR 351.224(e), that we made certain ministerial errors in our calculations for the final results with respect to our calculation of freight for the Minh Phu Group and certain typographical errors for various exporter company names.[6]

Because we have revised the antidumping duty margin for Minh Phu Group, we are also revising the antidumping duty margin for the separate rate respondents because the separate rate margin for those companies was calculated as the simple average margin for Minh Phu Group and Nha Trang Group. In accordance with section 751(h) of the Act, we are amending the final results of the administrative review of certain frozen warmwater shrimp from Vietnam.

The dumping margins for the period of review for these amended final results are as follows:

Exporter	Margin (percent)
Minh Phu Group:	0.53
Minh Phat Seafood Co., Ltd. aka	
Minh Phat Seafood aka	
Minh Phu Seafood Export Import Corporation (and affiliates Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.) aka	
Minh Phu Seafood Corp. aka	
Minh Phu Seafood Corporation aka	
Minh Qui Seafood aka	
Minh Qui Seafood Co., Ltd.	
Minh Phu Seafood Pte aka	
Minh Phat aka	
Minh Qui	
Minh Phu Hau Giang Seafood Co., Ltd.	
Nha Trang Seafoods Group:	1.23
Nha Trang Seaproduct Company (''Nha Trang Seafoods'') aka	

[1] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review,* 77 FR 55800 (September 11, 2012) (''*Final Results*'').

[2] Minh Phu Seafood Corporation, Minh Qui Seafood Co., Ltd. and Minh Phat Seafood Co., Ltd.

[3] Nha Trang Seaproduct Company, NT Seafoods Corporation, Nhatrang Seafoods—F89 Joint Stock Company, and NTSF Seafoods Joint Stock Company.

[4] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Results of Administrative Review,* 77 FR 13547 (March 7, 2012) (''*Preliminary Results*'').

[5] *See* section 751(h) of the Tariff Act of 1930, as amended (''the Act'').

[6] *See* Ministerial Errors and Correction Memo.

Exporter	Margin (percent)
Nha Trang Seafoods aka	
Nha Trang Seafood Product Company aka	
Nha Trang Seaproduct Company Nha Trang Seafoods aka	
NT Seafoods Corporation (''NT Seafoods'') aka	
Nha Trang Seafoods—F.89 Joint Stock Company (''Nha Trang Seafoods—F.89'') aka	
NTSF Seafoods Joint Stock Company (''NTSF Seafoods'')	
Amanda Foods (Vietnam) Limited (''Amanda Foods'')	0.88
Bac Lieu Fisheries Company Limited aka	0.88
Bac Lieu Fisheries Company Limited (''Bac Lieu'') aka	
Bac Lieu Fisheries Joint Stock Company aka	
Bac Lieu Fisheries Limited Company aka	
Bac Lieu Fisheries Company Limited aka	
Bac Lieu Fis	
Camau Frozen Seafood Processing Import Export Corporation (''CAMIMEX'') aka	0.88
Camimex aka	
Camau Seafood Factory No. 4 aka	
Camau Seafood Factory No. 5 aka	
Camau Frozen Seafood Processing Import & Export aka	
Camau Frozen Seafood Processing Import Export Corp. (CAMIMEX–FAC 25) aka	
Frozen Factory No. 4 aka	
Camau Frozen Seafood Processing Import Export Corporation (''CAMIMEX'') aka	
Camimex aka	
Camau Frozen Seafood Processing Import Export Corporation	
C.P. Vietnam Livestock Company Limited aka	0.88
C.P. Vietnam Livestock Corporation (''C.P. Vietnam'') aka	
C.P. Vietnam Livestock Corporation aka	
C.P. Vietnam Livestock Co. Ltd.	
Cadovimex Seafood Import-Export and Processing Joint Stock Company (''CADOVIMEX–VIETNAM'') aka	0.88
Cadovimex Seafood Import-Export and Processing Joint Stock Company aka	
Cadovimex-Vietnam aka	
Cadovimex aka	
Cai Doi Vam Seafood Import-Export Company aka	
Cai Doi Vam Seafood Import-Export Company (''Cadovimex'') aka	
Cai Doi Vam Seafood Import-Export Company (Cadovimex) aka	
Cai Doi Vam Seafood aka	
Cai Doi Vam Seafood Im-Ex Company (Cadovimex) aka	
Cai Doi Vam Seafood Processing Factory aka	
Caidoivam Seafood Company (Cadovimex) aka	
Caidoivam Seafood Im-Ex Co.	
Cafatex Fishery Joint Stock Corporation (''Cafatex Corp.'') aka	0.88
Cafatex Fishery Joint Stock Corporation (''CAFATEX CORP.'') aka	
Cantho Animal Fisheries Product Processing Export Enterprise (Cafatex) aka	
Cafatex aka	
Cafatex Vietnam aka	
Xi Nghiep Che Bien Thuy Suc San Xuat Kau Cantho aka	
Cas aka	
Cas Branch aka	
Cafatex Saigon aka	
Cafatex Fishery Joint Stock Corporation aka	
Cafatex Corporation aka	
Taydo Seafood Enterprise aka	
Cafatex Corp. aka	
Cafatex Corporation	
Cam Ranh Seafoods Processing Enterprise Company (''Camranh Seafoods'') aka	0.88
Camranh Seafoods	
Can Tho Agricultural and Animal Products Import Export Company (''CATACO'') aka	0.88
CATACO Sole Member Limited Liability Company aka	
Can Tho Agricultural and Animal Product Import Export Company (''CATACO'') aka	
Can Tho Agricultural Products aka	
CATACO aka	
Can Tho Agricultural and Animal Products Imex Company	
Can Tho Import Export Fishery Limited Company (''CAFISH'')	0.88
Coastal Fishery Development aka	0.88
Coastal Fisheries Development Corporation (''Cofidec'') aka	
Coastal Fisheries Development Corporation (Cofidec) aka	
COFIDEC aka	
Coastal Fisheries Development Corporation aka	
Coastal Fisheries Development Co. aka	
Coastal Fisheries Development Corp.	
Cuulong Seaproducts Company (''Cuu Long Seapro'') aka	0.88
Cuu Long Seaproducts Limited (''Cuulong Seapro'') aka	
Cuulong Seapro aka	
Cuulong Seaproducts Company aka	

Exporter	Margin (percent)
Cuulong Seaproducts Company (“Cuulong Seapro”) aka	
Cuu Long Seaproducts Company (“Cuu Long Seapro”) aka	
Cuu Long Seaproducts Company aka	
Cuu Long Seapro aka	
Cuulong Seaproducts Company (“Cuu Long Seapro”) aka	
Cuu Long Seaproducts Limited (Cuulong Seapro) aka	
Cuulong Seapro aka	
Cuulong Seaproduct Company	
Danang Seaproducts Import Export Corporation (“Seaprodex Danang”) aka	0.88
Danang Seaproducts Import Export Corporation aka	
Danang Seaproduct Import-Export Corporation aka	
Danang Seaproducts Import Export aka	
Danang Sea Products Import Export Corporation aka	
Tho Quang Seafood Processing & Export Company aka	
Seaprodex Danang aka	
Tho Quang Seafood Processing and Export Company aka	
Tho Quang aka	
Tho Quang Co.	
Gallant Ocean (Vietnam) Co., Ltd. aka	0.88
Gallant Ocean (Quang Ngai) Co. Ltd.	
Viet I-Mei Frozen Foods Co., Ltd. aka	0.88
Viet I-Mei Frozen Foods Co. Ltd. aka	
Viet I-Mei aka	
Grobest & I-Mei Industrial (Vietnam) Co., Ltd. aka	
Grobest & I-Mei Industry (Vietnam) Co., Ltd. aka	
Grobest	
Investment Commerce Fisheries Corporation (“Incomfish”) aka	0.88
Incomfish aka	
Investment Commerce Fisheries Corp. aka	
Incomfish Corp. aka	
Incomfish Corporation aka	
Investment Commerce Fisheries aka	
Investment Commerce Fisheries Corporation aka	
Incomfish Corporation	
Kim Anh Company Limited (“Kim Anh”)	0.88
Minh Hai Export Frozen Seafood Processing Joint Stock Company aka	0.88
Minh Hai Jostoco aka	
Minh Hai Export Frozen Seafood Processing Joint-Stock Company (“Minh Hai Jostoco”) aka	
Minh Hai Export Frozen Seafood Processing Joint Stock Company (“Minh Hai Jostoco”) aka	
Minh Hai Export Frozen Seafood Processing Joint-Stock Company aka	
Minh Hai Joint Stock Seafood Processing Joint-Stock Company aka	
Minh Hai Export Frozen Seafood Processing Joint-Stock Co. aka	
Minh-Hai Export Frozen Seafood Processing Joint-Stock Company	
Minh Hai Joint-Stock Seafoods Processing Company (“Seaprodex Minh Hai”) aka	0.88
Sea Minh Hai aka	
Minh Hai Joint-Stock Seafoods Processing Company aka	
Seaprodex Minh Hai aka	
Seaprodex Min Hai aka	
Seaprodex Minh Hai (Minh Hai Joint Stock Seafoods Processing Co.) aka	
Seaprodex Minh Hai Factory aka	
Seaprodex Minh Hai Factory No. 69 aka	
Seaprodex Minh Hai Workshop 1 aka	
Seaprodex Minh Hai-Factory No. 78 aka	
Workshop I Seaprodex Minh Hai	
Minh Hai Sea Products Import Export Company (“Seaprimex Co”) aka	0.88
Ca Mau Seafood Joint Stock Company (“SEAPRIMEXCO”) aka	
Seaprimexco Vietnam aka	
Seaprimexco aka	
Seaprimex Co aka	
Ca Mau Seafood Joint Stock Company (“Seaprimexco”) aka	
Minh Hai Seaproducts Import Export Corporation aka	
Seaprimexco aka	
Minh Hai Seaproducts Co Ltd. (Seaprimexco) aka	
Ca Mau Seafood Joint Stock Company (“Seaprimexco Vietnam”)	
Ngoc Sinh Private Enterprise aka	0.88
Ngoc Sinh Seafoods aka	
Ngoc Sinh Seafoods Processing and Trading Enterprise aka	
Ngoc Sinh Fisheries aka	
Ngoc Sinh Private Enterprises aka	
Ngoc Sinh Seafoods Processing and Trading Enterprises aka	
Ngoc Sinh aka	
Ngoc Sinh Seafood Processing Company aka	
Ngoc Sinh Seafoods (Private Enterprise)	

Exporter	Margin (percent)
Ngoc Tri Seafood Joint Stock Company	0.88
Nhat Duc Co., Ltd. aka	0.88
Nhat Duc Co., Ltd. (“Nhat Duc”)	
Nha Trang Fisheries Joint Stock Company (“Nha Trang Fisco”) aka	0.88
Nha Trang Fisheries Joint Stock Company aka	
Nhatrang Fisheries Joint Stock Company aka	
Nha Trang Fisco aka	
Nhatrang Fisco aka	
Nha Trang Fisheries Joint Stock Company (“Nha Trang Fisco”) aka	
Nha Trang Fisheries, Joint Stock aka	
Nha Trang Fishereies Joint Stock Company (Nha Trang Fisco)	
Phu Cuong Seafood Processing and Import-Export Co., Ltd. aka	0.88
Phu Cuong Seafood Processing and Import Export Company Limited aka	
Phu Cuong Jostoco Corp. aka	
Phu Cuong Jostoco Seafood Corporation	
Phuong Nam Co., Ltd. (“Phuong Nam”) aka	0.88
Western Seafood Processing and Exporting Factory (“Western Seafood”) aka	
Phuong Nam Foodstuff Corp. aka	
Phuong Nam Co. Ltd.	
Sao Ta Foods Joint Stock Company (“Fimex VN”) aka	0.88
Sao Ta Foods Joint Stock Company aka	
Fimex VN aka	
Sao Ta Seafood Factory aka	
Saota Seafood Factory	
Soc Trang Aquatic Products and General Import Export Company (“Stapimex”) aka	0.88
Soc Trang Seafood Joint Stock Company (“Stapimex”) aka	
Soc Trang Seafood Joint Stock Company aka	
Soc Trang Aquatic Products and General Import Export Company aka	
Stapimex aka	
Soc Trang Aquatic Products and General Import Export Company-(Stapimex) aka	
Stapimex Soc Trans Aquatic Products and General Import Export Company aka	
Stapmex	
Thuan Phuoc Seafoods and Trading Corporation aka	0.88
Thuan Phuoc Corp. aka	
Frozen Seafoods Factory No. 32 aka	
Seafoods and Foodstuff Factory aka	
My Son Seafoods Factory aka	
Seafoods and Foodstuff Factory	
UTXI Aquatic Products Processing Company aka	0.88
UT XI Aquatic Products Processing Company aka	
UT–XI Aquatic Products Processing Company aka	
UTXI aka	
UTXI Co. Ltd. aka	
Khanh Loi Seafood Factory aka	
Hoang Phuong Seafood Factory aka	
Hoang Phong Seafood Factory aka	
UTXI Aquatic Products Processing Corporation (“UTXICO”) aka	
UTXI Aquatic Products Processing Corporation aka	
UTXICO	
Viet Foods Co., Ltd. aka	0.88
Nam Hai Foodstuff and Export Company Ltd.	
Viet Hai Seafood Co., Ltd. aka	0.88
Vietnam Fish One Co., Ltd. (“Fish One”) aka	
Viet Hai Seafoods Company Ltd. (“Vietnam Fish One Co. Ltd.”)	
Vietnam Clean Seafood Corporation aka	0.88
VINA Cleanfood	
Vietnam-wide Entity	25.76

Rescission of Review, In Part

In the *Preliminary Results,* the Department preliminarily rescinded this review with respect to BIM Seafood because Domestic Producers [7] withdrew their request for review of BIM Seafood.[8] Pursuant to 19 CFR 351.213(d)(1), the Department will rescind an administrative review, in whole or in part, if the party that requested the review withdraws its request within 90 days of the date of publication of the notice of initiation of the requested review. Therefore, as the withdrawal of the request for review of BIM Seafood was timely, we are rescinding this review with respect to BIM Seafood.

These amended final results and notice are issued and published in accordance with sections 751(h), and 777(i)(1) of the Act, and 19 CFR 351.224.

[7] The Domestic Producers are the Ad Hoc Shrimp Trade Action Committee members: Nancy Edens; Papa Rod, Inc.; Carolina Seafoods; Bosarge Boats, Inc.; Knight’s Seafood Inc.; Big Grapes, Inc.; Versaggi Shrimp Co.; and Craig Wallis.

[8] *See Preliminary Results,* 77 FR at 13548.

Dated: October 5, 2012.

Paul Piquado,

Assistant Secretary for Import Administration.

[FR Doc. 2012–25660 Filed 10–17–12; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Renewable Energy and Energy Efficiency Trade Policy Mission to Chile

AGENCY: International Trade Administration, Commerce.

ACTION: Notice.

Mission Description:

The U.S. Department of Commerce's International Trade Administration (ITA) is organizing a Renewable Energy and Energy Efficiency (RE&EE) Trade Policy Mission to Santiago, Chile from April 15–16, 2013. The mission is designed to be led by a senior Department of Commerce official, and will focus on: (1) Creating a policy environment conducive to growth in Chile's RE&EE market; and (2) introducing U.S. RE&EE exporters to key Chilean Government officials. Mission participants will also be invited to showcase their U.S.-made RE&EE technologies at an important industry-specific trade show following the trade policy mission at their own expense.

The RE&EE trade policy mission will promote the competitiveness of U.S. wind, solar, geothermal, biomass, hydropower, waste-to-energy, smart grid, and energy efficiency exporters in a key emerging market and demonstrate U.S. Government support for Chile's renewable energy goals. The mission supports ITA's commitments contained in the Renewable Energy and Energy Efficiency Export Initiative (RE4I), which aims to significantly increase U.S. RE&EE exports by the end of 2014, the National Export Initiative time frame.

If firms decide to participate in the International Fair of Technologies (IFT) Energy 2013 trade show immediately following the trade mission (April 17–19, 2013), which is encouraged by the Department, they will be expected to register and pay for their participation in the show separately from their trade policy mission participation fees.

Commercial Setting:

Chile's fast growing economy and business friendly environment provide an attractive market for U.S. exporters. The rapidly expanding Chilean economy, which grew 6.1% in 2011, has caused a dramatic increase in the country's energy demand. Estimates indicate that Chile must install an additional 8 gigawatts (GW) of generating capacity by 2020 to meet its growing demand. Currently, Chile is dependent on imported fossil fuels for a large portion of its power generation (imported natural gas accounts for a third of the country's power capacity). As a result, energy prices have increased along with energy demand, incentivizing the development of the country's renewable energy resources. In fact, renewable energy technologies are much closer to ''grid parity'' in Chile than in most markets, enhancing their competitiveness.

Chile has a strong and growing energy industry. The country privatized its power sector in 1982, and today, has 70 power generation companies (4 dominant firms), five transmission operators (1 dominant), and 34 distribution companies (4 dominant). In renewable energy, Chile led Latin America in implementing a renewable energy portfolio standard (RPS). By 2011, Chilean utilities were required to produce 5% of their output from renewable energy sources; the quota increases by 0.5% annually from 2015 until 2024. Despite the RPS, renewable energy (aside from large hydropower) contributed just 2.7% of Chile's power capacity at the end of 2011. As a result, Chile must make a substantial investment in the sector to achieve its goal of 20% renewable energy capacity by 2020.

Fortunately, Chile possesses some of the world's largest potential for renewable energy. By 2011, Chile had installed only 0.198 GW of wind capacity, for example, despite an estimated potential of up to 10 GW. Likewise, Chile has developed only about half its biomass potential and has a small fraction of at least 2 GW of geothermal potential under development. Chile's solar potential is one of the largest in the world and—like other renewable energy technologies—has been largely undeveloped.

Chile's new National Energy Strategy contains six pillars: Energy efficiency; renewable energy; traditional fossil fuels; smart grid; competition in electricity distribution; and regional electricity distribution. In a speech on February 28, 2012, President Piñera announced the Government of Chile (GoC) would introduce 100 laws and administrative measures to implement the new strategy.

The mission will occur at an opportune time, as Chilean policy makers seek to establish policy to support the growth of renewable energy in their country. By facilitating high-level discussions between U.S. exporters and Chilean officials, the mission will help create a burgeoning export market for U.S. RE&EE companies, substantially increasing U.S. exports to a country whose resource potential and business environment portends significant growth for years to come.

ITA's U.S. and Foreign Commercial Service (US&FCS) at the U.S. Embassy in Santiago reports that U.S. companies are well positioned to meet export orders; and that potential policy incentives could strongly catalyze additional development. Opportunities are expected in the wind, solar, geothermal, biomass, hydropower, and energy efficiency sectors. Several U.S. firms have already made investments in Chile's renewable energy sector.

Mission Goals:

The RE&EE trade policy mission will facilitate the development of an export market by supporting the establishment of policy incentives in Chile's RE&EE market. The mission will combine the policy development and advocacy efforts of a traditional trade policy mission with networking and business outreach opportunities for participating firms.. The delegation will have a unique opportunity to meet government officials, discuss policy concerns, and suggest creative solutions to Chile's energy challenges. Several topics pertinent to the creation of a thriving renewable energy market will be addressed, including:

- Establishment of incentives to help Chile meet the goals of its National Energy Strategy;
- Development of interconnection standards and feed-in tariffs that would attract global investment and provide an incentive for development;
- Mapping of renewable energy resources;
- Strengthening of policy and regulatory cooperation between the United States and Chile; and
- Development of local financing institutions to further encourage development.

Trade policy mission participants are also encouraged to exhibit at the IFT Energy 2013 trade show immediately following the trade policy mission. Participation in IFT Energy 2013 is not mandatory and firms that exhibit will be expected to make arrangements with the conference organizer separate from their participation in the trade policy mission.

Mission Scenario:

The Renewable Energy and Energy Efficiency Trade Policy Mission will provide several opportunities for participants to discuss policy challenges

with Chilean Government officials. In addition, mission participants will have an opportunity to showcase their products in a U.S. Pavilion during the IFT Energy 2013 trade show.

During the trade policy mission, participants will:

- Receive market briefings on the status of the renewable energy market in Chile, including an assessment of upcoming opportunities;
- Receive a Market Assessment Report on opportunities in Chile's renewable energy market;
- Be introduced to key Chilean government officials and decision-makers during government-to-government meetings for opportunities to discuss policies and the business environment; and
- Attend a networking reception with Chilean business persons and government officials organized by the U.S. Foreign and Commercial Service.

PROPOSED TIMETABLE*

Date	Day	Activity
April 14	Sunday Santiago, Chile	Arrive in Santiago, Chile.
April 15	Monday Santiago, Chile	• Market briefing on RE&EE industry in Chile for mission participants by US&FCS Santiago and Embassy staff. • Meetings with key GoC officials and stakeholders.
April 16	Tuesday Santiago, Chile	• Lunch and seminar at AmCham Chile. • Networking and exchange with key private sector contacts. • Networking reception at Ambassador's Residence. • Mission ends.
April 17	Wednesday Santiago, Chile	• [OPTIONAL] Opportunity to attend/exhibit IFT Energy 2013.
April 18	Thursday Santiago, Chile	• [OPTIONAL] Opportunity to attend/exhibit IFT Energy 2013.
April 19	Friday Santiago, Chile	• [OPTIONAL] Opportunity to attend/exhibit IFT Energy 2013.

***Note:** The final schedule will depend on the availability of local government and business officials, specific goals of the mission participants, and air travel schedules.

Participation Requirements:

All parties interested in participating in the trade mission must complete and submit an application package for consideration by the Department of Commerce. All applicants will be evaluated based on their ability to meet certain conditions and best satisfy the selection criteria as outlined below. A minimum of 15 and maximum of 25 companies will be selected to participate in the mission from the applicant pool. U.S. companies already doing business in Chile as well as U.S. companies seeking to enter to the Chilean market for the first time may apply.

Fees and Expenses:

After a company or organization has been selected to participate on the mission, a payment to the Department of Commerce of a participation fee is required. The participation fee for the Trade Mission will be *$1,100* for a small or medium-sized firm (SME) [1], and *$1,400* for large firms. The fee for each additional firm representative (large firm or SME/trade organization) is $500. Expenses for travel, lodging, meals, and incidentals will be the responsibility of each mission participant. Delegation members will be able to take advantage of U.S. Embassy rates for hotel rooms. The cost to exhibit at the show is $575 per square meter of booth space; this will be paid by the trade mission participant directly to the show organizer.

Exclusions:

The mission fee does not include any personal travel expenses such as lodging, most meals, local ground transportation, except as stated in the proposed timetable, or air transportation to and from the United States. Business visas are not required. Participants will be expected to register and pay for the IFT Energy 2013 trade show separately from their trade policy mission registration and dues, if they decide to participate in the show following the mission.

Conditions for Participation:

An applicant must submit a completed mission application signed by a company officer, together with supplemental application materials, including adequate information on the company's products and/or services, primary market objectives, and goals for participation. If the Department of Commerce receives an incomplete application, the Department may reject the application, request additional information, or take the lack of information into account when evaluating the applications.

Each applicant must also certify that the products or services it seeks to export through the mission are either produced in the United States, or, if not, marketed under the name of a U.S. firm and has at least 51 percent U.S. content of the value of the finished product or service.

Selection Criteria for Participation: Selection will be based on the following criteria:

- Suitability of the company's products or services to the market;
- Applicant's potential for business in Chile and in the region, including likelihood of exports resulting from the mission;
- Consistency of the applicant's goals and objectives with the stated scope of the mission;

Referrals from political organizations and any documents containing references to partisan political activities (including political contributions) will be removed from an applicant's submission and not considered during the selection process. Diversity of company size and location may also be considered during the review process.

Timeline for Recruitment and Applications:

Mission recruitment will be conducted in an open and public manner, including publication in the **Federal Register**, posting on the Commerce Department trade mission

[1] An SME is defined as a firm with 500 or fewer employees or that otherwise qualifies as a small business under SBA regulations (see *http://www.sba.gov/services/contracting_opportunities/sizestandardstopics/index.html*). Parent companies, affiliates, and subsidiaries will be considered when determining business size. The dual pricing reflects the Commercial Service's user fee schedule that became effective May 1, 2008 (see *http://www.export.gov/newsletter/march2008/initiatives.html* for additional information).

calendar (*http://export.gov/trademissions*) and other Internet Web sites (including the Renewable Energy & Energy Efficiency Exporters Portal at *www.export.gov/reee*), press releases to general and trade media, direct mail, notices by industry trade associations and other multiplier groups, and publicity at industry meetings, symposia, conferences, and trade shows. Recruitment for the mission will begin immediately and conclude no later than March 1, 2013. The U.S. Department of Commerce will review applications and make selection decisions on a rolling basis beginning in November 1, 2013. Applications received after March 1, 2013 will be considered only if space and scheduling permit.

Contacts:

Ryan Mulholland, Renewable Energy Trade Specialist, MAS—Office of Energy and Environmental Industries, Phone: (202) 482–4693, Email: *Ryan.Mulholland@trade.gov;*

Ellen Lenny-Pessagno, Senior Commercial Officer, U.S. Commercial Service—Santiago, Chile, Tel: (56) 2–330–3610, Email: *Ellen.Lenny-Pessagno@trade.gov.*

Elnora Moye,

Trade Program Assistant.

[FR Doc. 2012–25647 Filed 10–17–12; 8:45 am]

BILLING CODE 3510–FP–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY: Commodity Futures Trading Commission.

TIME AND DATE: 10:00 a.m., Friday, November 2, 2012.

PLACE: 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–25801 Filed 10–16–12; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10:00 a.m., Friday November 9, 2012.

PLACE: 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–25802 Filed 10–16–12; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10:00 a.m., Friday November 23, 2012.

PLACE: 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–25804 Filed 10–16–12; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10:00 a.m., Friday, November 16, 2012.

PLACE: 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–25803 Filed 10–16–12; 4:15 pm]

BILLING CODE 6351–01–P

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meetings

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 10:00 a.m., Friday, November 30, 2012.

PLACE: 1155 21st St. NW., Washington, DC, 9th Floor Commission Conference Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED: Surveillance and Enforcement Matters. In the event that the times or dates of these or any future meetings change, an announcement of the change, along with the new time and place of the meeting will be posted on the Commission's Web site at *http://www.cftc.gov.*

CONTACT PERSON FOR MORE INFORMATION: Sauntia S. Warfield, 202–418–5084.

Sauntia Warfield,

Assistant Secretary of the Commission.

[FR Doc. 2012–25805 Filed 10–16–12; 4:15 pm]

BILLING CODE 6351–01–P

DEPARTMENT OF DEFENSE

Department of the Army; Army Corps of Engineers

Notice of Solicitation of Applications for Stakeholder Representative Members of the Missouri River Recovery Implementation Committee

AGENCY: Department of the Army, U.S. Army Corps of Engineers, DoD.

ACTION: Notice.

SUMMARY: The Commander of the Northwestern Division of the U.S. Army Corps of Engineers (Corps) is soliciting applications to fill two vacant stakeholder representative member positions on the Missouri River Recovery Implementation Committee (MRRIC). Members are sought to fill vacancies on a committee to represent various categories of interests within the Missouri River basin. The MRRIC was formed to advise the Corps on a study of the Missouri River and its tributaries and to provide guidance to the Corps with respect to the Missouri River recovery and mitigation activities currently underway. The Corps established the MRRIC as required by the U.S. Congress through the Water Resources Development Act of 2007 (WRDA), Section 5018.

DATES: The agency must receive completed applications and endorsement letters no later than November 19, 2012.

ADDRESSES: Mail completed applications and endorsement letters to U.S. Army Corps of Engineers, Omaha District (Attn: MRRIC), 1616 Capitol Avenue, Omaha, NE 68102–4901 or email completed applications to *info@mrric.org.* Please put ''MRRIC'' in the subject line.

FOR FURTHER INFORMATION CONTACT: Mary S. Roth, 402–995–2919.

SUPPLEMENTARY INFORMATION: The operation of the MRRIC is in the public interest and provides support to the Corps in performing its duties and responsibilities under the Endangered Species Act, 16 U.S.C. 1531 *et seq.;* Sec. 601(a) of the Water Resources Development Act (WRDA) of 1986, Public Law 99–662; Sec. 334(a) of WRDA 1999, Public Law 106–53, and Sec. 5018 of WRDA 2007, Public Law 110–114. The Federal Advisory Committee Act, 5 U.S.C. App. 2, does not apply to the MRRIC.

A Charter for the MRRIC has been developed and should be reviewed prior to applying for a stakeholder representative membership position on the Committee. The Charter, operating procedures, and stakeholder application forms are available electronically at *www.MRRIC.org.*

Purpose and Scope of the Committee. The duties of the MRRIC cover two areas:

1. The Committee provides guidance to the Corps, and affected Federal agencies, State agencies, or Native American Indian Tribes on a study of the Missouri River and its tributaries to determine the actions required to mitigate losses of aquatic and terrestrial habitat, to recover federally listed species protected under the Endangered Species Act, and to restore the river's ecosystem to prevent further declines among other native species. This study is identified in Section 5018(a) of the WRDA. It will result in a single, comprehensive plan to guide the implementation of mitigation, recovery, and restoration activities in the Missouri River Basin. This plan is referred to as the Missouri River Ecosystem Restoration Plan (MRERP). For more information about the MRERP go to *www.MRERP.org.*

2. The MRRIC also provides guidance to the Corps with respect to the Missouri River recovery and mitigation plan currently in existence, including recommendations relating to changes to the implementation strategy from the use of adaptive management; coordination of the development of consistent policies, strategies, plans, programs, projects, activities, and priorities for the Missouri River recovery and mitigation plan. Information about the Missouri River Recovery Program is available at *www.MoRiverRecovery.org.*

3. Other duties of MRRIC include exchange of information regarding programs, projects, and activities of the agencies and entities represented on the Committee to promote the goals of the Missouri River recovery and mitigation plan; establishment of such working groups as the Committee determines to be necessary to assist in carrying out the duties of the Committee, including duties relating to public policy and scientific issues; facilitating the resolution of interagency and intergovernmental conflicts between entities represented on the Committee associated with the Missouri River recovery and mitigation plan; coordination of scientific and other research associated with the Missouri River recovery and mitigation plan; and annual preparation of a work plan and associated budget requests.

Administrative Support. To the extent authorized by law and subject to the availability of appropriations, the Corps provides funding and administrative support for the Committee.

Committee Membership. Federal agencies with programs affecting the Missouri River may be members of the MRRIC through a separate process with the Corps. States and Federally recognized Native American Indian tribes, as described in the Charter, are eligible for Committee membership through an appointment process. Interested State and Tribal government representatives should contact the Corps for information about the appointment process.

This Notice is for individuals interested in serving as a stakeholder member on the Committee. In accordance with the Charter for the MRRIC, stakeholder membership is limited to 28 people, with each member having an alternate. Members and alternates must be able to demonstrate that they meet the definition of ''stakeholder'' found in the Charter of the MRRIC. Applications are currently being accepted for representation in the stakeholder interest categories listed below:

a. Hydropower;
b. Irrigation;
c. Major Tributaries;
d. Navigation;
e. Thermal Power; and
f. Waterway Industries.

Terms of stakeholder representative members of the MRRIC are three years. There is no limit to the number of terms a member may serve.

Members and alternates of the Committee will not receive any compensation from the federal government for carrying out the duties of the MRRIC. Travel expenses incurred by members of the Committee will not be reimbursed by the federal government.

Application for Stakeholder Membership. Persons who believe that they are or will be affected by the Missouri River recovery and mitigation activities and are not employees of federal agencies, tribes, or state agencies, may apply for stakeholder membership on the MRRIC. Applications for stakeholder membership may be obtained electronically at *www.MRRIC.org.* Applications may be emailed or mailed to the location listed (see **ADDRESSES**). In order to be considered, each application must include:

1. The name of the applicant and the primary stakeholder interest category that person is qualified to represent;

2. A written statement describing the applicant's area of expertise and why the applicant believes he or she should be appointed to represent that area of expertise on the MRRIC;

3. A written statement describing how the applicant's participation as a Stakeholder Representative will fulfill the roles and responsibilities of MRRIC;

4. A written description of the applicant's past experience(s) working collaboratively with a group of individuals representing varied interests towards achieving a mutual goal, and the outcome of the effort(s);

5. A written description of the communication network that the applicant plans to use to inform his or her constituents and to gather their feedback, and

6. A written endorsement letter from an organization, local government body, or formal constituency, which demonstrates that the applicant represents an interest group(s) in the Missouri River basin.

To be considered, the application must be complete and received by the close of business on November 19, 2012, at the location indicated (see **ADDRESSES**). Applications must include an endorsement letter to be considered complete. Full consideration will be given to all complete applications received by the specified due date.

Application Review Process. Committee stakeholder applications will be forwarded to the current members of the MRRIC. The MRRIC will provide membership recommendations to the Corps as described in Attachment A of the *Process for Filling MRRIC Stakeholder Vacancies* document (*www.MRRIC.org*). The Corps is responsible for appointing stakeholder members. The Corps will consider applications using the following criteria:

- Ability to commit the time required.
- Commitment to make a good faith (as defined in the Charter) effort to seek balanced solutions that address multiple interests and concerns.
- Agreement to support and adhere to the approved MRRIC Charter and Operating Procedures.
- Demonstration of a formal designation or endorsement by an organization, local government, or constituency as its preferred representative.
- Demonstrations of an established communication network to keep constituents informed and efficiently seek their input when needed.
- Agreement to participate in collaboration training as a condition of membership.

All applicants will be notified in writing as to the final decision about their application.

Certification. I hereby certify that the establishment of the MRRIC is necessary and in the public interest in connection with the performance of duties imposed on the Corps by the Endangered Species Act and other statutes.

Mary S. Roth,

Project Manager for the Missouri River, Recovery Implementation Committee (MRRIC).

[FR Doc. 2012–25619 Filed 10–17–12; 8:45 am]

BILLING CODE 3720–58–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice of Intent To Prepare an Environmental Impact Statement for the Disposal and Reuse of the Former Naval Air Station Joint Reserve Base Willow Grove, Horsham, PA and Notice of Public Scoping Meetings

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act (NEPA) of 1969, as implemented by the Council on Environmental Quality regulations (40 CFR Parts 1500–1508), the Department of the Navy (DoN) announces its intent to prepare an Environmental Impact Statement (EIS) to evaluate the potential environmental consequences of the disposal and reuse of the former Naval Air Station Joint Reserve Base (NAS JRB) Willow Grove, Horsham, Pennsylvania, per Public Law 101–510, the Defense Base Closure and Realignment Act of 1990, as amended in 2005 (BRAC Law). Potential impacts associated with reuse of NAS JRB Willow Grove, including the change in land use and traffic patterns, will be evaluated and will contribute to the alternatives considered.

DATES: The DoN will conduct public scoping meetings in Horsham Township in Montgomery County, PA to receive comments on the environmental concerns that should be addressed in the EIS. Both public scoping open houses will be held at the Horsham Township Community Center located at 1025 Horsham Road, Horsham, PA. Schedule will be as follows:

1. Open House: Monday, October 29, 2012, 4:00 p.m.–8:00 p.m.

2. Open House: Tuesday, October 30, 2012, 10:00 a.m.–2:00 p.m.

FOR FURTHER INFORMATION CONTACT: Director, BRAC Program Management Office Northeast, 4911 Broad Street, Building 679, Philadelphia, PA 19112–1303, telephone 215–897–4900, fax 215–897–4902, email: *david.drozd@navy.mil.*

SUPPLEMENTARY INFORMATION: The Base Closure and Realignment (BRAC) Commission was established by Public Law 101–510, the BRAC Law, to recommend military installations for realignment and closure. Recommendations of the 2005 BRAC Commission were included in a report presented to the President on September 8, 2005. The President approved and forwarded this report to Congress on September 16, 2005, which became effective as public law on November 9, 2005, and must be implemented in accordance with the requirements of the BRAC Law. In 2005, NAS JRB Willow Grove, PA was designated for closure under the authority of the Defense Base Closure and Realignment Act of 1990, Public Law 101–510, as amended (the Act). Pursuant to this designation, on January 8, 2010, land and facilities at this installation were declared excess to the DoN and made available to other DoD components and other Federal agencies. The DoN has evaluated all timely Federal requests and made a decision to close the former NAS JRB Willow Grove on September 15, 2011.

The proposed action for this EIS is to accommodate the BRAC 2005 law. The BRAC-directed action includes disposal and reuse of NAS JRB Willow Grove and its excess properties. Upon completion of the disposal, the property will be redeveloped in accordance with the Horsham Township Authority (HLRA) Redevelopment Plan.

The EIS will consider the alternatives that are reasonable to accomplish the proposed action. Alternatives to be considered include: (1) Disposal of the property by the DoN and reuse in accordance with the HLRA's Preferred Land Use Plan; (2) Disposal of the property by the DoN with a higher-density reuse scenario; (3) Disposal of the property by the DoN and reuse as an airport; and (4) No Action in which the DoN would retain the property in a caretaker status and no reuse or development would occur.

Alternative 1 would meet the requirements of the BRAC Law by allowing for the disposal and reuse of NAS JRB Willow Grove. Reuse would be conducted in accordance with the HLRA Plan. The Plan provides a mix of land uses based on existing conditions on the installation and in the community, guiding principles for development established by the HLRA, and public participation. It is anticipated that full build-out of the Plan would be implemented over a 20-year period. The Reuse Plan calls for the development of approximately 444 acres (52%) of the total base property. In addition, approximately 418 acres (48%) would be dedicated to a variety of active and passive land uses,

including recreation, open space, and natural areas. The Plan also incorporates elements based on smart-growth principles, including pedestrian-friendly transportation features (e.g., walkable neighborhoods, bike lanes, and compact development), open spaces, and a mix of land use types.

Alternative 2 would also meet the requirements of the BRAC Law by allowing for disposal and reuse of NAS JRB Willow Grove. This alternative features a higher density of residential and community mixed-use development. Similar to Alternative 1, this alternative includes a mix of land use types, preserves open space and natural areas, and incorporates elements based on smart-growth principles, including pedestrian-friendly transportation and compact development. It is anticipated that full build-out of the higher-density scenario would be implemented over a 20-year period. The higher density alternative calls for the development of approximately 576 acres (67%) of the total base property. In addition, approximately 280 acres (32%) of the base would be dedicated to a variety of active and passive land uses, including recreation, open space, and natural areas.

Alternative 3 would maintain and reuse the existing airfield for private aviation purposes. The Plan reuses the existing airfield and its supporting infrastructure (i.e., taxiways, parking aprons and hangar facilities). After accounting for the area being reused for aviation purposes, the remaining land available for development would be approximately 380 acres. This would be developed in a mix of land use types and densities, and preserves open space and natural areas. New development would be airport related industry and businesses.

Alternative 4 is required by NEPA and is the No Action Alternative. Under this alternative, NAS JRB Willow Grove would be retained by the U.S. government in caretaker status. No reuse or redevelopment would occur at the facility.

The EIS will address potential direct, indirect, short-term, long-term, and cumulative impacts on the human and natural environments, including potential impacts on topography, geology and soils, water resources, biological resources, air quality, noise, infrastructure and utilities, traffic, cultural resources, land use, socioeconomics, environmental justice, and waste management. Known areas of concern associated with the BRAC action include impacts on socioeconomics due to loss of the military and civilian workforce, impacts on local traffic patterns resulting from reuse scenarios, and the clean-up of installation remediation sites.

The DoN is initiating the scoping process to identify community concerns and issues that should be addressed in the EIS. Agencies and the public are encouraged to provide written comments at scheduled public scoping meetings. Comments should clearly describe specific issues or topics that the EIS should address. Written comments must be postmarked or emailed by midnight November 13, 2012, and should be sent to: Director, BRAC Program Management Office Northeast, 4911 Broad Street, Building 679, Philadelphia, PA 19112–1303, telephone 215–897–4900, fax 215–897–4902, email: *david.drozd@navy.mil*.

Requests for special assistance, sign language interpretation for the hearing impaired, language interpreters, or other auxiliary aids for scheduled public scoping meetings must be sent by mail or email by October 24, 2012, to Mr. Matt Butwin, Ecology and Environment, Inc., 348 Southport Circle, Suite 101, Virginia Beach, Virginia 23452, telephone 757–456–5356, ext. 2811, email: *MButwin@ene.com*.

Dated: October 11, 2012.

C. K. Chiappetta,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2012–25686 Filed 10–17–12; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests; Office of Postsecondary Education; Annual Performance Report for the Gaining Early Awareness for Undergraduate Programs

SUMMARY: The GEAR UP annual performance report asks for information specific to the budget year for which the report is being submitted. The final performance report asks for information specific to the last budget year of the grant, and also requires the grantee to update the enrollment and graduation data of all students who have participated in a GEAR UP program at any time during the project period.

DATES: Interested persons are invited to submit comments on or before December 17, 2012.

ADDRESSES: Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting Docket ID number ED–2012–OPE–0036 or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW., LBJ, Room 2E117, Washington, DC 20202–4537.

Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that Federal agencies provide interested parties an early opportunity to comment on information collection requests. The Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management, publishes this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Annual Performance Report for the Gaining Early Awareness for Undergraduate Programs.

OMB Control Number: 1840–0777.

Type of Review: Revision.

Total Estimated Number of Annual Responses: 225.

Total Estimated Number of Annual Burden Hours: 2,475.

Abstract: The Annual Performance Report for Partnership and State Projects for Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) is a required report that grant recipients must submit annually. The purpose of this information collection is for accountability. The data

is used to report on progress in meeting the performance objectives of GEAR UP, program implementation, and student outcomes. The data collected includes budget data on Federal funds and match contributions, demographic data, and data regarding services provided to students.

Dated: October 15, 2012.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Privacy, Information and Records Management Services, Office of Management.

[FR Doc. 2012–25700 Filed 10–17–12; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford. The Federal Advisory Committee Act (Pub. L. No. 92–463, 86 Stat. 770) requires that public notice of this meeting be announced in the **Federal Register**.

DATES: Thursday, November 1, 2012 8:30 a.m.–5:00 p.m. Friday, November 2, 2012 8:30 a.m.–3:00 p.m.

ADDRESSES: Red Lion Hanford House, 802 George Washington Way, Richland, WA 99352.

FOR FURTHER INFORMATION CONTACT: Tifany Nguyen, Federal Coordinator, Department of Energy Richland Operations Office, 825 Jadwin Avenue, P.O. Box 550, A7–75, Richland, WA, 99352; Phone: (509) 376–3361; or Email: *tifany.nguyen@rl.doe.gov.*

SUPPLEMENTARY INFORMATION:

Purpose of the Board: The purpose of the Board is to make recommendations to DOE–EM and site management in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda:

- Tri-Party Agreement Agencies—Annual Updates
  - U.S. Department of Energy (DOE), Richland Operations Office
  - U.S. DOE, Office of River Protection
  - State of Washington Department of Ecology
  - U.S. Environmental Protection Agency
- Draft White Paper on Hanford Advisory Board (HAB) Values
- Draft Letter/Advice—Other HAB membership-related issues
- Overview of the Draft Injury Assessment Plan from the Hanford Natural Resources Trustee Council
- DOE's Land Conveyance Environmental Assessment: Overview of October 10 Public Scoping Meeting
- Board Member Orientation (for both new and current members/alternates)
- Review of EM SSAB Letters
- Committee Reports
- Board Business—Selection of new HAB Chair

Public Participation: The meeting is open to the public. The EM SSAB, Hanford, 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 Tifany Nguyen at least seven days in advance of the meeting at the phone number listed above. Written statements may be filed with the Board either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Tifany Nguyen at the address or telephone number listed above. Requests must be received five days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Deputy Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Individuals wishing to make public comments will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Tifany Nguyen's office at the address or phone number listed above. Minutes will also be available at the following Web site: *http://www.hanford.gov/page.cfm/hab.*

Issued at Washington, DC on October 9, 2012.

LaTanya R. Butler,

Acting Deputy Committee Management Officer.

[FR Doc. 2012–25628 Filed 10–17–12; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

Nationwide Categorical Waivers of the American Recovery and Reinvestment Act

AGENCY: Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy (DOE).

ACTION: Notice of Amended Limited Waivers.

SUMMARY: The U.S. Department of Energy (DOE) is hereby granting an Amended Waiver of section 1605 of the American Reinvestment and Recovery Act of 2009 (Recovery Act Buy American provisions) in EERE-funded projects for (1) Enphase microinverters and (2) pre-insulated district heating pipe systems.

This amendment withdraws the nonavailability waiver issued on August 11, 2010 for Enphase micro-inverters, and the nonavailability waiver issued March 27, 2012 for pre-insulated district heating pipe systems.

DATES: *Effective Date:* October 3, 2012.

FOR FURTHER INFORMATION CONTACT: Christine Platt-Patrick, Office of Energy Efficiency and Renewable Energy (EERE), (202) 586–7691, Department of Energy, 1000 Independence Avenue SW., Mailstop EE–2K, Washington, DC 20585.

SUPPLEMENTARY INFORMATION: Under the authority of Recovery Act, Public Law 111–5, section 1605(b)(2), the head of a Federal department or agency may issue a ''determination of inapplicability'' (a waiver of the Buy American provision) if the iron, steel, or relevant manufactured good is not produced or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality (''nonavailability''). The authority of the Secretary of Energy to make all inapplicability determinations was re-delegated to the Assistant Secretary for Energy Efficiency and Renewable Energy (EERE), for EERE projects under the Recovery Act, in Redelegation Order No. 00–002.01E, dated April 25, 2011.

On August 11, 2010, The Assistant Secretary issued a nonavailability waiver for Enphase micro-inverters. On March 27, 2012 the Assistant Secretary issued a nonavailability waiver for pre-insulated district heating pipe systems consisting of thin wall thickness steel pipe meeting the EN13941 standard, bonded to polyurethane foam insulation, bonded to an HDPE jacket, such that all the components operate as a single pipe (including two 1.5 mm

squared area copper wires embedded in the insulation for leak detection and location); pre-insulated steel fittings with the same characteristics as the pre-insulated pipe; and pre-insulated maintenance free ball valves with an all welded valve body and a stainless steel valve ball in a spring loaded teflon seat, having the same insulation and jacket characteristics as the pipe.

As with all waivers, the Assistant Secretary reserved the right to revisit and amend this determination based on any changes in the manufacturing landscape, such as the entry into the market of new domestic manufacturers.

The remaining items covered by the February 11, 2010 Waiver (24-leaf, motorized DMX iris units, induction lamps and ballasts, commercial-scale high efficiency condensing boilers with indirect water heaters, large-format solar thermal collectors for integrated district heating systems, and turbochargers for Mitsubishi/Man 52/55B diesel generator engines) continue to be covered by the August 11, 2010 waiver and remain subject to the specifications and conditions of that waiver.

In order for the withdrawn waivers to continue to apply substantial steps to commit funds for the purchase of the formerly waived items must have been made on or before October 31, 2012.

Substantial steps to commit funds would include, but are not limited to, (1) issuing a Request for Proposals (RFP) on or before October 31, 2012 (applicable only where the grantee accepts a proposal received under that RFP); (2) in the case of a sole source selection: placing an order for the goods on or before October 31, 2012; (3) commencing a bidding process on or before October 31, 2012; (4) in circumstances where the grantee solicited quotes without an RFP: the grantee purchases the goods based on a quote dated on or before October 31, 2012 and the order for the goods is placed on or before October 31, 2012; or (5) grantee has executed a contract or purchase agreement with a supplier to acquire affected goods on or before October 31, 2012.

EERE hereby provides notice that on October 3, 2012, an Amended Waiver of section 1605 of the American Reinvestment and Recovery Act of 2009 (Recovery Act Buy American provisions) in EERE-funded projects for (1) Enphase microinverters and (2) pre-insulated district heating pipe systems.

This amendment withdraws the nonavailability waiver issued on August 11, 2010 for Enphase micro-inverters, and the nonavailability waiver issued March 27, 2012 for pre-insulated district heating pipe systems. This notice constitutes the detailed written justification required by Section 1605(c) for waivers based on a finding under subsection (b).

This waiver determination is pursuant to the delegation of authority by the Secretary of Energy to the Assistant Secretary for Energy Efficiency and Renewable Energy with respect to expenditures within the purview of his responsibility. Consequently, this waiver applies to all EERE projects carried out under the Recovery Act.

Authority: Pub. L. 111–5, section 1605.

Issued in Washington, DC on October 9, 2012.

David T. Danielson,

Assistant Secretary, Energy Efficiency and Renewable Energy, U.S. Department of Energy.

[FR Doc. 2012–25636 Filed 10–17–12; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9742–7]

National Drinking Water Advisory Council: Request for Nominations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for Nominations.

SUMMARY: The EPA invites nominations of qualified candidates to be considered for a three-year appointment to the National Drinking Water Advisory Council (Council). The 15 member Council was established by the Safe Drinking Water Act (SDWA) to provide practical and independent advice, consultation and recommendations to the EPA Administrator on the activities, functions, policies, and regulations required by the SDWA. This notice solicits nominations to fill four new vacancies through December 15, 2015. To maintain the representation required by statute, nominees will be selected to represent: State and local agencies (two vacancies) and the general public (two vacancies).

DATES: Nominations should be submitted on or before November 19, 2012.

ADDRESSES: Submit nominations to Roy Simon, Designated Federal Officer (DFO), The National Drinking Water Advisory Council, U.S. Environmental Protection Agency, Office of Ground Water and Drinking Water (Mail Code 4601–M), 1200 Pennsylvania Avenue NW, Washington, DC 20460. You may also email nominations with the subject line NDWACResume2012 to *Simon.Roy@epa.gov.*

FOR FURTHER INFORMATION CONTACT: Email your questions to Roy Simon or call him at 202–564–3868, or to Jacquelyn Springer, at *springer.jacquelyn@epa.gov* or call her at 202–564–9904.

SUPPLEMENTARY INFORMATION: *National Drinking Water Advisory Council:* The Council was created by Congress on December 16, 1974, as part of the Safe Drinking Water Act of 1974, Public Law 93–523, 42 U.S.C. 300j–5 and is operated in accordance with the provisions of the Federal Advisory Committee Act (FACA), 5 U.S.C. App.2. The Council consists of 15 members, including a Chairperson, appointed by EPA's Administrator. Five members represent the general public; five members represent appropriate State and local agencies concerned with water hygiene and public water supply; and five members represent private organizations or groups demonstrating an active interest in the field of water hygiene and public water supply, of which two members shall represent small, rural public water systems. The current list of members is available on the EPA Web site at: *http://water.epa.gov/drink/ndwac/.*

The Council meets face-to-face at least once each year and likely a second meeting by conference call/webinar, generally in the spring and fall. Additionally, members may be asked to participate in ad hoc workgroups to develop policy recommendations, advice letters and reports to address specific program issues.

Member Nominations: Any interested person and/or organization may nominate qualified individuals for membership. The EPA values and welcomes diversity. In an effort to obtain nominations of diverse candidates, the agency encourages nominations of women and men of all racial and ethnic groups.

All nominations will be fully considered, but applicants need to be aware of the specific representation required by the SDWA for the current vacancies: State and local agencies concerned with public water supply (two vacancies), and the general public (two vacancies). Other criteria used to evaluate nominees will include:

- Demonstrated experience with drinking water issues at the national, State or local level;
- Excellent interpersonal, oral and written communication and consensus-building skills;
- Willingness to commit time to the Council and demonstrated ability to work constructively on committees;
- Absence of financial conflicts of interest;

• Absence of appearance of a lack of impartiality; and

• Background and experiences that would help members contribute to the diversity of perspectives on the Council, e.g., geographic, economic, social, cultural, educational backgrounds, professional affiliations, and other considerations.

Nominations must include a resume, which provides the nominee's background, experience and educational qualifications, as well as a brief statement (one page or less) describing the nominee's interest in serving on the Council and addressing the other criteria described above. Nominees should be identified by name, occupation, position, current business address, and email and telephone number. Interested candidates may self-nominate.

The DFO will acknowledge receipt of nominations. Nominees are encouraged to provide any additional information that they feel would be useful for consideration, such as: availability to participate as a member of the Council; how the nominee's background, skills and experience would contribute to the diversity of the Council; and any concerns the nominee has regarding membership.

Persons selected for membership will receive compensation for travel and a nominal daily compensation (if appropriate) while attending meetings. Additionally, selected candidates will be required to fill out the ''Confidential Financial Disclosure Form for EPA Special Government Employees'' [EPA Form 3310–48]. This confidential form allows EPA to determine whether there is a statutory conflict between that person's public responsibilities as a Special Government Employee and private interests and activities, or the appearance of a lack of impartiality, as defined by Federal regulation. The form may be viewed and downloaded through the ''Ethics Requirements for Advisors'' link on the OGWDW NDWAC Web site, *http://water.epa.gov/drink/ndwac/fact.cfm.*

Other sources, in addition to this **Federal Register** notice, may also be utilized in the solicitation of nominees.

To help the EPA in evaluating the effectiveness of its outreach efforts, please tell us how you learned of this opportunity.

Dated: October 11, 2012.

Pamela S. Barr,

Acting Director, Office of Ground Water and Drinking Water.

[FR Doc. 2012–25669 Filed 10–17–12; 8:45 am]

BILLING CODE 6560–50–P

EXPORT-IMPORT BANK

[Public Notice 2012–0531]

Agency Information Collection Activities: Comment Request

AGENCY: Export-Import Bank of the United States.

ACTION: Submission for OMB review and comments request.

Form Title: EIB 92–51 Application for Special Buyer Credit Limit (SBCL) Under Multi-Buyer Credit Insurance Policies.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The ''Application for Special Buyer Credit Limit (SBCL) Under Multi-Buyer Export Credit Insurance Policies'' form will be used by entities involved in the export of US goods and services, to provide Ex-Im Bank with the information necessary to obtain legislatively required assurance of repayment and fulfills other statutory requirements.

The application can be reviewed at: *www.exim.gov/pub/pending/EIB92–51.pdf.* Application for Special Buyer Credit Limit (SBCL) Under Multi-Buyer Credit Insurance Policies.

DATES: Comments should be received on or before November 19, 2012 to be assured of consideration.

ADDRESSES: Comments maybe submitted electronically on *www.regulations.gov* or by mail to Office of Information and Regulatory Affairs, 725 17th Street NW. Washington, DC 20038 Attn: OMB 3048–0015.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 92–51 Application for Special Buyer Credit Limit (SBCL) Under Multi-Buyer Credit Insurance Policies.

OMB Number: 3048–0015.

Type of Review: Regular.

Need and Use: The information requested enables the applicant to provide Ex-Im Bank with the information necessary to obtain legislatively required assurance of repayment and fulfills other statutory requirements.

Annual Number of Respondents: 3,400.

Estimated Time per Respondent: 30 minutes.

Government Annual Burden Hours: 3,400 hours.

Frequency of Reporting or Use: Yearly.

Government Review Time: 1 hour.

Total Hours 3,400.

Cost to the Government: $131,648.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2012–25621 Filed 10–17–12; 8:45 am]

BILLING CODE 6690–01–P

EXPORT-IMPORT BANK

[Public Notice 2012–0304]

Agency Information Collection Activities: Final Collection; Comment Request

AGENCY: Export-Import Bank of the U.S.

ACTION: Submission for OMB Review and Comments Request.

Form Title: EIB 03–02 Application for Medium Term Insurance or Guarantee.

SUMMARY: The Export-Import Bank of the United States (Ex-Im Bank), as a part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal Agencies to comment on the proposed information collection, as required by the Paperwork Reduction Act of 1995.

The purpose of this collection is to gather information necessary to make a determination of eligibility of a transaction for Ex-Im Bank assistance under its medium-term guarantee and insurance program.

The form can be viewed at *www.exim.gov/pub/pending/eib03-02.pdf.*

DATES: Comments should be received on or before December 17, 2012 to be assured of consideration.

ADDRESSES: Comments may be submitted electronically on *www.regulations.gov* or by mail to Vasilios Giannpooulos, Export Import Bank of the United States, 811 Vermont Ave. NW., Washington, DC 20571.

SUPPLEMENTARY INFORMATION:

Titles and Form Number: EIB 03–02 Application for Medium Term Insurance or Guarantee.

OMB Number: 3048–0014.

Type of Review: Regular.

Need and Use: The purpose of this collection is to gather information necessary to make a determination of eligibility of a transaction for Ex-Im Bank assistance under its medium-term guarantee and insurance program.

Affected Public: This form affects entities involved in the export of U.S goods and services.

Annual Number of Respondents: 400.

Estimated Time per Respondent: 1 hour and 45 minutes.

Number of forms reviewed by Ex-Im Bank: 400.

Government Annual Burden Hours: 700 hours.

Government Cost: $38,115.

Frequency of Reporting or Use: As needed—each time a company seeks medium term guarantee or insurance support for an export sale.

Sharon A. Whitt,

Agency Clearance Officer.

[FR Doc. 2012–25622 Filed 10–17–12; 8:45 am]

BILLING CODE 6690–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Notice to All Interested Parties of the Termination of the Receiverships of 1309 Carteret Federal Savings Bank, Newark, NJ and 8609 Carteret Savings Bank, F.A.

Notice is hereby given that the Federal Deposit Insurance Corporation (''FDIC'') as Receiver for Carteret Federal Savings Bank, Newark, New Jersey and Carteret Savings Bank, F.A. (''Receiver'') intends to terminate its receiverships for said institutions. The Resolution Trust Corporation (''RTC'') was appointed Receiver for Carteret Federal Savings Bank and Carteret Savings Bank, F.A. and pursuant to 12 U.S.C. 1441a(m)(1) FDIC succeeded RTC as Receiver. The liquidation of receiverships assets has been completed. To the extent permitted by available funds and in accordance with law, the Receiver will be making a final dividend payment to proven creditors.

Based on the foregoing, the Receiver has determined that the continued existence of the receiverships will serve no useful purpose. Consequently, notice is given that the receiverships shall be terminated, to be effective no sooner than thirty days after the date of this Notice. If any person wishes to comment concerning the termination of the receiverships, such comment must be made in writing and sent within thirty days of the date of this Notice to: Federal Deposit Insurance Corporation, Attention: Receivership Oversight Department 32.1, 1601 Bryan Street, Dallas, Texas 75201.

No comments concerning the termination of these receiverships will be considered which are not sent within this timeframe.

Dated at Washington, DC, this 15th day of October 2012.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2012–25659 Filed 10–17–12; 8:45 am]

BILLING CODE 6714–01–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 November 2, 2012.

A. Federal Reserve Bank of Minneapolis (Jacqueline G. King, Community Affairs Officer) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Quoin Financial Bank 401(K) Profit Sharing Plan, Miller, South Dakota (First Bank & Trust, Brookings, South Dakota, trustee; Tom, Jerry, and Garry Peterka with power to vote), and Goodman Group Management Deferred Compensation Rabbi Trust Plan, F/B/O Dan Peterka, Phoenix, Arizona (Wilmington Trust Retirement and Institutional Services Company, Phoenix, Arizona, trustee; Dan Peterka with power to vote);* to join the Peterka Family Group to acquire voting shares of M & H Financial Services Inc., and thereby indirectly acquire voting shares of Quoin Financial Bank, both in Miller, South Dakota.

B. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Mikael Lowell Males, individually and as co-trustee of the Males Family Trust, the Males Family Trust, the Males 2010 Trust, The James L. Males Trust, and the William L. Males Living Trust, all of Edmond, Oklahoma, and Toni Darlene Swartwood, Elk City, Oklahoma,* as co-trustee of the Males Family Trust, all as members of the Males Family group; to acquire voting shares of Cheyenne Banking Corporation, and thereby indirectly acquire voting shares of Security State Bank, both in Cheyenne, Oklahoma.

Board of Governors of the Federal Reserve System, October 15, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2012–25657 Filed 10–17–12; 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 13, 2012.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *Heartland Financial USA, Inc.,* Dubuque, Iowa; to acquire 100 percent of the voting shares of Heritage Bank, NA., Phoenix, Arizona.

Board of Governors of the Federal Reserve System, October 15, 2012.

Margaret McCloskey Shanks,

Associate Secretary of the Board.

[FR Doc. 2012–25656 Filed 10–17–12; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for OMB Review; Comment Request

Title: Data Collection Plan for a Follow-up Survey with Child Welfare Information Gateway Customers.

OMB No.: 0970–NEW.

Description: The proposed information collection activity includes a follow-up survey designed to assess how professional customers are using information received from Child Welfare Information Gateway. Child Welfare Information Gateway is a service of the Children's Bureau, a component within the Administration for Children and Families, and is dedicated to the mission of connecting professionals and concerned citizens to information on programs, research, legislation, and statistics regarding the safety, permanency, and well-being of children and families. The follow-up survey will gather data about how professionals use Child Welfare Information Gateway's information services in their work. Survey findings will be applied to make continuous improvements to Child Welfare Information Gateway's Web site and other information services.

Respondents: Child Welfare Information Gateway professional users.

ANNUAL BURDEN ESTIMATES

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Follow-up Survey	Private Sector	100	0.167	16.7
Follow-up Survey	State, Local, or Tribal Governments	100	0.167	16.7

Estimated Total Annual Burden Hours: 33.4 hours.

Additional Information

Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 370 L'Enfant Promenade SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection. Email address: *infocollection@acf.hhs.gov.*

OMB Comment

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: *OIRA_SUBMISSION@OMB.EOP.GOV,* Attn: Desk Officer for the Administration for Children and Families.

Robert Sargis,

Reports Clearance Officer.

[FR Doc. 2012–25648 Filed 10–17–12; 8:45 am]

BILLING CODE 4184–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Advisory Committee on Training in Primary Care Medicine and Dentistry; 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: Advisory Committee on Training in Primary Care Medicine and Dentistry (ACTPCMD).

Date and Time: November 1, 2012, 10:00 a.m.–5:00 p.m. Eastern Time.

Place: Webinar format.

SUPPLEMENTARY INFORMATION:

Status: The meeting will be open to the public.

Purpose: The Advisory Committee provides advice and recommendations on a broad range of issues relating to grant programs authorized by sections 222 and 749 of the Public Health Service Act, as amended by section 5103(d) and re-designated by section 5303 of the Patient Protection and Affordable Care Act of 2010.

At this meeting, the Advisory Committee will finalize its report on the inter-professional education of primary care providers. The Committee will also select a topic for its next report and begin planning how to approach the writing of that report. The Committee's reports are submitted to the Secretary of the Department of Health and Human Services; the Committee on Health, Education, Labor and Pensions of the Senate; and the Committee on Energy and Commerce of the House of Representatives.

Agenda: The meeting on Thursday, November 1, 2012, will begin with opening comments from HRSA senior officials. Work on the Committee's tenth report on inter-professional training of primary care providers will begin with an update by the report's writing group. The Committee will then complete the report and approve the final draft. Before the next major agenda item, HRSA staff will present a brief update on the Agency's efforts in the area of interprofessional oral health clinical competencies. Much of the remaining meeting time will be spent on determining a topic for the next report, establishing a writing group to guide the writing process, and developing a report outline. The Committee also will plan for the next Advisory Committee meeting, which will be a face-to-face meeting in April 2013, and determine report work to be done in the interim. An opportunity will be provided for public comment at the end of the meeting.

For members of the public interested in gaining access to the webinar, please use the following URL: *https://hrsa.connectsolutions.com/actpcmd/.* The audio portion of the meeting will be

computer-based. Anyone wishing to make a public comment should use the Question & Answer Pod any time during the meeting. The questions will be collected and as many addressed as possible during time provided at the end of the meeting. Anyone wishing further information on the webinar aspects of the meeting should contact Iwona Grodecki at (301) 443–8379.

FOR FURTHER INFORMATION CONTACT: Anyone interested in obtaining a roster of members or other relevant information should write or contact Jerilyn K. Glass, M.D., Ph.D., Division of Medicine and Dentistry, Bureau of Health Professions, Health Resources and Services Administration, Room 9A–27, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857, Telephone (301) 443–7271. The web address for information on the Advisory Committee is *http://www.hrsa.gov/advisorycommittees/bhpradvisory/actpcmd/index.html.*

Dated: October 12, 2012.

Bahar Niakan,

Director, Division of Policy Information and Coordination.

[FR Doc. 2012–25662 Filed 10–17–12; 8:45 am]

BILLING CODE 4165–15–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Workshop

Notice is hereby given of a Strategic Planning Workshop convened by the Interagency Autism Coordinating Committee (IACC).

The purpose of the 2012 IACC Strategic Planning Workshop is to discuss, in a public forum, significant advances in basic and translational science and services research that have occurred since January 2011, when the IACC Strategic Plan for Autism Spectrum Disorder Research was previously updated. The group will also identify remaining gap areas in autism research. Invited experts and IACC Subcommittee members will use this forum to share information that may be considered by the IACC in their planning for the 2012 update to the IACC Strategic Plan. The workshop will be open to the public and accessible by live webcast and conference call.

Name of Committee: Interagency Autism Coordinating Committee (IACC).

Type of Meeting: Strategic Planning Workshop.

Date: October 29–30, 2012.

Time: 9:00 a.m. to 5:30 p.m. Eastern Time.

Agenda: The workshop will focus on the seven chapters of the 2011 IACC Strategic Plan, featuring discussions between IACC members and external experts in the areas of basic and translational science, as well as services research and policy, regarding updates that may be considered for the 2012 Strategic Plan. The first day of the workshop, October 29th, will focus on services research and policy. The second day of the workshop, October 30th, will focus on basic and translational research.

Place: Omni Shoreham Hotel, 2500 Calvert Street NW., Washington, DC 20008.

Conference Call Access:

October 29, 2012, Phone number: 888–972–6896, Access code: 1954800.

October 30, 2012, Phone number: 888–469–3189, Access code: 8310127.

Each day of the workshop will feature breakout sessions as part of the agenda. Call-in information for each session will be available on the IACC Web site (*http://iacc.hhs.gov/events/*) prior to the day of the workshop.

Webcast Live: http://videocast.nih.gov/.

Cost: The meeting is free and open to the public.

Registration: https://pointpass.com/events/IACC_Strategic_Planning_Workshop/. Pre-registration is recommended to expedite check-in. Seating in the meeting room is limited to room capacity and on a first come, first served basis.

Access: The workshop location is within two blocks of the Woodley Park/Zoo/Adams Morgan Metro station (Red Line). On-site parking is available for a fee; limited neighborhood parking may be available.

Contact Person: Ms. Lina Perez, Office of Autism Research Coordination, National Institute of Mental Health, NIH, 6001 Executive Boulevard, NSC, Room 6182a, Rockville, MD 20852, Phone: (301) 443–6040, Email: *IACCPublicInquiries@mail.nih.gov.*

Please Note: This workshop will also be open to the public through a conference call number and live webcast on the Internet. Members of the public who participate using the conference call phone number will be able to listen to the discussion but will not be heard. If you experience any technical problems with the conference call or webcast, please email *iacchelpdesk2012@gmail.com.*

To access the live webcast on the Internet the following computer capabilities are required: (A) Internet Explorer 5.0 or later, Netscape Navigator 6.0 or later or Mozilla Firefox 1.0 or later; (B) Windows® 2000, XP Home, XP Pro, 2003 Server or Vista; (C) Stable 56k, cable modem, ISDN, DSL or better Internet connection; (D) Minimum of Pentium 400 with 256 MB of RAM (Recommended); (E) Java Virtual Machine enabled (Recommended).

Individuals who participate in person or by using these electronic services and who need special assistance, such as captioning of the conference call or other reasonable accommodations, should submit a request to the contact person listed on this notice at least 5 days prior to the meeting.

As a part of security procedures, attendees should be prepared to present a photo ID at the meeting registration desk during the check-in process. Pre-registration is recommended. Seating will be limited to the room capacity and seats will be on a first come, first served basis, with expedited check-in for those who are pre-registered.

The schedule for the meeting is subject to change.

Information about the IACC is available on the Web site: *http://www.iacc.hhs.gov.*

Dated: October 11, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25582 Filed 10–17–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Amended Notice of Meeting

Notice is hereby given of changes in the meeting of the National Institute on Drug Abuse Special Emphasis Panel, October 2, 2012, 8:30 a.m. to October 2, 2012, 1:00 p.m., National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD, 20852 which was published in the **Federal Register** on September 6, 2012, 77; 173 FR 2012–21889.

The date and time of the meeting are changed to November 8, 2012, 8:30 a.m. to November 8, 2012, 12:00 p.m. The meeting is closed to the public.

Dated: October 12, 2012.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25583 Filed 10–17–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Alcohol Abuse and Alcoholism; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant

applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Alcohol Abuse and Alcoholism Special Emphasis Panel.

Name of Committee:

Date: November 5, 2012.

Time: 2:30 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 5635 Fishers Lane, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Richard A. Rippe, Ph.D., Scientific Review Officer, National Institute on Alcohol Abuse and Alcoholism, 5635 Fishers Lane, Room 2109, Rockville, MD 20852, 301–443–8599, *rippera@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.273, Alcohol Research Programs, National Institutes of Health, HHS)

Dated: October 11, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25584 Filed 10–17–12; 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; Molecular Pharmacology.

Date: November 8, 2012.

Time: 2:00 p.m. to 5:00 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: Jonathan K Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040A, MSC 7806, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Biological Chemistry and Macromolecular. Biophysics.

Date: November 13–14, 2012.

Time: 7:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kathryn M Koeller, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, 301–435–2681, *koellerk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Cell Biology, Developmental Biology, and Bioengineering.

Date: November 15, 2012.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Kenneth Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7717, Bethesda, MD 20892, 301–435–1789, *kenneth.ryan@nih.hhs.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Cardiovascular Sciences.

Date: November 15, 2012.

Time: 8:00 a.m. to 6:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Bradley Nuss, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4142, MSC7814, Bethesda, MD 20892, 301–451–8754, *nussb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and AIDS Related Research.

Date: November 15–16, 2012.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kenneth A Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–12–140: Role of the Microflora in the Etiology of Gastro-Intestinal Cancer.

Date: November 15, 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: 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; Population Sciences and Epidemiology: Chronic Disease Epidemiology and Genetics.

Date: November 15, 2012.

Time: 2:00 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: George Vogler, Ph.D., Scientific Review Officer, PSE IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, Bethesda, MD 20892, 301–435–0694, *voglergp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Oncology F32.

Date: November 16, 2012.

Time: 8:00 a.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: Michael L Bloom, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7804, Bethesda, MD 20892, 301–451–0132, *bloomm2@mail.nih.gov.*

Name of Committee: AIDS and Related Research Integrated Review Group; NeuroAIDS and other End-Organ Diseases Study Section.

Date: November 16, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road, NW., Washington, DC 20008.

Contact Person: Eduardo A Montalvo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR10–021: AIDS-Science Track Award For Research Transition (R03).

Date: November 16, 2012.

Time: 3:00 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Wardman Park Washington DC Hotel, 2660 Woodley Road, NW., Washington, DC 20008.

Contact Person: Eduardo A Montalvo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7852, Bethesda, MD 20892, (301) 435–1168, *montalve@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 12, 2012.

Anna Snouffer,

Deputy Director, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25585 Filed 10–17–12; 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 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 Mental Health Special Emphasis Panel; NIH Summer Research Experience Programs.

Date: November 9, 2012.

Time: 11:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: David M. Armstrong, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center/Room 6138/MSC 9608, 6001 Executive Boulevard, Bethesda, MD 20892–9608, 301–443–3534, *armstrda@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; National Cooperative Drug Discovery & Development.

Date: November 14, 2012.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852, (Telephone Conference Call).

Contact Person: Vinod Charles, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6151, MSC 9606, Bethesda, MD 20892–9606, 301–443–1606, *charlesvi@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Harnessing Advanced Health Technologies to Drive Mental Health Improvement.

Date: November 15, 2012.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: St. Gregory Hotel, 2033 M Street NW., Washington, DC 20036.

Contact Person: Aileen Schulte, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–1225, *aschulte@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; K99/R00 Pathway to Independence Awards.

Date: November 16, 2012.

Time: 1:00 p.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, (Telephone Conference Call).

Contact Person: Megan Kinnane, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6148, MSC 9609, Rockville, MD 20852–9609, 301–402–6807, *libbeym@mail.nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; P30 Centers Program for Research on HIV/AIDS & Mental Health.

Date: November 19, 2012.

Time: 1:00 p.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, (Telephone Conference Call).

Contact Person: David W. Miller, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Room 6140, MSC 9608, Bethesda, MD 20892–9608, 301–443–9734, *millerda@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 11, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25591 Filed 10–17–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Center for Scientific Review Special Emphasis Panel, November 8, 2012, 8:00 a.m. to November 8, 2012, 5:00 p.m., Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD, 20814 which was published in the **Federal Register** on October 10, 2012, 77 FR 61614–61615.

The meeting location has been changed to Double Tree by Hilton, 8120 Wisconsin Avenue, Bethesda, MD 20814. The meeting date and time remain the same. The meeting is closed to the public.

Dated: October 11, 2012.

Carolyn A. Baum,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2012–25586 Filed 10–17–12; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0070]

Agency Information Collection Activities: Refugee/Asylee Adjusting Status, Form Number I–643; Extension, Without Change, of a Currently Approved Collection

ACTION: 30-Day Notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on June 28, 2012, at 77 FR 38650, allowing for a 60-day public comment period. USCIS did not receive any comment(s) in connection with the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until November 19, 2012. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to DHS, and to the OMB USCIS Desk Officer. Comments may be submitted to: DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via email at *uscisfrcomment@uscis.dhs.gov,* to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via email at *oira_submission@omb.eop.gov* and via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2006–0029. When submitting comments by email, please make sure to add 1615–0070 in the subject box.

All submissions received must include the agency name, OMB Control Number and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, Without Change, of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Refugee/Asylee Adjusting Status.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–643; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Individuals or households. Refugees and Asylees, Cuban/Haitian Entrants under section 202 of Public Law 99–603, and Amerasians under Public Law 97–359, must use this form when applying for adjustment of status, with the U.S. Citizenship and Immigration Services (USCIS). USCIS will provide the data collected on this form to the Department of Health and Human Services (HHS).

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 195,000 respondents averaging .916 hours (55 minutes) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 178,620 Hours.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020; Telephone 202–272–8433.

Dated: October 12, 2012.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2012–25608 Filed 10–17–12; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services

[OMB Control Number 1615–0111]

Agency Information Collection Activities: Petition for CNMI-Only Nonimmigrant Transition Worker, Form I–129CW; Extension, Without Change, of a Currently Approved Collection

ACTION: 30-Day notice.

SUMMARY: The Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection notice was previously published in the **Federal Register** on August 3, 2012, at 77 FR 46446, allowing for a 60-day public comment period. USCIS did receive a comment in connection with the 60-day notice.

DATES: The purpose of this notice is to allow an additional 30 days for public comments. Comments are encouraged and will be accepted until November 19, 2012. This process is conducted in accordance with 5 CFR 1320.10.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to DHS, and to the OMB USCIS Desk Officer. Comments may be submitted to: DHS, USCIS, Office of Policy and Strategy, Chief, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020. Comments may also be submitted to DHS via email at *uscisfrcomment@uscis.dhs.gov,* to the OMB USCIS Desk Officer via facsimile at 202–395–5806 or via email at *oira_submission@omb.eop.gov* and via the Federal eRulemaking Portal Web site at *http://www.regulations.gov* under e-Docket ID number USCIS–2012–0011. When submitting comments by email, please make sure to add 1615–0111 in the subject box.

All submissions received must include the agency name, OMB Control Number and Docket ID. Regardless of the method used for submitting comments or material, all submissions will be posted, without change, to the Federal eRulemaking Portal at *http://www.regulations.gov,* and will include

any personal information you provide. Therefore, submitting this information makes it public. You may wish to consider limiting the amount of personal information that you provide in any voluntary submission you make to DHS. For additional information please read the Privacy Act notice that is available via the link in the footer of *http://www.regulations.gov.*

Note: The address listed in this notice should only be used to submit comments concerning this information collection. Please do not submit requests for individual case status inquiries to this address. If you are seeking information about the status of your individual case, please check ''My Case Status'' online at: *https://egov.uscis.gov/cris/Dashboard.do,* or call the USCIS National Customer Service Center at 1–800–375–5283.

Written comments and suggestions from the public and affected agencies should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of This Information Collection

(1) *Type of Information Collection Request:* Extension, without change, of a currently approved collection;

(2) *Title of the Form/Collection:* Petition for CNMI-Only Nonimmigrant Transition Worker.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* Form I–129CW; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Primary: Business or other for-profit; Not-for-profit institutions; Commonwealth or Local Government.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* 6,000 form respondents at 3 hours per response and 12,000 respondents from whom USCIS collects biometrics at 1.17 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 38,160 total Annual Hours Burden.

If you need a copy of the information collection instrument with supplementary documents, or need additional information, please visit *http://www.regulations.gov.* We may also be contacted at: USCIS, Office of Policy and Strategy, Regulatory Coordination Division, 20 Massachusetts Avenue NW., Washington, DC 20529–2020; Telephone 202–272–8377.

Dated: October 12, 2012.

Laura Dawkins,

Chief, Regulatory Coordination Division, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security.

[FR Doc. 2012–25609 Filed 10–17–12; 8:45 am]

BILLING CODE 9111–97–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–IA–2012–N244; FXIA16710900000P5–123–FF09A30000]

Endangered Species; Receipt of Applications for Permit

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of applications for permit.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

DATES: We must receive comments or requests for documents on or before November 19, 2012.

ADDRESSES: Brenda Tapia, Division of Management Authority, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 212, Arlington, VA 22203; fax (703) 358–2280; or email *DMAFR@fws.gov.*

FOR FURTHER INFORMATION CONTACT: Brenda Tapia, (703) 358–2104 (telephone); (703) 358–2280 (fax); *DMAFR@fws.gov* (email).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I request copies of applications or comment on submitted applications?

Send your request for copies of applications or comments and materials concerning any of the applications to the contact listed under **ADDRESSES**. Please include the **Federal Register** notice publication date, the PRT-number, and the name of the applicant in your request or submission. We will not consider requests or comments sent to an email or address not listed under **ADDRESSES**. If you provide an email address in your request for copies of applications, we will attempt to respond to your request electronically.

Please make your requests or comments as specific as possible. Please confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, and

in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), along with Executive Order 13576, ''Delivering an Efficient, Effective, and Accountable Government,'' and the President's Memorandum for the Heads of Executive Departments and Agencies of January 21, 2009—Transparency and Open Government (74 FR 4685; January 26, 2009), which call on all Federal agencies to promote openness and transparency in Government by disclosing information to the public, we invite public comment on these permit applications before final action is taken.

III. Permit Applications

A. Endangered Species

Applicant: Mesa Garden, Belen, NM; PRT–678845

The applicant requests renewal of a permit to export the following endangered and threatened cactus species for the purpose of enhancement of the species in the wild: Tobusch fishhook (Sclerocatus *brevihamatus tobuschii*), star cactus, (*Astrophytum asterias*), Nellie's cory cactus (*Escobaria minima*), bunched Cory cactus (*Coryphantha ramillosa*), Cochise pincushion cactus (*Coryphantha robbinsorum*), Sneed pincushion cactus (*Escobaria sneedii v. sneedii*), Lee pincushion cactus, (*Escobaria sneedii* v. *leei*), Chisos Mountain hedgehog cactus (*Echinocereus chisoensis* v. *chisoensis*), Kuenzler hedgehog cactus (*Echinocereus fendleri* v. *kuenzleri*), black lace cactus (*Echinocereus reichenbachii* v. *albertii*), Arizona hedgehog cactus (*Echinocereus triglochidiatus* v. *arizonicus*), Davis' green Pitaya (*Echinocereus viridiflorus* v. *davisii*), Lloyd's Mariposa cactus (*Sclerocactus mariposensis*) Brady's pincushion cactus (*Pediocactus bradyi*), San Rafael cactus (*Pediocactus despainii*), Knowlton's cactus (*Pediocactus knowltonii*), Peebles Navajo cactus (*Pediocactus peeblesianus v. peeblesian*), Siler pincushion cactus (*Pediocactus sileri*), Uinta Basin hookless cactus (*Sclerocactus glaucus*), Mesa Verde cactus (*Sclerocactus mesae-verdae*), Wright fishhook cactus (*Sclerocactus wrightiae*), Pima pineapple cactus (*Coryphantha scheeri v. robustispina*), and Nichols Turk's head cactus (*Echinocactus horizonthalonius* v. *nicholii*). This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Wildlife Conservation Society, Bronx, NY; PRT–86344A

The applicant requests a permit to import five horned guan (*Oreophasis derbianus*) from Mexico for the purpose of enhancement of the survival of the species.

Applicant: Feld Entertainment, Inc., Vienna, VA; PRT–79461A

The applicant requests a permit to import two live captive-born tigers (*Panthera tigris*) for the purpose of enhancement of the survival of the species from Alexander Lacey of the Netherlands.

Applicant: Illinois State Museum Research and Collections Center, Springfield, IL; PRT–84293A

The applicant requests a permit to re-export wild biological samples of Hine's emerald dragonfly (*Somatochlora hineana*) to Canada for the purpose of enhancement of the survival of the species.

Applicant: Carson Springs Wildlife Conservation Foundation, Gainesville, FL; PRT–86835A

The applicant requests a permit to import four South African cheetahs, (*Acinonyx jubatus jubatus*) from South Africa for the purpose of conservation education and enhancement of the survival of the species. This notification covers activities to be conducted by the applicant over a 5-year period.

Applicant: Ferdinand Fercos Hantig and Anton Fercos Hantig, Las Vegas, NV; PRT–073403, 114454, and 206853

On April 06, 2012, we published a **Federal Register** notice inviting the public to comment on two applications for permits to conduct certain activities with endangered species (77 FR 20838). We are now reopening the comment period to allow the public the opportunity to review additional information submitted for the re-issuance of their permits to re-export and re-import three captive born tigers (*Panthera tigris*) to worldwide locations for the purpose of enhancement of the species. The permit numbers and animals are 073403, Sherni; 114454, Dora; and 206853, Allaya. This notification covers activities to be conducted by the applicant over a 3-year period.

Applicant: Indianhead Ranch, Inc.; Del Rio, TX; PRT–67596A

On August 3, 2012, we published a **Federal Register** notice inviting the public to comment on an application for a permit to conduct certain activities with endangered species (77 FR 46514). We are now amending the publication and reopening the comment period to allow the public the opportunity to comment on a request for a permit to export the sport-hunted trophies of one addax (*Addax nasomaculatus*) and one Scimitar horned oryx (*oryx dammah*) culled from a captive herd maintained in the state of Texas, for the purpose of enhancement of the survival of the species.

Applicant: Indianhead Ranch, Inc. Del Rio, TX; PRT–79115A

The applicant requests a permit to export the sport-hunted trophy of one addax (*Addax nasomaculatus*), culled from a captive herd maintained in the state of Texas, for the purpose of enhancement of the survival of the species.

Applicant: Indianhead Ranch, Inc. Del Rio, TX; PRT–79116A

The applicant requests a permit to export the sport-hunted trophies of one Scimitar horned oryx (*oryx dammah*) and one Dama gazelle (*Nanger Dama*), culled from a captive herd maintained in the state of Texas, for the purpose of enhancement of the survival of the species.

Applicant: 777 Ranch, Hondo, TX; PRT–85070A

The applicant requests a permit to export the sport-hunted trophy/trophies of one addax (*Addax nasomaculatus*), culled from a captive herd maintained in the state of Texas, for the purpose of enhancement of the survival of the species.

Applicant: Dinges Taxidermy Studio, Omaha, NE; PRT–86638A

The applicant requests a permit to export the sport-hunted trophy/trophies of one scimitar-horned oryx (*Oryx dammah*) and two Addax (*Addax nasomaculatus*) culled from a captive herd maintained in the state of Texas, for the purpose of enhancement of the survival of the species.

Applicant: Dinges Taxidermy Studio, Omaha, NE; PRT–86640A

The applicant requests a permit to export the sport-hunted trophy/trophies of one scimitar-horned oryx (*Oryx dammah*) and one addax (*Addax nasomaculatus*) culled from a captive herd maintained in the state of Texas, for the purpose of enhancement of the survival of the species.

Multiple Applicants

The following applicants each request a permit to import the sport-hunted trophy of one male bontebok

(*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Richard Creelman, Moultonboro, NH; PRT–81013A

Applicant: David Cote, Morristown, NJ; PRT–87103A

Applicant: David Smith, Humble, TX; PRT–86852A

Brenda Tapia,

Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority.

[FR Doc. 2012–25610 Filed 10–17–12; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LL WO220000 L63100000.PH0000 13X]

Renewal of Approved Information Collection

AGENCY: Bureau of Land Management, Interior.

ACTION: 60-Day notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act, the Bureau of Land Management (BLM) invites public comments on, and plans to request approval to continue, the collection of information that enables the BLM to monitor compliance with timber export restrictions. The Office of Management and Budget (OMB) has assigned control number 1004–0058 to this information collection.

DATES: Please submit comments on the proposed information collection by December 17, 2012.

ADDRESSES: Comments may be submitted by 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: 1004–0058'' regardless of the form of your comments.

FOR FURTHER INFORMATION CONTACT: Mike Bechdolt, at 202–912–7234. 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. Bechdolt.

SUPPLEMENTARY INFORMATION: OMB regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act, 44 U.S.C. 3501–3521, require that interested members of the public and affected agencies be given an opportunity to comment on information collection and recordkeeping activities (see 5 CFR 1320.8(d) and 1320.12(a)). This notice identifies an information collection that the BLM plans to submit to OMB for approval. The Paperwork Reduction Act provides 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.

The BLM will request a 3-year term of approval for this information collection activity. Comments are invited on: (1) The need for the collection of information for the performance of the functions of the agency; (2) The accuracy of the agency's burden estimates; (3) Ways to enhance the quality, utility and clarity of the information collection; and (4) Ways to minimize the information collection burden on respondents, such as use of automated means of collection of the information. A summary of the public comments will accompany our submission of the information collection requests to OMB.

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: Timber Export Reporting and Substitution Determination (43 CFR part 5420).

OMB Control Number: 1004–0058.

Abstract: This collection of information collection pertains to compliance of Federal timber purchases with timber export restrictions.

Forms:

- Form 5450–17, Export Determination; and
- Form 5460–17, Substitution Determination.

Frequency of Collection: On occasion.

Description of Respondents: Purchasers of Federal timber.

Estimated Annual Responses: 2.

Estimated Annual Burden Hours: 2.

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
Form 5450–17 Export Determination	1	1	1
Form 5460–17 Substitution Determination	1	1	1
Totals	2		2

Jean Sonneman,

Information Collection Clearance Officer, Bureau of Land Management.

[FR Doc. 2012–25627 Filed 10–17–12; 8:45 am]

BILLING CODE 4310–84–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDB00100 LF1000000.HT0000 LXSS020D0000 4500031158]

Notice of Intent To Amend the Cascade Resource Management Plan (RMP) and the Kuna and Bruneau Management Framework Plans (MFP) for the Bruneau, Four Rivers Field Offices in Idaho and the Associated Environmental Assessment

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969 as amended (NEPA), and the Federal Land Policy and Management Act of 1976 as amended, the Bureau of Land Management (BLM) Boise District Office, Boise, Idaho, intends to prepare Resource Management Plan (RMP) and Management Framework Plan (MFP) amendments with an associated Environmental Assessment (EA) for the Bruneau and Four Rivers Field Offices and by this notice announcing the beginning of the scoping process to solicit public comments and identify issues.. The amendments would clarify the subset of lands, designated as eligible or potentially eligible for disposal, that meet FLPMA's Section 203 sale criteria. The BLM Boise District Office will also analyze approximately 1,600 acres of public land, currently identified as Category I (retention), for reclassification as suitable for sale under FLPMA Section 203, exchange or Recreation and Public Purpose patent. This reclassification could result in a net benefit to BLM programs and aid in blocking up State and Federal management units. The BLM will apply Section 203 criteria to determine whether the parcels will be considered eligible for disposal through sale or through exchange or Recreation and Public Purposes (R&PP) Act conveyance or leases.

DATES: This notice initiates the public scoping process for the RMP and MFP amendments with associated EA. Comments on issues may be submitted in writing until November 19, 2012. In order to be included in the analysis, all comments must be received prior to the close of the 30-day scoping period or 30 days after the last public meeting, whichever is later. We will provide additional opportunities for public participation as appropriate.

ADDRESSES: You may submit comments on issues and planning criteria related to the Cascade RMP (1988), Bruneau MFP (1983), and Kuna MFP (1983) proposed amendments and associated EA by any of the following methods:

- *Web site: http://www.blm.gov/id/st/en/info/nepa.html.*
- *Email: kmoore@blm.gov.*
- *Fax:* (208) 384–3326.
- *Mail:* BLM Boise District Office, Attn: Kelley Moore, 3948 Development Ave., Boise, ID 83705.

Documents pertinent to this proposal may be examined at the BLM's Boise District Office at 3894 Development Ave, Boise, ID 38705.

FOR FURTHER INFORMATION CONTACT: and/or to have your name added to our mailing list, contact Kelley Moore, Realty Specialist, telephone: 208–384–3339; address: 3894 Development Ave, Boise, ID 38705; email: *kmoore@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 (8:00 a.m. to 4:30 p.m.). 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: This document provides notice that the BLM, Boise District Office, Boise, Idaho, intends to prepare RMP and MFP amendments with an associated EA to analyze proposed amendments to the 1983 Bruneau MFP, the 1983 Kuna MFP, and the 1988 Cascade RMP, announces the beginning of the scoping process, and seeks public input on issues and planning criteria. The planning areas are located in Ada, Adams, Boise, Canyon, Elmore, Gem, Valley, and Washington counties in Idaho and encompasses approximately 780,000 acres of public land. The purpose of the public scoping process is to determine relevant issues that will influence the scope of the environmental analysis, including alternatives, and guide the planning process.

Preliminary issues for the plan amendment areas have been identified by BLM personnel; Federal, State, and local agencies; and other stakeholders. The issues include:

(1) Identify lands currently designated as eligible or potentially eligible for disposal, that also meet FLPMA Section 203 sale criteria (43 U.S.C. 1713(a)). The land disposal classifications within each of the above land use plans fail to identify parcels of public land that have been evaluated for disposal by sale under FLPMA Section 203. The quoted language from each of the plans would be clarified in these amendments so that public lands currently designated as ''potentially eligible'' for disposal are designated as either eligible through sale or not. The proposed amendments would not change the BLM's ability to dispose of those lands through exchange, R&PP Act leases or other means of conveyance, or to retain them; and

(2) Analyze the reclassification to ''available for disposal,'' approximately 1,600 acres presently classified for ''retention'' in the Kuna MFP. Preliminary planning criteria are FLPMA's Section 203 sale criteria for the clairification parcels and BLM's planning handbook (H–1601–1) for the reclassification parcels. The clairification and reclassification would not have any on-the-ground impacts so no other preliminary planning criteria are being considered.

Disposal of BLM parcels considered suitable for conveyance by sale or other accepted methods may lead to economic benefits to the local community, while blocking up Federal and State management units in the area. Pursuant to Section 1505 of the Omnibus Public Land Management Act of 2009, Public Law 111–11, the proceeds from the sale of eligible parcels could allow BLM to acquire lands that are of higher social, cultural or environmental value, and/or could be more efficiently and economically managed. Any determination of the suitability of identified BLM parcels for disposal, however, would not remove the BLM's obligation to carry out a detailed environmental analysis prior to any proposed sale, exchange, issuance of an R&PP Act lease, or conveyance through any other means. Nor would it change BLM's authority to retain those lands under Federal management.

The public is invited to provide scoping comments on the above mentioned issues, as well as other issues that should be addressed in the preparation of the plan amendments. You may submit comments on issues and planning criteria in writing to the BLM at any public scoping meeting, or you may submit them to the BLM using one of the methods listed in the **ADDRESSES** section above. To be most helpful, you should submit comments by the close of the 30-day scoping period or within 30 days after the last public meeting, whichever is later.

The BLM will use the NEPA public participation requirements to assist the agency in satisfying the public involvement requirements under Section 106 of the National Historic Preservation Act (NHPA) (16 U.S.C. 470(f)) pursuant to 36 CFR 800.2(d)(3). The information about historic and cultural resources within the area potentially affected by the proposed action will assist the BLM in identifying and evaluating impacts to such resources in the context of both NEPA and Section 106 of the NHPA.

The BLM will consult with Indian tribes on a government-to-government basis in accordance with Executive Order 13175 and other policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with tribes and other stakeholders that may be interested in or affected by the proposed action that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency. 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 BLM will evaluate identified issues to be addressed in the plan, and will place them into one of three categories:

1. Issues to be resolved in the plan amendment;
2. Issues to be resolved through policy or administrative action; or
3. Issues beyond the scope of this plan amendment.

The BLM will provide an explanation in the EA as to why an issue was placed in category two or three. The public is also encouraged to help identify any management questions and concerns that should be addressed in the plan. The BLM will work collaboratively with interested parties to identify the management decisions that are best suited to local, regional, and national needs and concerns.

The BLM will use an interdisciplinary approach to develop the plan amendments in order to consider the variety of resource issues and concerns identified. Specialists with expertise in the following disciplines will be involved in the planning process: lands and realty, rangeland management, minerals and geology, forestry, outdoor recreation, archaeology, paleontology, wildlife and fisheries, hydrology, and soils.

Authorities: 43 U.S.C. 1713(a); 43 CFR 1610.5–5 & 43 CFR 2710.

Allen Sieglitz,

District Manager.

[FR Doc. 2012–25593 Filed 10–17–12; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLMT926000–L14200000–BJ0000]

Notice of Filing of Plats of Survey; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of filing of plats of survey.

SUMMARY: The Bureau of Land Management (BLM) will file the plat of survey of the lands described below in the BLM Montana State Office, Billings, Montana, on November 19, 2012.

DATES: Protests of the survey must be filed before November 19, 2012 to be considered.

ADDRESSES: Protests of the survey should be sent to the Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669.

FOR FURTHER INFORMATION CONTACT: Marvin Montoya, Cadastral Surveyor, Branch of Cadastral Survey, Bureau of Land Management, 5001 Southgate Drive, Billings, Montana 59101–4669, telephone (406) 896–5124 or (406) 896–5009, *Marvin_Montoya@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: This survey was executed at the request of the Regional Realty Officer, Northwest Region, Bureau of Indian Affairs, Portland, Oregon, and was necessary to determine individual and tribal trust lands.

The lands we surveyed are:

Principal Meridian, Montana

T. 22 N., R. 20 W.

The plat, in seven sheets, representing the dependent resurvey of portions of the south and east boundaries, the subdivisional lines, the adjusted original meanders of the former left and right banks of the Flathead River, downstream, through sections 5 and 8, the meanders of North and South Pablo and Polson Reservoirs (fixed and limiting boundaries) and the subdivision of certain sections, and the survey of a portion of the southerly right-of-way of U.S. Highway 93 in section 4, certain parcels in sections 4 and 17 and a metes and bounds description, Tract A, in section 29, Township 22 North, Range 20 West, Principal Meridian, Montana was accepted September 28, 2012.

We will place a copy of the plat, in seven sheets, and related field notes we described in the open files. They will be available to the public as a matter of information. If the BLM receives a protest against this survey, as shown on this plat, in seven sheets, prior to the date of the official filing, we will stay the filing pending our consideration of the protest. We will not officially file this plat, in seven sheets, until the day after we have accepted or dismissed all protests and they have become final, including decisions or appeals.

Authority: 43 U.S.C. chapter 3.

James D. Claflin,

Chief Cadastral Surveyor, Division of Resources.

[FR Doc. 2012–25705 Filed 10–17–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY920000.L14300000.ET0000; WYW 111611]

Notice of Proposed Withdrawal Extension and Notification of a Public Meeting for the East Fork Elk Winter Range; WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Assistant Secretary of the Interior for Policy, Management and Budget proposes to extend the duration of Public Land Order (PLO) No. 6960, as corrected by PLO No. 6980, for an additional 20-year term. PLO No. 6960 withdrew 10,535.30 acres of public mineral estate from location or entry under the United States mining laws, to protect the East Fork Elk Winter Range and elk natural feeding grounds in Fremont County. This notice gives an opportunity for the public to comment on the proposed withdrawal extension and announces the date, time, and location of a public meeting.

DATES: We must receive comments on or before January 16, 2013. We will hold a public meeting on December 3, 2012.

ADDRESSES: Send your comments to the State Director, Bureau of Land Management, Wyoming State Office, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

FOR FURTHER INFORMATION CONTACT: Janelle Wrigley, Bureau of Land Management, Wyoming State Office, 307–775–6257, or at the above address. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to reach the Bureau of Land Management (BLM) contact during normal business hours. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The withdrawal created by PLO No. 6960 (58 FR 16628 (1993)), as corrected by PLO No. 6980 (58 FR 33025 (1993)), will expire on March 29, 2013, unless extended. PLO No. 6960 is incorporated herein by reference. The BLM has filed a petition/application to extend PLO No. 6960 for an additional 20-year term. The PLO withdrew 10,535.30 acres of public mineral estate from location or entry under the United States mining laws, to protect the East Fork Elk Winter Range and elk natural feeding grounds.

The proposed withdrawal extension would continue to protect the elk and bighorn sheep winter range, feeding grounds, and capital investments for an additional 20-year term.

The use of a right-of-way, interagency, or cooperative agreement would not adequately constrain nondiscretionary uses which could result in permanent loss of significant values and irreplaceable resources of the range.

There are no suitable alternative sites since the lands contain an area that elk and bighorn sheep have historically used as winter range, because of the physical characteristics of the lands and the local weather conditions.

The purpose of the requested withdrawal extension does not require water rights.

You may examine records relating to the application by contacting Janelle Wrigley at the above address or by telephone: 307–775–6257, or the BLM Lander Field Office, Field Manager, 1335 Main Street, Lander, Wyoming 82520 or by telephone: 307–332–8400.

For a period until January 16, 2013, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal extension may present their views in writing to the BLM Wyoming State Director at the address noted above. Comments, including names and street addresses of respondents, will be available for public review at the BLM Lander Field Office, 1335 Main Street, Lander, Wyoming, during regular business hours 8:00 a.m. to 4:30 p.m., Monday through Friday, except Federal holidays.

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 may 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.

We will hold a public meeting in connection with the proposed withdrawal extension on December 3, 2012, at the Dubois Town Hall, 712 Meckem, Dubois, Wyoming from 4:30 p.m. until 7:30 p.m. We will publish a notice of the time and place in at least one local newspaper no less than 30 days before the scheduled meeting date. Interested parties may make oral statements and may file written statements at the meeting. We will consider all statements received before we submit any recommendation concerning the proposed extension to the Assistant Secretary for final action.

We will process this withdrawal extension proposal in accordance with the regulations set forth in 43 CFR 2310.1–2.

Authority: 43 CFR 2310.3–1.

Larry Claypool,

Acting Wyoming State Director.

[FR Doc. 2012–25594 Filed 10–17–12; 8:45 am]

BILLING CODE 4310–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLWY920000 L14300000.ET0000; WYW 179968]

Notice of Proposed Withdrawal of Public Land for the Buffalo Bill Dam and Reservoir Modification Project Recreation Site and Opportunity for a Public Meeting; WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Reclamation (BR) has filed an application with the Bureau of Land Management (BLM) requesting the Assistant Secretary of the Interior for Policy, Management and Budget to withdraw 32.56 acres of public land from settlement, sale, location, and entry under the general land laws, including the United States mining laws, for protection of recreational facilities constructed in connection with the Buffalo Bill Dam and Reservoir Modification Project near Cody, Wyoming. This notice gives the public an opportunity to comment on the application and to request a public meeting.

DATES: Comments must be received on or before January 16, 2013.

ADDRESSES: Comments and meeting requests should be sent to the BLM Wyoming State Director, 5353 Yellowstone Road, Cheyenne, Wyoming 82009.

FOR FURTHER INFORMATION CONTACT: Diane Schurman, BLM Wyoming State Office, telephone: 307–775–6189; email: *Dschurma@blm.gov* or at the above address. 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. The FIRS is available 24 hours a day, 7 days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The Assistant Secretary for Policy, Management and Budget proposes to withdraw, subject to valid existing rights, the following described public land from settlement, sale, location, and entry under the general land laws, including the United States mining laws, but not from leasing under the mineral leasing laws, for a period of 20 years to protect the capital investments of a developed recreation site in the Buffalo Bill Dam and Reservoir Modification Project area:

Sixth Principal Meridian

T. 52 N., R. 104 W.,
Sec. 14, lots 10, 11, 26, and 27;
Sec. 15, lots 21, 22, and 23.

The area described contains 32.56 acres in Park County.

The Assistant Secretary for Policy, Management and Budget approved the BR's petition/application; therefore, it constitutes a withdrawal proposal.

The purpose of the proposed withdrawal is to protect the capital investments expended for the recreational facilities to be administered pursuant to a joint-venture agreement by the Wyoming Recreation Commission for the BR. This recreational site is part

of a Master Plan for the Buffalo Bill State Park and the Buffalo Bill Dam and Reservoir Modification Project.

The use of a right-of-way, interagency or cooperative agreement, or surface management under the 43 CFR 3809 regulations would not adequately constrain nondiscretionary uses which could result in permanent loss of significant values of the recreation site. There are no suitable alternative sites since the lands described here contain the resource values that need protection.

No water rights would be needed to fulfill the purpose of the requested withdrawal.

Records relating to the application may be examined by contacting either Diane Schurman at the above address or by calling 307–775–6189 or Lyle Myler, Bureau of Reclamation, Wyoming Area Office, Mills, Wyoming, or by calling 307–261–5676.

For a period until January 16, 2013, all persons who wish to submit comments, suggestions, or objections in connection with the proposed withdrawal application may present their views in writing to the BLM Wyoming State Director at the address or email address noted above.

Comments including names and street addresses of respondents will be available for public review at the BLM Wyoming State office, during regular business hours 8:00 a.m. to 4:30 p.m., Monday through Friday, except holidays. 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 may 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. Individual respondents may request confidentiality. If you wish to withhold your name or address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comments. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

For a period until October 20, 2014, the land will be segregated as specified above unless the application is denied or canceled or the withdrawal is approved prior to that date. Licenses, permits, cooperative agreements, or discretionary land use authorizations of a temporary nature which would not impact the site may be allowed with the approval of an authorized officer of the BLM during the application processing period.

Notice is hereby given that an opportunity for a public meeting is afforded in connection with the proposed withdrawal. All interested persons who desire a public meeting for the purpose of being heard on the proposed withdrawal must submit a written request to the BLM Wyoming State Director no later than January 16, 2013. If the authorized officer determines that a public meeting will be held, a notice of the time and place will be published in the **Federal Register** and a local newspaper at least 30 days before the scheduled date of the meeting.

This application will be processed in accordance with the regulations set forth in 43 CFR 2310.1–2.

Donald A. Simpson,

State Director.

[FR Doc. 2012–25592 Filed 10–17–12; 8:45 am]

BILLING CODE 4310–MN–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731–TA–873–875, 878–880, and 882 (Second Review)]

Steel Concrete Reinforcing Bar From Belarus, China, Indonesia, Latvia, Moldova, Poland, and Ukraine; Notice of Commission Determinations to Conduct Full Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice

SUMMARY: The Commission hereby gives notice that it will proceed with full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) to determine whether revocation of the antidumping duty orders on steel concrete reinforcing bar from Belarus, China, Indonesia, Latvia, Moldova, Poland, and Ukraine would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. A schedule for the reviews will be established and announced at a later date. For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

DATES: *Effective Date:* October 5, 2012.

FOR FURTHER INFORMATION CONTACT: Amy Sherman (202–205–3289), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION: On October 5, 2012, the Commission determined that it should proceed to full reviews in the subject five-year reviews pursuant to section 751(c)(5) of the Act. The Commission found that both the domestic interested party group response to its notice of institution (77 FR 39254, July 2, 2012) was adequate and that the respondent interested party group responses with respect to Latvia and Moldova were adequate, and decided to conduct full reviews of the antidumping duty orders on steel concrete reinforcing bar from Latvia and Moldova. The Commission found that the respondent interested party group response with respect to Belarus, China, Indonesia, Poland, and Ukraine was inadequate. However, the Commission determined to conduct full reviews concerning the orders on steel concrete reinforcing bar from Belarus, China, Indonesia, Poland, and Ukraine to promote administrative efficiency in light of its decision to conduct full reviews with respect to the orders on subject imports from Latvia and Moldova. A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements will be available from the Office of the Secretary and at the Commission's Web site.

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: October 15, 2012.

By order of the Commission.

Lisa R. Barton,

Acting Secretary to the Commission.

[FR Doc. 2012–25666 Filed 10–17–12; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Wireless Industrial Technology Konsortium Inc.

Notice is hereby given that, on September 25, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Wireless Industrial Technology Konsortium Inc. (''WITEK'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Nivis LLC, Atlanta, GA, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and WITEK intends to file additional written notifications disclosing all changes in membership.

On August 8, 2008, WITEK filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on September 18, 2008 (73 FR 54170).

The last notification was filed with the Department on November 2, 2010. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on December 17, 2010 (75 FR 79025).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–25689 Filed 10–17–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993; Advanced Media Workflow Association, Inc.

Notice is hereby given that, on September 24, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Advanced Media Workflow Association, Inc. has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Apple, Cupertino, CA; Tedial, Campanillas, SPAIN; Harry Plate (individual member), Snohomish, WA; and Robert Rutherford (individual member), Lidcombe, Australia, have been added as parties to this venture.

Also, Automatic Duck, Snohomish, WA; Dark Matter, Epsom, Surrey, United Kingdom; Oracle America, Redwood Shores, CA; SeaChange International, Acton, MA; and Brooks Harris (individual member), Marina del Rey, CA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Advanced Media Workflow Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On March 28, 2000, Advanced Media Workflow Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on June 29, 2000 (65 FR 40127).

The last notification was filed with the Department on July 3, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on July 25, 2012 (77 FR 43614).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–25694 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Network Centric Operations Industry Consortium, Inc.

Notice is hereby given that, on September 25, 2012, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Network Centric Operations Industry Consortium, Inc. (''NCOIC'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Office of the Assistant Secretary for Networks & Information Integration/ Department of Defense Chief Information Officer, Washington, DC; CACI International, Inc., Arlington, VA; Federal Aviation Administration, Washington, DC; GBL Systems, Camarillo, CA; L–3 Communications, New York, NY; Luciad, Leuven, BELGIUM; and Mosaic ATM, Leesburg, VA, have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and NCOIC intends to file additional written notifications disclosing all changes in membership.

On November 19, 2004, NCOIC filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on February 2, 2005 (70 FR 5486).

The last notification was filed with the Department on May 9, 2012. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on June 8, 2012 (77 FR 34066).

Patricia A. Brink,

Director of Civil Enforcement, Antitrust Division.

[FR Doc. 2012–25691 Filed 10–17–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Jose Gonzalo Zavaleta, M.D.; Denial of Application

On March 2, 2011, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, issued an Order to Show Cause (Order) to Jose Gonzalo Zavaleta, M.D. (Applicant), of Alexandria, Louisiana (La.). The Order proposed the denial of Applicant's pending applications for DEA Certificates of Registration as a practitioner, which he filed on April 19, 2010 (Control Number W10020882C) and on December 9, 2010 (Control Number W10078290C), for the registered location of 1217 Willow Glen

River Road, Alexandria, La., on the ground that his registration would be ''inconsistent with the public interest.'' Order at 1 (citing 21 U.S.C. 823(f)).

The Show Cause Order incorporated by reference the allegations of a previous Show Cause Order which had been issued on February 23, 2009; a copy of the latter was attached to the second Show Cause Order. *Id.* at 1–2. The first Show Cause Order had alleged that Applicant voluntarily surrendered his DEA Certificate of Registration, BZ5998250, on March 26, 2008, after being charged with six counts of prescribing controlled substances beyond authority and accepted medical treatment, in violation of La. Rev. Stat. Ann. § 40:971(C)(1)(2008) (effective Aug. 15, 2006). *Id.* The first Order further alleged that Applicant prescribed controlled substances to undercover agents with ''cursory or no medical examinations, and without a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1),'' including a total of 75 dosage units of hydrocodone (including Lortab and/or Lorcet), which are schedule III narcotics; 20 dosage units of Xanax, a schedule IV controlled substance; and six ounces of Phenergan with codeine, a schedule V narcotic cough syrup. *Id.* Finally, the first Order alleged ''[Applicant] facilitated the undercover officers' procurement of drugs by fraudulent means'' when he advised them to ''provide false medical information'' to justify ''illegitimate prescriptions.'' *Id.* at 2.

In addition to these allegations, the Second Show Cause Order alleged that on June 24, 2010, Applicant had entered into a consent agreement with the Louisiana State Board of Medical Examiners which had found ''that reasonable cause existed for recommending that a formal Administrative Complaint be filed against [him], charging [him] with violation of the Louisiana Medical Practice Act.'' Show Cause Order at 2. The Second Show Cause Order further alleged that ''[t]o avoid the filing of a formal Administrative Complaint, [Applicant] entered into a consent order with the Board * * * in which [he] accepted a public reprimand and various conditions [were] place upon [his] medical license.''

On March 7, 2011, the Second Show Cause Order, which also notified Applicant of his right to either request a hearing on the allegations or to submit a written statement in lieu of a hearing, the procedures for doing so, and the consequence if he failed to do either, was served on Applicant by certified mail addressed to him at the address listed on his second and third applications. *Id.* at 2 (citing 21 CFR 1316.47; 21 CFR 1301.43). Since service of the Second Order, more than thirty days have now passed and neither Applicant, nor anyone purporting to represent him, has either requested a hearing or submitted a written statement in lieu of a hearing. *See* 21 CFR 1301.43(b)–(d). Accordingly, I find that Applicant has waived his rights to a hearing or to submit a written statement. *Id.* 1301.43(d). I therefore issue this Decision and Final Order without a hearing based on relevant material contained in the investigative record submitted by the Government. I make the following findings.

Findings

On July 27, 2011, I issued a Decision and Final Order denying Respondent's application which he filed on July 28, 2008 and which was the subject of the first Show Cause Order. *See Jose Gonzalo Zavaleta, M.D.,* 76 FR 49506 (Aug. 10, 2011). Therein, I made extensive findings that are *res judicata* in this proceeding.

Applicant was previously the holder of DEA Certificate of Registration, BZ5998250, which authorized him to dispense controlled substances in schedules II through V as a practitioner at the registered location of 5629 Jackson Street Ext., Alexandria, Louisiana. 76 FR 49506. However, on March 26, 2008, concurrent with Applicant's arrest on state drug charges (the circumstances of which are set forth below), he voluntarily surrendered his registration. *Id.* Applicant's registration was then retired by DEA on March 27, 2008. *Id.*

On July 28, 2008, Applicant applied for a new DEA registration as a practitioner in schedules IV and V; this application was denied by my Order of August 10, 2011. *Id.* On April 19, 2010, Applicant filed a second application for a practitioner's registration, seeking authority to handle controlled substances in schedules II thorugh V at the registered location of Rapides Primary Health Care Center, 1217 Willow Glenn River Rd., Alexandria, La. 71302. GX 6, at 1. On his application, Respondent stated that ''the DA made me an offer for a program called PTI and no DEA license for two years. Now, I have completed my part of the deal, meaning I completed two years without [a] DEA license, and now I want my unrestricted DEA license back.'' *Id.* On December 9, 2010, Respondent filed a third application; this application was also for the registered location of the Rapides Primary Health Care Center. GX 7.

Applicant first came to the attention of law enforcement on January 17, 2008, when Louisiana State Police received a call from a pharmacist that he had authorized prescriptions for ''excessive amounts of name brand narcotics with no generic substitutions allowed.'' 76 FR at 49506. Upon receipt of this information, an undercover state trooper (UC1) visited Applicant's clinic with audio/video recording equipment on January 23, 2008. *Id.* When Applicant asked UC1 ''why he was there,'' UC1 responded by requesting ''[h]ydrocodone pain pills.'' *Id.* UC1 ''initially denied that he was in pain but, after negotiating with [Applicant], he agreed to falsely state that he was suffering from a sexually transmitted disease,'' and Applicant recorded this false information in UC1's medical file. *Id.* Then, Applicant, without any physical examination to verify the claim of illness or symptoms, wrote prescriptions for 15 Lortab [1] pills and an antibiotic. *Id.* The undercover agent paid $100 for the visit. *Id.*

Five days later, on January 28, 2008, UC1 returned to Applicant's clinic seeking additional ''pain pills.'' *Id.* However, Applicant denied his request for more pain pills ''because 'big brother' was watching him.'' *Id.*

Thereafter, on January 30, February 8, and February 28, 2008, a second state trooper (UC2) visited Applicant's clinic in an undercover capacity, while equipped with an audio/video recording device. *Id.* At UC2's first visit, Applicant issued her a prescription for hydrocodone,[2] notwithstanding UC2's ''initially den[ying] she was in pain'' and ''later stat[ing] she was in pain in order to obtain a prescription for hydrocodone.'' *Id.* At her second visit on February 8, Applicant provided prescriptions for hydrocodone and Phenergan with codeine,[3] the latter being a cough syrup, ''even though she had no cough or congestion and exhibited no such symptoms.'' *Id.* On UC2's third visit, she requested and obtained from Applicant prescriptions for hydrocodone and Xanax.[4] *Id.* To justify issuing the prescriptions, Applicant ''coached'' UC2 about what to say and recorded the coached statements in her medical file. *Id.* At the

[1] Lortab, which is a combination drug containing hydrocodone and acetaminophen, is a schedule III controlled substance. 21 CFR 1308.13(e)(iv).

[2] Hydrocodone is typically combined with acetaminophen. In this formulation, it is a schedule III controlled substance. 21 CFR 1308.13(e)(iv).

[3] Phenergan with codeine cough syrup consists of a combination of promethazine and codeine; it is a schedule V controlled substance. 21 CFR 1308.15(c).

[4] Xanax (alprazolam) is a schedule IV controlled substance. 21 CFR 1308.14(c)(1).

undercover visits, Applicant never ''require[d] any medical records nor did he conduct any physical examinations.'' *Id.*

On March 20, 2008, after a state court judge issued a warrant for Applicant's arrest, Louisiana State Police alerted DEA to the investigation and pending arrest. *Id.* Thereafter, on March 26, 2008, Applicant was arrested and charged with ''six counts of prescribing beyond authority and accepted medical treatment, a violation of Louisiana Revised Statute 40:971C(1).'' *Id.* Based on Applicant's arrest, a DEA Diversion Investigator asked for the voluntary surrender of his DEA registration; Applicant agreed and signed a DEA–104, Voluntary Surrender of Controlled Substance Privileges.[5] *Id.* at 49506–07.

Respondent has presented no evidence that he acknowledges his misconduct and accepts responsibility for it.

Discussion

Section 303(f) of the Controlled Substances Act (CSA) provides that an application for a practitioner's registration may be denied upon a determination ''that the issuance of such registration would be inconsistent with the public interest.'' 21 U.S.C. 823(f). In making the public interest determination in the case of a practitioner, Congress directed that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing * * * controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

Id.

''[T]hese factors are considered in the disjunctive.'' *Robert A. Leslie,* 68 FR 15227, 15230 (2003). I may rely on any one or a combination of factors and may give each factor the weight I deem appropriate in determining whether * * * to deny an application. *Id.* Moreover, I am ''not required to make findings as to all of the factors.'' *Hoxie* v. *DEA,* 419 F.3d 477, 482 (6th Cir. 2005) (citing *Morall* v. *DEA,* 412 F.3d 165, 173–74 (D.C. Cir. 2005)).

In this matter, while I have considered all of the factors, I conclude that it is not necessary to make findings with respect to factors one (the recommendation of the state licensing board), three (applicant's conviction record) and five (such other conduct which may threaten public health and safety). Having previously found that Applicant has committed acts which render his registration ''inconsistent with the public interest,'' 76 FR at 49507 (quoting 21 U.S.C. 823(f), 824(a)(4)), and Applicant having failed to present any evidence to rebut this conclusion, I will order that his pending applications for registration be denied.

Factors Two and Four—Applicant's Experience in Dispensing Controlled Substances and Compliance With Applicable Laws Related to Controlled Substances

Under a longstanding DEA regulation, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' 21 CFR 1306.04(a). This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment * * * is not a prescription within the meaning and intent of [21 U.S.C. 829] and * * * the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' *Id.; see also* La. Rev. Stat. Ann. § 40:961(33) (2008) (effective Aug. 15, 2004);[6] La. Rev. Stat. Ann. § 40:1238.2(A) (2008) (effective Aug. 15, 2006).[7]

As the Supreme Court recently explained, ''the [CSA's] prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' *Gonzales* v. *Oregon,* 546 U.S. 243, 274 (2006) (citing *United States* v. *Moore,* 423 U.S. 122, 135, 143 (1975)); *see also* La. Rev. Stat. Ann. § 40:1238.2(A) (2008) (effective Aug. 15, 2006).

Under the CSA, it is fundamental that a practitioner must establish and maintain a bonafide doctor-patient relationship in order to act ''in the usual course of * * * professional practice'' and to issue a prescription for a ''legitimate medical purpose.'' *Laurence T. McKinney,* 73 FR 43260, 43265 n.22 (2008); *see also Moore,* 423 U.S. at 142–43 (noting that evidence established that physician ''exceeded the bounds of 'professional practice,''' when ''he gave inadequate physical examinations or none at all,'' ''ignored the results of the tests he did make,'' and ''took no precautions against * * * misuse and diversion''). The CSA generally looks to state law to determine whether a doctor and patient have established a bonafide doctor-patient relationship. *See Kamir Garces-Mejias,* 72 FR 54931, 54935 (2007); *United Prescription Services, Inc.,* 72 FR 50397, 50407 (2007); *but see* 21 U.S.C. § 829(e)(2)(B) (providing federal standard for prescribing over the internet).

Under the regulation of the Louisiana Board of Medical Examiners, in the treatment of ''intractable pain * * * a physician shall comply'' with the Louisiana Pain Rules, including the requirements that a physician perform an ''[e]valuation of the [p]atient'' and make a ''[m]edical [d]iagnosis.'' La. Admin. Code tit. 46:XLV.6921(A) (2008). ''Evaluation of the patient shall initially include relevant medical, pain, alcohol and substance abuse histories, an assessment of the impact of pain on the patient's physical and psychological functions, a review of previous diagnostics studies, previously utilized therapies, an assessment of coexisting illnesses, diseases, or conditions, and an *appropriate physical examination.'' Id.*

[5] As part of the record in this matter, the Government submitted a copy of the Consent Order applicant entered into with the Louisiana State Board of Medical Examiners. GX 5. While therein, Applicant ''acknowledge[d] that the reported information could provide the Investigating Officer with probable cause to pursue formal administrative proceedings against him for violation of the [Louisiana Medical Practice] Act,'' Applicant did not admit to any of the allegations. *Id.* at 2. Accordingly, I do not rely on the Consent Order to make any findings regarding violations of federal law by the Applicant in prescribing to undercover agents.

However, I find that Respondent had a full and fair opportunity to litigate the allegations of the first DEA Show Cause Order, even if he did not avail himself of it. *See Alan H. Olefsky,* 76 FR 20025, 20031 (2011); *Robert L. Dougherty* 76 FR 16823, 16830 (2011). Accordingly, those findings are *res judicata* in this proceeding. *Olefsky,* 76 FR at 20031; *Dougherty,* 76 FR at 16830.

[6] Louisiana law defines the term ''prescription'' to mean ''a written request for a drug * * * issued by a licensed physician * * * for a legitimate medical purpose, for the purpose of correcting a physical, mental, or bodily ailment, and acting in good faith in the usual course of his professional practice.'' La. Rev. Stat. Ann. § 40.961(33).

[7] This statute provides that:

A prescription, in order to be effective in legalizing the possession of legend drugs, shall be issued for a legitimate medical purpose by one authorized to prescribe the use of such legend drugs. An order purporting to be a prescription issued to a drug abuser or habitual user of legend drugs, not in the course of professional treatment, is not a prescription within the meaning and intent of this Section. Any person who knows or should know that he or she is filling such a prescription or order to a drug abuser or habitual user of legend drugs, as well as the person issuing the prescription, may be charged with a violation of this Section.

La. Rev. Stat. Ann. § 40:1238.2(A).

(emphasis added); *see also Armstrong* v. *La. State Bd. of Med. Examiners,* 868 So. 2d 830, 840 (La.App. 4 Cir. Feb. 18, 2004) (upholding two year suspension of physician's license; noting that when prescribing controlled substances for relief of non-malignant pain is ''unaccompanied by appropriate testing, diagnosis, oversight and monitoring * * * the physician falls below generally accepted standards of care''); *Pastorek* v. *La. State Bd. of Med. Examiners,* 4 So. 3d 833 (La.App. 4 Cir. Dec. 17, 2008). The Board's rules further require that a ''medical diagnosis * * * be established and fully documented in the patient's medical record.'' La. Admin. Code tit. 46:XLV.6921(A)(2) (2008).

Louisiana law also prohibits a physician from ''[a]ssist[ing] a patient or any other person in obtaining a controlled dangerous substance through misrepresentation, fraud, forgery, deception, or subterfuge.'' La. Rev. Stat. Ann. § 40:971.2 (2008) (effective Aug. 15, 2005). It is also unlawful for a physician to ''prescribe * * * legally controlled substances beyond his respective prescribing authority or for a purpose other than accepted medical treatment of disease, condition, or illness. *Id.,* at § 40:971(C)(1) (2008) (effective Sept. 9, 1988).

As found in my Decision and Order of July 27, 2011, on four occasions, Applicant prescribed drugs containing hydrocodone (including Lortab and/or Lorcet), which are schedule III narcotics; Xanax, a schedule IV controlled substance; and Phenergan with codeine, a schedule V narcotic cough syrup; to Louisiana State Troopers acting in undercover capacities. *See* 76 FR at 49508. Notably, Applicant issued these prescriptions without conducting a physical examination at any of the visits and the undercover agents received these prescriptions even though they did not demonstrate conditions or symptoms that would justify the prescriptions. *Id.*

Moreover, both undercover agents initially denied they were in pain, but Applicant assisted the agents in obtaining controlled substances by encouraging them to make false statements. *See id.* For example, while he denied being in pain, UC1 asked Applicant for ''[h]ydrocodone pain pills,'' and then ''negotiate[ed]'' with Applicant to ''falsely state'' he had a sexually transmitted disease. *Id.* Likewise, Applicant also ''coached'' the second undercover agent on what to say to ''justify issuing the prescriptions and wrote her coached statements in a medical file.'' *Id.* Therefore, Applicant failed to establish a physician-patient relationship, lacked a legitimate medical purpose, and acted outside of the usual course of professional practice in prescribing controlled substances to the undercover agents and thus violated Federal law. *See id.* (citing 21 CFR 1306.04(a); 21 U.S.C. 841(a)(1); *see also Louisiana* v. *Moody,* 393 So. 2d 1212, 1215 (La. 1981) (holding that physician furnished prescriptions for ''other than a legitimate medical purpose'' based on evidence showing that prescriptions were issued in response to specific requests of patients and physician did not conduct physical examinations or take medical histories)).

I therefore hold again that granting Applicant's applications for a new registration ''would be inconsistent with the public interest.[8]'' 21 U.S.C. 823(f). Accordingly, I will order that Applicant's pending applications be denied.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 28 CFR 0.100(b), I order that the applications (Control Numbers W10020882C and W10078290C) of Jose Gonzalo Zavaleta, M.D., for a DEA Certificate of Registration as a practitioner be, and they hereby are, denied. This order is effective November 19, 2012.

Dated: October 8, 2012.

Michele M. Leonhart,

Administrator.

[FR Doc. 2012–25576 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

[8] As found above, Applicant stated in his second application that ''the DA made me an offer for a program called PTI and no DEA license for two years,'' and that because he has ''completed two years without [a] DEA license,'' he ''want[s] [his] unrestricted DEA license back.'' GX 6. Respondent has presented no evidence that any DEA official agreed to the deal he made with the district attorney, and in any event, a state official has no authority to bind this Agency. *See Edmund Chein,* 72 FR 6580, 6590 (2007) (Congress granted the authority to determine whether a registration ''is consistent with the public interest'' to ''the Attorney General of the United States, and that authority has been delegated solely to the officials of [DEA]. State officials therefore lack authority to resolve a matter pending before the Drug Enforcement Administration'' and cannot bind this Agency.) (citing 21 U.S.C. 824, 28 CFR 0.100(b), and *Fourth Street Pharmacy v. DEA,* 836 F.2d 1137, 1139 (8th Cir. 1988)); *see also* 21 U.S.C. 823(f)).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. 11–34]

Zvi H. Perper, M.D., Decision and Order

On July 19, 2011, Administrative Law Judge (ALJ) Gail A. Randall issued the attached recommended decision. The Respondent did not file exceptions to the decision.

Having reviewed the entire record, I have decided to adopt the ALJ's recommended rulings, findings of fact, conclusions of law, and recommended Order except for her legal conclusions as to the initial visits of the two undercover officers (UCs) and her discussion in the first full paragraph at page 34 of her slip opinion.[1] However, I need not decide whether the prescriptions Respondent issued at the initial visits of the two UCs violated 21 CFR 1306.04(a), because there is substantial evidence to support the ALJ's legal conclusions that he acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing prescriptions at the UCs' subsequent visits.

More specifically, one week after the initial visit of David Hays (UC1), at which he was prescribed 150 Percocet, a drug which combines 10 mg of oxycodone with 325 mg of acetaminophen, Hays returned to Respondent complaining that the drug was causing digestive problems. Respondent then prescribed 150 Roxicodone (oxycodone) 30 mg, without any inquiry into Hays' pain level. Tr. 54, GX 3a, at 13. Respondent noted in the chart, however, that Hays ''had no relief [from] pain.'' GX 12, at 14.

With respect to this prescription, the Government's Expert testified that the ''[m]edication would not have been indicated given the complaints of the patient, [and] certainly not that particular agent and certainly not that dose or frequency.'' Tr. 54. Notably, this

[1] The ALJ noted that Respondent and his PA ''were given direct evidence of diversion and failed to act.'' Slip Op. at 34. More specifically, the ALJ noted that UC1 had told the PA that his girlfriend had used some of his controlled substances and that the PA did nothing in response and that UC2 had told both Respondent and his PA that he had bought controlled substances off the street and that neither Respondent nor his PA took any action. *Id.* The ALJ thus reasoned that ''[a] practitioner who takes no 'precautions against * * * misuse and diversion' exceeds the bound of professional practice when he prescribes controlled substances[,]'' and that ''[s]uch action violates the standard of diligence expected of a DEA registrant.'' *Id.* (quoting *United States* v. *Moore,* 423 U.S. 122, 142–43 (1975)).

While purchasing drugs off the street may well be evidence that a patient is a substance abuser, the record contains no evidence establishing the appropriate course of professional practice when a practitioner is confronted with such information. Likewise, while UC1's statement to the PA that his girlfriend had gotten into his medication supports a finding that diversion is occurring, here again, the record contains no evidence establishing what precautions were required to be taken under the standard of professional practice. Thus, while I find this conduct extremely disturbing, I do not rely on it.

testimony was unrefuted. I thus conclude that Respondent acted outside of the usual course of professional practice and lacked a legitimate purpose in issuing the prescription and thus violated federal law. 21 CFR 1306.04(a).

Hays returned three weeks later (May 19, 2010) and saw Respondent's Physician Assistant (PA). While during the visit, the PA initially confused Hays with a patient whose name was spelled Hayes, upon recognizing his error he nonetheless noted that Hays was ''too early.'' GX 4, at 14. During the visit, Hays asked the PA if he could increase the Roxicodone 30 mg prescription because he was probably going to be gone for three or four months working on a tugboat. *Id.* at 23. The PA instead offered to give Hays ''the fifteen milligrams * * * strength.'' *Id.* at 25. Hays asked the PA if he ''[c]ould * * * increase the thirties * * * just to whatever is reasonable and add some fifteens,'' to which the PA answered: ''I have to ask.'' *Id.* The PA then told Hays To ''have a seat in the waiting room'' and ''[l]et me find out for you.'' *Id.* Notably, during this visit, Hays did not tell the PA that he was experiencing breakthrough pain.

Approximately fifteen minutes later, the PA spoke with Hays and told him that Respondent ''was very generous'' but that the ''the deal'' was that Hays could not see the PA again until after the fourth of July. *Id.* at 31. The PA then told Hays that Respondent had given him 210 Roxicodone 30 mg and 90 Roxicodone 15 mg. *Id.* at 32; GX 12, at 23 (copies of prescriptions). On the prescription for the Roxicodone 15 mg, Respondent noted that it was for ''breakthrough'' pain, even though Hays never complained of having breakthrough pain.[2]

While the progress note for this visit stated ''Earliest pt. can be seen until 7/5/10,'' *id.* at 20; on June 16, Hays returned and saw Respondent. GX 5, at 16. While Hays was nearly three weeks early, Respondent did not raise this as an issue, *see id.* at 16–19, even though according to the Government's Expert, this is a ''red flag'' indicative of ''[d]rug-seeking behavior'' and either abuse or diversion. Tr. 65, 67. Moreover, Hays told Respondent that he still had not been on the tugboat assignment—the purported reason for why he needed an increase in his prescriptions—and once again asked for an increase. GX 5, at 16–19.

Respondent then noted that Hays' ''pain level is only a two over ten'' and that this was ''pretty good.'' *Id.* at 17. Respondent then asked Hays if he was ''having some breakthrough pain mostly at work.'' *Id.* Hays answered: ''Every now and then something feels * * * a little bit hey-wire back there,'' that it was ''mostly in the mornings,'' and that he would ''get all sore and stiff back there.'' *Id.* Respondent noted that at the last visit, Hays had been ''given a prescription for breakthrough pain'' and Hays was ''going kind of rapidly with [his] medicine.'' *Id.* Notwithstanding that Hays had reported his pain level as only a two and was nearly three weeks early, Respondent gave him a prescription for 210 tablets of Roxicodone 30 mg, a prescription for 90 Roxicodone 15 mg for breakthrough pain, and a prescription for a liver function test, which Hays never obtained. GX 12, at 26.

Hays returned on July 20 and saw the PA. Hays told the PA that he was doing ''pretty good'' and that his back had improved. GX 6, at 3–4. During the visit, Hays told the PA that his girlfriend had gotten into his medicine (which according to the Government's Expert was indicative of ''misuse and diversion,'' Tr. 65) and wanted to come to the clinic. GX 6, at 5. The PA told Hays that ''we could only see her with a valid reason * * * like an MRI report'' and ''not just because [the drugs] made her feel good.'' *Id.* at 6. The PA, however, then commented that ''she got that subtle euphoria and of course she liked it. But if she doesn't have a true pain area * * * it's not appropriate.'' *Id.* The PA then explained that the laws had changed and that the clinic would never fill prescriptions again and that Hays would have to go to a pharmacy to fill the prescriptions and that the clinic was going to discuss with local pharmacies where they could ''at least direct patients to.'' *Id.* at 7.

The PA then discussed giving Hays ''this new medicine called Dilaudid, which is a morphine derivative'' for his breakthrough pain. After discussing how Dilaudid (hydromorphone) was different from oxycodone, the PA and Hays resumed discussing where the latter could fill his prescriptions with the PA stating that because of the number of pills (210 Roxicodone), it was ''extremely hard to believe that [Hays would] be able to get'' the Oxycodone 30s from big chain drug stores such as CVS or Publix. *Id.* at 11. Hays then asked the PA to recommend a pharmacy which would fill the prescriptions; the PA told him he would give him a list and that the pills would cost four dollars each. *Id.* at 12. In response, Hays stated that he could not afford to fill 210 pills and asked if the PA could split his prescription; the PA agreed. *Id.* at 12–13. The PA stated that a lot of the small pharmacies were going to ''require a non-narcotic, non-controlled medicine to go with'' the narcotic prescriptions and that ''[t]hey wouldn't just take * * * the Roxicodone, Dilaudid script from'' him because there is ''a perception problem.'' *Id.* at 14–15. The PA then explained that he would give Hays a prescription for thirty Motrin to put in his ''back pocket'' which he could produce if the pharmacist questioned the prescriptions. *Id.* at 15. However, the PA told Hays to ''shred'' the script if the pharmacist did not question the prescriptions. *Id.*

Later, the PA asked Hays if he was ''satisfactory in the sleep department and in the anxiety department?'' *Id.* at 18. Hays answered: ''You know, I never have anxiety, really. And I sleep pretty good.'' *Id.* Following a discussion of a new state law prohibiting pain management clinics from dispensing and a proposal to establish a state prescription database, the PA left to have Respondent review and sign the prescriptions. *Id.* at 23. Respondent issued Hays two prescriptions totaling 210 tablets of Roxicodone 30 mg, as well as prescriptions for 60 Dilaudid 4 mg and 30 Motrin.

Hays returned on August 18 and again saw the PA. Notably, on the Patient Comfort Assessment form, Hays indicated that the worst his pain had been in the last month was a ''3'' on a ''0'' to ''10'' scale, that his pain had averaged a ''2'' during the last month, and that it was currently a ''1.'' GX 12, at 33. Hays also wrote that his pain ''was in my lower back but feels better now'' and circled that pain was ''occasional'' and not ''continuous.''

Hays told the PA that the Dilaudid made him ''kind of dizzy and nauseous'' and that he thought the oxycodone were ''good for'' him and asked if Respondent ever prescribed the 80s. GX 7, at 22–23. The PA stated that Respondent would ''start out a little slower[,] like the 40's * * * but yes, we do, do the 80s.'' *Id.* at 23. Hays told the PA that he did not have any problems getting the thirties and that his ''girlfriend knew [a] a place that has them * * * readily available.'' *Id.* The PA then asked Hays whether he had ''hand[ed] two split scripts in in one time''; Hays said ''No.'' *Id.* at 24. The PA then told Respondent that he had to get his liver function tested and told him where to get it and that it would cost $45. *Id.* at 24–25.

[2] Under Federal law, a practitioner may issue a patient ''multiple prescriptions authorizing the patient to receive a total of up to a 90-day supply of a schedule II controlled substance'' provided, *inter alia,* that the prescriptions otherwise comply with 21 CFR 1306.04(a) (as well as other provisions of the CSA and state law), the prescriptions include the earliest date on which they can be filled, and that they ''do not create an undue risk of diversion or abuse.'' 21 CFR 1306.12(b)(1).

Next, the PA asked Hays if his ''lower back [was] okay this month?'' *Id.* at 25. Hays answered: ''You know, I think it really feels pretty good.'' *Id.* The PA then asked: ''Do you even need a breakthrough * * * I mean * * * [y]ou're taking seven * * * a day, why don't you just stick with them?'' *Id.* Hays answered: ''well, there might be that occasion when I did need it but * * * I don't know.'' *Id.* at 26. The PA replied: ''I'll throw you a few Percocets then just to get on the safe side but the 15s are very hard to come by and they're very expensive.'' *Id.*

Hays asked if the stuff Michael Jackson had taken would work; the PA stated that that drug was only indicated to ''put people out with and perform surgery.'' *Id.* at 27. Hays then asked ''if there is some other creative way that you could deal with me?'' *Id.* at 28. In response, the PA asked: ''Are you having trouble sleeping? Is [that] what you're getting at?'' *Id.* Hays answered ''I wonder * * * I do have trouble sleeping. I don't sleep much.'' *Id.* The PA then asked Hays if he had ''ever tried Valium?'' *Id.* After Hays answered that he had not, the PA asked if he would like to. *Id.* Hays replied ''You know I might, because there are times when I * * * and it could be because * * * I've got too much on my mind, with work and everything, and I wake up at night and then I just stay awake.'' *Id.* The PA then told Hays to ''try it one hour before you want it to work,'' but not to drive on it and not to take it every night.[3] *Id.* at 29.

Hays and the PA returned to discussing his use of Dilaudid, with the PA stating that he was going to discontinue it. *Id.* at 30. The PA then asked Hays to move each leg up to his hand, and whether doing so bothered his back; Hays indicated that it did not. *Id.* at 31; *see also* GX 20 (audio recording of visit). The PA asked Hays if he needed the prescriptions split again; Hays answered that he did not. GX 7, at 31. The PA then said he was going to give Hays ''a couple [of] Percocet for the day'' for ''breakthrough'' pain and advised him to ''eat with them.'' *Id.* at 31–32. The PA added that ''hopefully the seven thirties a day will be enough pain relief for you and you don't need anything else'' and advised Hays to fill the Percocet prescription only if he needed it. *Id.* Following a discussion of doctor shopping, the PA went to Respondent to obtain his approval for the prescriptions. *Id.* at 39. Thereafter, Hays was provided with prescriptions for 210 Roxicodone 30 mg, 60 Percocet 10/325mg, 30 Valium 10mg, and Motrin. GX 12, at 35.

With respect to the Dilaudid prescription Respondent issued to Hays, the Government's Expert testified that there was no evidence that Hays was experiencing break-through pain ''of any significant degree.'' Tr. 60. The Expert further explained that ''[t]here was no history consistent with severe break-through pain and it appeared that [Hays'] pain was adequately—more than adequately managed, even based on the subjective history.'' *Id.* The Expert thus concluded that Dilaudid prescription was ''not justified.'' *Id.* This testimony stands unrefuted.

I therefore conclude that substantial evidence supports the conclusion that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing the Dilaudid prescription to Hays. 21 CFR 1306.04(a). Moreover, for the same reasons that the Expert concluded that the Dilaudid prescription was not medically justified, I also conclude that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing the May 15 and June 16 prescriptions for Roxicodone 15mg, as well as the August 18 prescription for Percocet 10, all of which were purportedly issued for breakthrough pain.

As for the Valium prescription, the Government's Expert observed that the progress note ''indicated that the patient had insomnia for the past month'' but that Respondent did not explain ''in his note why Valium [was] being added, although the prescription is to be taken one at bedtime only.'' *Id.* at 61. Continuing, the Expert testified that while he could ''hypothesize why [Valium] may have been chosen * * * there was nothing that would justify that dose * * * for this individual.'' *Id.*

The Government's Expert further explained that before prescribing Valium for insomnia, ''[t]he first reasonably standard thing to do would be to ensure that the patient wasn't doing anything that may be promoting insomnia'' such as having ''caffeine at night or excessive meals right before bedtime.'' *Id.* at 62. Once this was addressed, the Expert stated that if ''medications were indicated there are [other] agents that are appropriate for insomnia, rather than a benzodiazepine like Valium, [which is available in 2, 5 and 10 mg tablets], at its highest dose.'' *Id.* at 63. Finally, the Expert noted that Valium's ''primary purpose is not [to treat] insomnia.'' *Id.*

Here too, the testimony of the Government's Expert was unrefuted. I therefore conclude that substantial evidence supports the conclusion that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing the Valium prescription to Hays. 21 CFR 1306.04(a).[4]

As for the prescriptions issued to Eddie Martinez, the evidence showed that Respondent increased his prescription from 120 Percocet 10/325 at the initial visit (for a total daily dose of 40 mg of oxycodone) to 90 Oxycodone 30 mg (for a total daily dose of 90 mg of oxycodone) at the second visit. GX 13, at 16, 20. The Government's Expert opined that Martinez's complained-of pain level did not justify a prescription for Roxicodone 30, which was more than double the dosing of the previous prescription, as ''[t]here wasn't any physical examination abnormality or focal neurological deficit * * * consistent with his MRI finding or even his complaints that * * * would have warranted those medications at that dose[].'' Tr. 85. This testimony was unrefuted.

At the third visit, Martinez told Respondent that he had run out a week early and bought drugs on the street even though in Respondent's words ''[y]ou changed from Percocet to Oxycodone, that's a much stronger medicine than what you were using'' and ''there's a significant increase in the total amount of medicine you're getting daily.'' GX 11, at 20; *see also id.* at 22. At the visit, Respondent wrote Martinez

[3] Under DEA precedent, a registrant is strictly liable for the misconduct of those employees that he has authorized to act on his behalf with respect to the registrant's handling of controlled substances. *See Anthony L. Capelli,* 59 FR 42288 (1994) (holding registrant strictly liable for unauthorized prescriptions issued under his registrant by unlicensed persons). *See also Scott C. Bickman,* 76 FR 17694, 17703 (2011); *Harrell Robinson,* 74 FR 61370, 61377–78 2009, *Paul Volkman,* 73 FR 30630, 30644 n.42 (2008). While in this case the PA did not have authority to issue controlled substance prescriptions under Florida law, it is clear that Respondent authorized the PA to act on his behalf in evaluating his patients and relied on the PA's evaluation to issue controlled substances prescriptions. Accordingly, Respondent is strictly liable for issuing the prescriptions.

[4] Noting that Hays had asked the PA ''if there is some other creative way that you could deal with me?'' and the PA's response that: ''Are you having trouble sleeping? Is [that] what you're getting at?,'' the ALJ reasoned that the circumstances surrounding the prescription ''nearly equate[] to outright drug dealing.'' ALJ at 31. I go one step further and conclude that it was an outright drug deal, noting not only unusual nature of Hays' statement, but also that Hays had denied a sleep problem just one month earlier, as well as the Expert's testimony that: (1) the PA's evaluation of Hays' sleep problem was inadequate, Tr. 62; (2) that there are other drugs which are indicated for insomnia and that Valium's ''primary purpose is not [to treat] insomnia''; and (3) that the prescribed dose was ''very high.'' *Id.* at 63.

prescriptions for 90 Roxicodone 30 mg, as well as 60 Percocet 10 mg, the latter being for ''breakthrough pain.'' GX 13, at 24. Notably, on the Patient Comfort Assessment Guide for this visit, Martinez noted that at its worst, his pain was a ''5'' on a scale of 0 to 10, a decrease from the level of 7–8 which he reported the previous month. GX 13, at 17, 21. Moreover, at no point did Martinez complain of having breakthrough pain. *See* GX 11, at 20–24.

According to the Government's Expert, that Martinez said he had run out early and complained of unrelieved pain was not a legitimate medical justification for increasing the dosing of oxycodone because it was ''[n]ot based on the history, physical, and objective information available in this patient's file.'' Tr. 87. The Expert further opined that while it would be within the course of professional practice to prescribe analgesic medications ''if the clinical justification existed,'' Martinez's ''history and physical'' did not meet the criteria for prescribing. *Id.* at 90.

Here again, this testimony was unrefuted. Accordingly, I hold that substantial evidence supports the conclusion that Respondent acted outside of the usual course of professional practice and lacked a legitimate medical purpose in issuing oxycodone prescriptions to Martinez at both his second and third visits. 21 CFR 1306.04(a). I thus conclude that Respondent violated Federal law in issuing numerous controlled substance prescriptions to both UCs.

This finding provides reason alone to conclude that Respondent has committed acts which render his registration inconsistent with the public interest. *See* 21 U.S.C. 824(a)(4). However, this conclusion is buttressed by the ALJ's additional findings and legal conclusions, including those regarding the shortages of controlled substances ordered under Respondent's registration (nearly 24,000 dosage units of oxycodone 30 and 2,565 dosage of Endocet 10/325), his failure to take initial inventories after moving his practice, 21 CFR 1304.11, and his failure ''to provide any explanation for his conduct or any assurances regarding his future conduct.'' ALJ at 37. *See also Medicine Shoppe-Jonesborough,* 73 FR 364, 387 (2008).[5]

Accordingly, I adopt the ALJ's recommended order that Respondent's registrations be revoked and any pending applications be denied. For the same reasons which led me to order the Immediate Suspension of Respondent's registrations, I conclude that the public interest requires that this Order be made effective immediately. *See* 21 CFR 1316.67.

Order

Pursuant to the authority vested in me by 21 U.S.C. 823(f) and 824(a), as well as 28 CFR 0.100(b), I order that DEA Certificates of Registration Nos. FP1312406, BP8477639, and BP3429835, issued to Zvi H. Perper, M.D., be, and they hereby are revoked. I further order that any pending applications of Zvi H. Perper, M.D., to renew or modify any of his registrations, be, and they hereby are denied. This Order is effective immediately.

Dated: October 8, 2012.

Michele M. Leonhart,

Administrator.

Frank Mann, Esq., for the Government
Richard G. Lubin, Esq. & *Anthony Vitale, Esq.,* for the Respondent

RECOMMENDED RULINGS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION OF THE ADMINISTRATIVE LAW JUDGE

I. PROCEDURAL BACKGROUND

Gail A. Randall, Administrative Law Judge. The Administrator, Drug Enforcement Administration (''DEA'' or ''Government''), issued an Order to Show Cause and Immediate Suspension of Registration (''Order I'') dated February 18, 2011, proposing to revoke the DEA Certificate of Registration, Number FP1312406, of Zvi H. Perper, M.D., (''Respondent'' or ''Dr. Perper''), as a practitioner, pursuant to 21 U.S.C. § 824(a)(4) (2006), and deny any pending applications for renewal or modification of such registration pursuant to 21 U.S.C. § 823(f), because the continued registration of the Respondent would be inconsistent with the public interest, as that term is used in 21 U.S.C. §§ 823(f) and 824(a)(4). Order I also immediately suspended the registration pursuant to 21 U.S.C. § 824(d), because the Respondent's continued registration constituted an imminent danger to the public health or safety. [Administrative Law Judge Exhibit (''ALJ Exh.'') 1].

The Administrator, Drug Enforcement Administration, issued a second Order to Show Cause and Immediate Suspension of Registration (''Order II'') dated March 4, 2011, proposing to revoke the DEA Certificates of Registration, Numbers BP7732349,[6] BP7622764,[7] BP7622752,[8] BP3429835, and BP8477639, of Dr. Perper, as a practitioner, pursuant to 21 U.S.C. § 824(a)(4) (2006), and deny any pending applications for renewal or modification of such registrations pursuant to 21 U.S.C. § 823(f), because the continued registration of the Respondent would be inconsistent with the public interest, as that term is used in 21 U.S.C. §§ 823(f) and 824(a)(4). Order II also immediately suspended these registrations pursuant to 21 U.S.C. § 824(d), because the Respondent's continued registration constituted an imminent danger to the public health or safety. [ALJ Exh. 3].

The Respondent was served with the Order II on March 7, 2011. [ALJ Exh. 2].

The Orders asserted that the Respondent dispensed controlled substances to undercover law enforcement officers for other than a legitimate medical purpose and/or outside the usual course of professional practice. [ALJ Exh. 1]. Further, the Orders also alleged that Respondent's Physician's Assistant coached an undercover law enforcement person on how to procure large amounts of narcotics from pharmacies without ''arousing suspicions that the prescriptions were being issued for other than legitimate medical purposes.'' [ALJ Exh. 1 at 2].

By letter dated March 15, 2011, the Respondent, through counsel, timely filed a request for a hearing in the above-captioned matter. [ALJ Exh. 4].

At the Respondent's request, the hearing was held in St. Lucie, Florida, on May 18–19, 2011. [ALJ Exh. 6; Transcript (''Tr.'') Volume I–II]. At the hearing, Counsel for the DEA called witnesses to testify and introduced documentary evidence. The Respondent, through Counsel, elected not to present any evidence. [Tr. 346]. After the hearing, both Counsel submitted Proposed Findings of Fact, Conclusions of Law and Argument.

II. ISSUE

The issue in this proceeding is whether or not the record as a whole establishes by a preponderance of the evidence that the Drug Enforcement Administration should revoke the DEA Certificate of Registrations, Numbers FP1312406, BP7732349, BP7622764, BP7622752, BP3429835, BP8477639, of Zvi H. Perper, M.D., (''Respondent''), as a practitioner, pursuant to 21 U.S.C. § 824(a),

[5] As explained in *Medicine Shoppe-Jonesborough,* where, as here, ''the Government has proved that a registrant has committed acts inconsistent with the public interest, a registrant must 'present[] sufficient mitigating evidence to assure the Administrator that [he] can be entrusted with the responsibility carried by such a registration.'" 73 FR at 387 (quoting *Samuel S. Jackson,* 72 FR 23848, 23853 (2007) (quoting *Leo R. Miller,* 53 FR 21931, 21932 (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), [DEA] has repeatedly held that where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for [his] actions and demonstrate that [he] will not engage in future misconduct.'' *Medicine Shoppe,* 73 FR at 387; *see also Jackson,* 72 FR at 23853; *John H. Kennedy,* 71 FR 35705, 35709 (2006); *Prince George Daniels,* 60 FR 62884, 62887 (1995). *See also Hoxie* v. *DEA,* 419 F.3d at 483 (''admitting fault'' is ''properly consider[ed]'' by DEA to be an ''important factor[]'' in the public interest determination).

[6] This registration expired by its own terms on March 31, 2011, and the Respondent did not file an application to renew it. [Tr.293–94, 323; Govt. Exh. 1].

[7] This registration expired by its own terms on March 31, 2011, and the Respondent did not file an application to renew it. [Tr. 297, 323–324; Govt. Exh. 1].

[8] This registration expired by its own terms on March 31, 2011, and the Respondent did not file an application to renew it. [Tr. 297, 324; Govt. Exh. 1].

and deny any pending applications for renewal or modification of such registrations, pursuant to 21 U.S.C. § 823(f), because his continued registrations would be inconsistent with the public interest, as that term is defined in 21 U.S.C. § 823(f). [Tr. 8; ALJ Exh. 5].

III. FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

A. Stipulated Facts

The parties have jointly agreed to the following stipulated facts:

1. Respondent is registered with DEA as a practitioner in Schedules II–V under DEA registration numbers FP1312406, BP7732349, BP7622764, BP7622752, BP3429835, and BP8477639 at the following locations, respectively: (1) Delray Pain Management, 102 N. Swinton Avenue, Delray Beach, Florida 33444; (2) Women's Center of Hyde Park, LLC, 502 S. Magnolia Avenue, Tampa, Florida 33606–2257; (3) 1103 Lucerne Terrace, Orlando, Florida 32806; (4) 609 Virginia Drive, Orlando, Florida 32803; (5) 3025 Andrews Place, Boca Raton, Florida 33234; and (6) Ocala Womens Center, 108 NW Pine Avenue, Ocala, Florida 34475. [ALJ Exh. 5].

2. DEA registration Nos. BP7732349, BP7622764, and BP7622752 expire by their terms on March 31, 2011; DEA registration Nos. FP1312406 and BP8477639 expire by their terms on March 31, 2012; and DEA registration No. BP3429835 expires by its terms on March 31, 2013. [*Id.*{.

3. Respondent is currently licensed in the State of Florida as a Medical Doctor (Dispensing Practitioner), Lic. No. ME 65525, expiration date: 1/31/2013. [*Id.*].

B. Background Facts

4. The Respondent works at Delray Pain Management (''clinic''). The clinic disqualified some patients because of the distance they had to travel to get to the clinic. [Tr.183].

5. In 2009, the Respondent ordered 321,600 dosage units of oxycodone. [Tr. 318; Government Exhibit (''Govt. Exh.'') 14 at 3]. From January 1 to June 30 of 2010, the Respondent ordered 387,248 dosage units of oxycodone. [Tr. 318–19; Govt. Exh. 14 at 4]. Based on these purchases, the Respondent ranked 22nd in the nation regarding practitioners purchasing oxycodone. [Tr. 319].

6. The Respondent accepted cash for office visits and prescriptions. [Tr. 320–323; Govt. Exh. 34].

7. The record does not contain any legal documents indicating the ownership of Delray Pain Management. Mr. Kent Murray appears to have been the owner of the pain clinic for some time, but the Respondent acted as either the general manager or also the owner of the clinic. [Tr. 326–329].

8. The clinic requires a valid Florida identification for the patients seen there. [Tr. 332].

9. The clinic also requires each patient to provide an MRI. [Tr. 332–33]. The MRIs of Mr. Hays and Mr. Martinez were verified by an individual named Lynette or Lynn. [Tr. 334–35; Govt. Exh. 12 at 16; Govt. Exh. 13 at 12].

10. Both undercover agents were required to take a urinalysis examination on their first visit. [Tr. 335].

11. Each new patient at the clinic was required to give a medical history with an emphasis on their pain complaint. [Tr. 336]. The undercover agents, on their first visits, had a face-to-face meeting with the Respondent. [Tr. 336].

C. Dr. Rubenstein's Testimony

12. Dr. Rubenstein, a medical doctor, is board certified in Physical Medicine in Rehabilitation, in Pain Medicine, and in Electrodiagnostic Medicine. [Tr. 20; Govt. Exh. 25 at 1]. Dr. Rubenstein has a private practice focused on his specialties, and he is licensed to practice medicine in Florida and Virginia. [Tr. 23]. Approximately 90 percent of his patients have some type of pain complaint. [Tr. 24].

13. He also has two certificates, one as a Diplomate of the American Academy of Pain Management, and Board Certification through the American Board of Medical Specialties, with a sub-specialty in Pain Medicine. [Tr. 21]. He has been practicing pain medicine since 1993. [*Id.*].

14. Dr. Rubenstein holds four academic appointments and teaches pain medicine at each one. [Tr. 22].

15. Dr. Rubenstein was qualified as an expert in pain management and pain medicine. [Tr. 24].

16. Prior to rendering his opinion concerning the Respondent's prescribing of controlled substances, Dr. Rubenstein reviewed the medical records reporting the treatment of two individuals, David Hays [9] and Eddie Martinez.[10] Dr. Rubenstein also reviewed the transcripts of their visits with the Respondent. [Tr. 29–30, 34; Govt. Exhs. 12 and 13, 2–11].

D. Treatment of David Hays

17. David Hays first visited the Respondent on April 21, 2010. [Govt. Exh. 12 at 5; Govt. Exh. 15]. On that date, Mr. Hays' chart [11] notes a drug screen was taken with negative results for all tested substances, to include opiates. [Tr. 123–24; Govt. Exh. 12 at 8]. At none of the other visits, after controlled substances were prescribed, did the Respondent require a urinalysis screen. [Govt. Exhs. 3–7, 9–11].

18. In his medical history forms, Mr. Hays reported taking over-the-counter anti-inflammatories such as Advil or Motrin. [Govt. Exh. 12 at 9–10]. From the medical history, Dr. Rubenstein concluded that he had not taken opiates in the past. [Tr. 40–41]. The urinalysis results corroborated this conclusion as to the immediate past. [Tr. 96].

19. The medical history form also indicated that Mr. Hays did not have a primary physician, and that his last physical examination was in August 1980. [Govt. Exh. 12 at 4].

Mr. Hays also wrote that he had never taken opiates before. [Govt. Exh. 12 at 11].

20. Mr. Hays also signed an agreement regarding his responsibilities in taking medications that may be prescribed (''Agreement''). The Agreement informed Mr. Hays of his agreement to random drug testing, to only receiving pain medications from the Respondent, to understanding that lost medications will not be refilled, and to keeping referral appointments should the Respondent make such a referral. The Agreement also defines actions Mr. Hays may take that would result in his being discharged from the practice. Such actions include selling or distributing prescribed medications, obtaining pain medication from a source other than ''my doctor,'' forging or altering a prescription, or failing to receive any therapeutic benefit from the pain medication. Mr. Hays and the Respondent signed this Agreement on April 21, 2010. [Tr. 41–42; Govt. Exh. 12 at 12].

21. At the initial visit there was no evidence that Mr. Hays was doctor shopping. [Tr. 97].

22. Mr. Hays' medical history also disclosed, in response to questions asked on the form, that his pain was sharp and had been with him for three years, and that his pain interfered with work, sleep, and daily activities. [Tr. 190–93; Govt. Exh. 12 at 10]. However, the form did not provide space for Mr. Hays to discuss the basis for his answers to these questions, and nowhere else in the medical record are these concerns addressed. [Tr. 42–43; Govt. Exh. 12 at 10–11].

23. When asked on the intake form if Mr. Hays had provided honest and valid medical records to the clinic, he answered ''Yes.'' [Tr. 193]. As for his treatment goals, Mr. Hays wrote that he wanted to ''work better''. [Tr. 193]. Mr. Hays also wrote and told the Respondent that the pain interfered with his self-esteem, his overall energy, and his ability to perform physical activities. [Tr. 193–94, 198; Govt. Exh. 12 at 11]. Mr. Hays also told the Respondent that his back ''hurt.'' [Tr. 200]. However, none of these complaints, other than pain, was discussed with Mr. Hays. [Govt. Exh. 2].

24. Mr. Hays' magnetic resonance imaging (''MRI'') report noted that there was ''L4/5 and L5/S1, small protrusions with annular bulge and no nerve effacement.'' [Tr. 44; Govt. Exh. 12 at 16]. Per Dr. Rubenstein, the MRI report, alone, does not justify prescribing of narcotics on April 21, 2010. [Tr. 46]. This MRI, ''in and of itself, (doesn't) define necessarily a pain generator, maybe a potential pain generator, that needs to be related to the patient's history and physical examination.'' [Tr. 46].

25. Mr. Hays' basic complaint was low back stiffness, having never said pain during the physical examination. [Tr. 129, 189]. Low back pain is a diagnosis, however. [Tr. 47]. Mr. Hays explained that he restored BMW motorcycles, and his back was ''stiff and jammed up and all.'' [Govt. Exh. 2 at 22]. He agreed, however, that his pain had worsened over the last three years. [Govt. Exh. 2 at 23]. He managed his pain with over-the-counter

[9] David Hays is the undercover name used by Special Agent Jack Lunsford. For consistency with the documentary exhibits, I will refer to this individual as Mr. Hayes. Since this investigation, SA Lunsford has retired from the DEA. [Tr. 118, 179, 308].

[10] Eddie Martinez is the undercover name used by Special Agent Eddie Brigantty. [Tr. 308].

[11] The Respondent maintained a medical record for Mr. Hays. [Govt. Exh. 12].

medications like Aleve. He denied currently taking any medications or having taken medications in the past year. [Govt. Exh. 2 at 23, 27]. The Respondent then instructed Mr. Hays that he only gives prescriptions for one month and that Mr. Hays must only be seen by him. [*Id.* at 25].

26. Next, the Respondent physically examined the patient. [*See id.* at 27]. The Respondent noted that Mr. Hays experienced ''no pain with straight leg raising bilaterally and normal motor and sensory.'' [Govt. Exh. 12 at 14]. Dr. Rubenstein opined that this would represent a limited neurologic exam for this patient. [Tr. 47]. But the results were ''normal,'' and Dr. Rubenstein opined that he did not see ''what the justification is, then, to even treat (him) if the exam is normal.'' [Tr. 98].

27. As part of the physical examination, the Respondent noted that there was a ''positive, moderate tenderness at L5/S1.'' [Tr. 48]. In response to the question of whether his pain was in his lower back, Mr. Hays responded ''yes.'' [Tr. 203]. However, Dr. Rubenstein noted that Mr. Hays did not complain of pain or tenderness during the physical examination, and such a complaint would need to be made for the Respondent to make such a legitimate observation. [Tr. 49].

28. The Respondent diagnosed Mr. Hays with ''chronic lumbar pain with bulge L4–5 and L5/S1 with protrusions. No radiculopathy.'' [Tr. 48; Govt. Exh. 12 at 14]. During the visit, the Respondent discussed a back brace that Mr. Hays could use, and he even showed Mr. Hays how to wear the belt. [Tr. 204; Govt. Exh. 2 at 32–40].

29. Mr. Hays paid $250.00 cash for an examination fee at this first visit. He was a ''walk-in patient'' without an appointment. [Tr. 121, 178].

30. On April 21, 2010, the Respondent prescribed Percocet 10/325 in a quantity of 150, to be taken every four to six hours. [Govt. Exh. 12 at 17]. Dr. Rubenstein opined that the ''doses and frequency of the medication were excessive. . . Percocet 10 milligrams would be excessive for an opioid naïve patient . . . and that quantity of medication would be excessive given the patient's pain complaints and lack of any objective pathology on physical examination.'' [Tr. 52]. Although muscle spasm may be expected given this diagnosis, opiates are not often given as a result of this observation. [Tr. 55–56].

31. Mr. Hays purchased 150 Percocet tablets and paid $195.00 cash for them. [Tr. 130, 178].

32. Mr. Hays next visited the Respondent, unscheduled, on April 28, 2010. On that date the Respondent wrote in Mr. Hays' medical records that the patient had complained of severe stomach upset and that the Percocet did not relieve his pain. The Respondent then prescribed Roxycodone, 30 milligrams, 150 dosage units to be taken as needed for pain. [Tr. 52, 150; Govt. Exh. 12 at 14, 18].

33. Yet Mr. Hays told the Respondent that the prior medication ''doesn't seem to be having the total effect I expected. And another side thing it does is it, it's giving me some kinda like-digestive-anxiety or something. I'm always feeling kinda unsettled.'' Later in the conversation, Mr. Hays stated that the medication ''[k]inda makes me not want to eat.'' [Govt. Exh. 3A at 11–12; *see also* Tr. 312; Govt. Exh. 16]. When asked about the Flexeril, Mr. Hays responded that ''I don't know that it does anything at all.'' [Govt. Exh. 3A at 13]. He was not asked if the Percocet relieved his pain, and he did not comment about the Percocet and pain. [Tr. 145; Govt. Exh. 3A]. Yet Mr. Hays medical chart contained the statement that the prior prescription had provided ''no relief (from) pain.'' [Govt. Exh. 12 at 14. Mr. Hays denied making such a statement, and no such statement appears on the recording or in the transcript. [Tr. 145; *see also* Govt. Exh. 3A and 16A]. Dr. Perper did not ask Mr. Hays whether he still had pills from the earlier script for Percocet, nor did he instruct him what to do with those remaining pills, if they existed. [Govt. Exh. 3A at 12, 16].

34. Dr. Rubenstein disagreed with this prescription, noting that the medication ''would have not been indicated given the complaints of the patient, certainly not that particular agent and certainly not that dose or frequency.'' [Tr. 54].

35. Mr. Hays did not pay anything for this visit. [Tr. 178].

36. On May 19, 2010, Mr. Hays visited with Mitchell Cohen, a physician's assistant at the Respondent's clinic. [Tr. 151, 312; Govt. Exh. 17 and 17A]. Mr. Hays reported that his pain was between zero to five on a ten point scale, and it was completely alleviated by taking the prescribed medication of six Roxycodone 30 milligram tablets per day. [Tr. 56; Govt. Exh. 12 at 21–22]. Mr. Hays rated his average pain as a ''2'' for the prior month, and rated his current pain level as ''no pain''. [Tr. 152; Govt. Exh. 12 at 22]. He also wrote ''was in lower back; gone now.'' [*Id.*]. Mr. Hays told Mr. Cohen that his lower back was ''no problem at all'' and denied having any side effects from the medication. [Govt. Exhs. 4 at 18, 17A]. He did state, however, that his symptoms ''might come back if (he) didn't have medication.'' [Govt. Exh. 4 at 19; Govt. Exh. 17A].

37. Mr. Cohen performed a cursory physical examination, asking him to raise and lower his legs, declaring that Mr. Hays' back felt ''a little tight'' but not ''horribly bad.'' [Govt. Exh. 4 at 21; Govt. Exh. 17A]. During this examination, Mr. Hays expressed no pain or discomfort. He also denied any anxiety or sleep problems. [Govt. Exh. 17A]. Here, Mr. Cohen asked about Mr. Hays'earlier prescription for Percocet, which Mr. Hays stated he still had. Mr. Cohen then instructed him to flush those pills and not to give them to anyone. [Govt. Exh. 4 at 22].

38. Mr. Hays requested a larger amount of pain medication, because he was joining a tugboat crew and would be gone for three months. [Tr. 156; Govt. Exh. 17A]. Mr. Cohen refused to approve this request and advised Mr. Hays to ''stretch out'' his medication by breaking it in half and ''tak(ing) some Advil in between.'' [Govt. Exhs. 4 at 24, 17A]. Mr. Cohen then offered to give Mr. Hays some 15 mg. strength oxycodone tablets instead of increasing the number of 30 mg. strength tablets prescribed to Mr. Hays. Mr. Hays again requested a greater quantity of Roxicodone (30 mg pills) as well as the 15 mg. oxycodone pills. [Govt. Exh. 4 at 24; Govt. Exh. 17A]. Mr. Cohen agreed to speak to the Respondent, whom Mr. Cohen later stated had been ''very generous'' in his prescribing to Mr. Hays. [Govt. Exh. 4 at 31–32; Govt. Exh. 12 at 23; Govt. Exh. 17A]. Ultimately, the Respondent added a prescription for 15 mg. strength oxycodone to Mr. Hays' 30 mg. prescription. [Govt. Exh. 12 at 20].

39. On this date, Mr. Hays received two prescriptions signed by the Respondent; one for Roxycodone 30 mg, 210 tablets, and one for Roxycodone 15 mg., 90 tablets. [Tr. 164; Govt. Exh. 12 at 23]. Mr. Cohen told Mr. Hays not to return to the clinic until after July 4. [Tr. 157; Govt. Exh. 4 at 31].

40. Mr. Hays paid $175.00 for this visit and $510.00 for the medication. [Tr. 178].

41. On June 16, 2010, Mr. Hays reported, and the Respondent acknowledged that Mr. Hays' lower back pain ranged from zero to four out of ten, with an average pain level of two, and a current pain level of one. [Tr. 58; Govt. Exh. 12 at 24, Govt. Exh. 5]. Mr. Hays circled on his intake form that his pain was ''gnawing'' and ''nagging.'' [Tr. 209; Govt. Exh. 12 at 24].

42. There was no discussion about Mr. Hays returning to the clinic before July 4. [Tr. 165].

43. During this visit, the Respondent again remarked that he was due to set out on a three month tug boat excursion, and asked for additional pills to tide him over. The Respondent noted that Mr. Hays was going through his medication rather quickly. [Govt. Exh. 5 at 17]. The Respondent asked Mr. Hays whether his break-through pain was mostly with work. Mr. Hays had not complained of break-through pain, however. [Tr. 166; Govt. Exh. 5 at 17]. Yet, at this visit he received a prescription for 210 Roxycodone 30 mg and 90 Roxycodone 15 mg., with ''break through pain'' written on the bottom. [Govt. Exh. 12 at 26].

44. Mr. Hays was prescribed a liver function test. [Tr. 210; Govt. Exh. 12 at 26]. However, Mr. Hays did not get such a test. [Tr. 210].

45. Mr. Hays paid $175.00 for this visit and $638.00 for his medication. [Tr. 178].

46. On July 20, 2010, Mr. Hays returned to the clinic. [Tr. 169; Govt. Exh. 6]. He met with Mitchell Cohen on that date. [Tr. 170]. Mr. Hays reported that his lower back pain ranged from zero to three out of ten, with complete relief after taking seven oxycodone [12] 30 milligram tablets and three oxycodone 15 milligram tablets per day. [Tr. 57; Govt. Exh. 12 at 29–30]. When asked if his lower back had improved with the medicine, Mr. Hays said that he thought it had improved. [Govt. Exh. 6 at 4].

47. On this date, the Respondent [13] prescribed Dilaudid four milligrams, 60 tablets to be taken one, twice daily, as needed for breakthrough pain. [Tr. 59; Govt. Exh. 12

[12] Roxycodone is a medication containing oxycodone. [Tr. 83].

[13] Although Mr. Cohen saw Mr. Hays, the prescriptions bore the Respondent's signature. [Govt. Exh. 12 at 3].

at 31]. He also signed two prescriptions [14] for Roxycodone 30 mg., one for 120 tablets and one for 90 tablets. [Govt. Exh. 12 at 31]. However, after reviewing the medical records for this date, there was no evidence that Mr. Hays was experiencing any breakthrough pain. [Tr. 60].

48. This shift of medication to Dilaudid was not justified according to Dr. Rubenstein. [Tr. 60]. Further, Dr. Rubenstein noted that no neurological musculoskeletal exam had been performed, and that Mr. Hays had violated his pain contract by allowing his girlfriend to share his medications. [Tr. 39–41; Govt. Exh. 12 at 12]. Dr. Rubenstein agreed that sharing medication with a girlfriend would be a violation of the Agreement. [Tr. 42]. In reviewing Mr. Hays' medical chart, Dr. Rubenstein found that ''drug-seeking behavior is suspected.'' [Tr. 95].

49. On this date, Mr. Hays told Mr. Cohen that his girlfriend ''got into [his] medication'' and ''liked it.'' [Tr. 170–71; Govt. Exh. 6 at 5; Govt. Exh. 19 and 19A]. Next, Mr. Hays said that his girlfriend wanted to come to the Respondent's clinic, but he was unsure whether she had a ''valid reason'' for requesting medication. [Govt. Exh. 6 at 5–6]. Mr. Hays also admitted that his own medication made him euphoric. [Govt. Exh. 6 at 6]. Mr. Cohen took no action in response to these comments except to tell Mr. Hays that the Respondent would not see his girlfriend unless she had a ''valid reason.'' [Govt. Exh. 6 at 6]. Mr. Cohen further stated that if Mr. Hays' girlfriend ''has a legitimate area of pain'' that is ''proven with an objective test . . . like an MRI, then no problem.'' [Govt. Exh. 6 at 6–7]. Mr. Cohen made no response to the news that Mr. Hays' girlfriend had gotten into his medication or that Mr. Hays experienced euphoria from his controlled substances. [*Id.*]. During this visit, Mr. Cohen also had a long conversation with Mr. Hays about the price of medication and where to have his prescriptions filled. Mr. Cohen advised Mr. Hays that ''at this level,'' he should not go to large chain pharmacies and that the clinic would provide him with a list of places to go. [Govt. Exh. 6 at 7–14]. Mr. Cohen then indicated that he would give him a script for Motrin, even though he already had two refills, because otherwise the script for controlled substances would not be filled by the pharmacy. [Govt. Exh. 6 at 14–15]. Then Mr. Cohen asked Mr. Hays how he would like his ''pills split.'' [Govt. Exh. 6 at 16].

50. Mr. Hays spent $200.00 cash for this visit. [Tr. 178].

51. On August 18, 2010, Mr. Hays returned to the clinic and met with Mitchell Cohen. [Tr. 174–75; Govt. Exh. 7; *see also* Tr. 314; Govt. Exh. 20]. Mr. Hays spent $200.00 for this visit. [Tr. 178].

52. Mr. Hays reported that his back pain ''feels better now,'' with a pain level from zero to three out of ten, averaging two, and a present rating of one. [Tr. 59; Govt. Exh. 12 at 33–34]. Further, during a physical exam where Mr. Cohen told Mr. Hays to move his legs up against Mr. Cohen's hand, Mr. Hays indicated that neither action caused him any discomfort or pain. [Govt. Exh. 7 at 30–31; Govt. Exh. 20]. He told Mr. Cohen that his girlfriend knew of a place for him to get prescriptions filled.

53. On this date, Mr. Hays asked Mr. Cohen whether there was some other ''creative way that he could deal with him.'' [Govt. Exh. 7 at 28]. To this Mr. Cohen responded, ''Are you having trouble sleeping? Is that what you're getting at?'' [*Id.*]. Mr. Hays replied, ''ummm….you know. I wonder . . . I do have trouble sleeping. I don't sleep much . . .'' [*Id.*]. Mr Cohen then asked if Mr. Hays had ever tried Valium and if he'd like to this month. [*Id.*]. The Respondent prescribed Roxycodone 30 mg, 210 tablets, Percocet 10 mg., 60 tablets for break-through pain, and Valium 10 mg., 30 tablets. [Tr. 177; Govt. Exh. 12 at 35]. Although the treatment note documented Mr. Hays' insomnia and noted that he was to take one Valium at bedtime only, Dr. Rubenstein opined that ''there was nothing that would justify that dose . . . for this individual.'' [Tr. 61–62; *see also* Govt. Exh. 7 at 28]. Rather, Dr. Rubenstein stated that the ''first reasonably standard thing to do would be to ensure that the patient wasn't doing anything or taking anything that may be promoting insomnia . . .'' [Tr. 62]. Dr. Rubenstein objected to the fact that the Respondent prescribed Valium at the highest available dose, which would be a very high dose, and ''its primary purpose is not for insomnia.'' [Tr. 63].

54. The Respondent had told Mr. Hays to obtain a liver function test, yet the medical records fail to indicate that such a test was taken. [Tr. 68]. Mr. Cohen also emphasized at this visit that the Respondent should get the test, and he told the Respondent where he could go and the cost of the test. [Govt. Exh. 7 at 24–25]. Dr. Rubenstein opined that he would be concerned about Mr. Hays' lack of compliance with the test recommendation, as well as being concerned about the possible liver toxicity that results from the medications being prescribed to Mr. Hays. [Tr. 68, 102–03].

55. Mr. Hays also told Mr. Cohen that he was not experiencing any side effects from the medication and that he felt ''real good'' now and was able to work better. [Tr. 212].

56. Dr. Rubenstein ultimately opined that, after reviewing the transcripts of the visits, the medical records, and the recording of the first visit, he did not believe the prescribing of controlled substances was within the acceptable standard of care, given the quantities and frequency of such prescriptions. [Tr. 68–69]. There was also a problem with patient safety because of the large dose of controlled substances prescribed at the initial visit. [Tr. 52, 69]. He also opined that the prescribing of controlled substances to Mr. Hays was not based on sound clinical grounds. [Tr. 69]. Dr. Rubenstein would not consider the prescribing appropriate, given ''the history and physical examination and objective information.'' [Tr. 69–70]. Thus, this prescribing of these controlled substances was outside the usual course of professional practice and without a legitimate medical purpose. [Tr. 70].

57. Further, Dr. Rubenstein did not find any evidence that the Respondent discussed the risk and benefits of the use of controlled substances with Mr. Hays. [Tr. 70].

58. Lastly, Dr. Rubenstein identified numerous ''red flags'' indicating potential diversion and/or abuse of controlled substances. [Tr. 65]. The Respondent seemed to ignore these red flags, for there was no reaction to Mr. Hays' constant requests for more narcotic medication or his sharing of medication with a girlfriend. [Tr. 65; *see also* Govt. Exhs. 3A at 7]. Also, no mention was made of Mr. Hays' visit before July 5, 2010. [Tr. 68].

E. Treatment of Eddie Martinez [15]

59. Mr. Martinez was first treated by the Respondent on June 10, 2010. He did not have an appointment. [Tr. 73, 226; Govt. Exh. 13; *see also* Tr. 314; Govt. Exh. 21 and 21A]. Digital audio and video recordings were made of the visit. [Govt. Exh. 21 and 21A]. A transcript of the audio recording was also made. [Govt. Exh. 8].

60. On the intake documentation,[16] Mr. Martinez answered ''yes'' to several of the questions asked in reference to his pain information. [Govt. Exh. 13 at 4]. However, the form did not provide space for Mr. Martinez to discuss his ''yes'' answers, and nothing in the medical record indicates that the Respondent discussed these questions with Mr. Martinez. [Tr. 73; Govt. Exh. 13]. The Respondent did not discuss the lack of information in Mr. Martinez documentation, for he did not list an emergency contact or a previous doctor. [Govt. Exh. 13 at 1]. When asked to note how long he had been on opiates, Mr. Martinez left that question blank. He also left blank the questions asking if he had taken a list of controlled substances. [Govt. Exh. 13 at 4]. He never described the duration of his pain or whether it was constant. [Govt. Exh. 13 at 2]. On the intake documents, Mr. Martinez denied taking Motrin, Advil, Aleve, or Naproxyn [Govt. Exh. 13 at 4], but then told the Respondent that he had tried taking at least some of those drugs. [Govt. Exh. 8 at 13–14]. Mr. Martinez even admitted that over-the-counter medications provided ''temporary'' relief. [Tr. 228; Govt. Exh. 13 at 14].

61. Yet the Respondent did enter into a physician-patient relationship with Mr. Martinez. [Tr. 92]. He had a face-to-face meeting with Mr. Martinez, and he kept medical records and evidence of the prescriptions he wrote to Mr. Martinez. [Tr. 92; Govt. Exh. 13].

[14] Instead of writing one prescription for 210 Roxicodone tablets, the prescriptions were divided into two separate prescriptions, one for 120 tablets and one for 90 tablets. Mr. Cohen advised Mr. Hays to hand in one of the prescriptions, then ''wait a couple of days or a week and go hand in the other one.'' [Govt. Exh. 6 at 13; Govt. Exh. 19 and 19A]. In this way Mr. Cohen advised Mr. Hays in how to avoid arousing suspicion when presenting his prescriptions to a pharmacy. Further, Mr. Cohen gave Mr. Hays a prescription for ibuprofen, saying that by providing a prescription for a non-controlled substance, he could waylay such suspicion, if needed. If the ibuprofen prescription was not needed in this way, Mr. Hays was to shred the prescription. [Govt. Exh. 6 at 15].

[15] Eddie Martinez is the undercover name of Special Agent Ed Brigantty. [Tr. 218, 221 308].

[16] The Respondent maintained a medical record for Mr. Martinez. [Govt. Exh. 13].

62. Mr. Martinez told the Respondent that he had pain in his leg and his back, and that the pain is worse in the morning. [Tr. 259]. On the pain assessment form, Mr. Martinez had circled his neck and upper spine as the locations for his pain. [Tr. 229–30, 259; Govt. Exh. 13 at 4]. Mr. Martinez told the Respondent that when he would lay down flat on a hard surface, that helped his pain. [Tr. 259].

63. Mr. Martinez signed a pain management agreement. [Govt. Exh. 13 at 5]. Mr. Martinez agreed not to obtain pain medications from any other sources other than the Respondent. [Tr. 74]. Dr. Rubenstein agreed that, if a patient stated that he had purchased illegally pain medications on the street, the patient would have violated this provision of the pain agreement. [*Id.*].

64. Mr. Martinez's urinalysis report was negative for all substances tested, to include opiates. [Tr. 96; Govt. Exh. 13 at 6]. After controlled substances were prescribed, at follow-up visits, the Respondent did not require any other urinalysis tests. [Tr. 112, 231, 249].

65. Mr. Martinez told the Respondent that his pain started ten years ago and ''slowly and surely got worse.'' [Govt. Exh. 8 at 11]. The Respondent asked him about his work, his other medications, and symptoms, and whether he saw any other physicians. [*Id.* at 12–14]. The Respondent conducted a physical examination of Mr. Martinez, which consisted of his raising his arm and leg and the Respondent asking if it hurt in various places on his body. [Tr. 227]. At no time did Mr. Martinez indicate he was experiencing any significant pain. [Govt. Exh. 8 at 16–17; *see also* Govt. Exhs. 21 and 21A]. Yet, compared to his MRI, Mr. Martinez's statements were contradictory. Though he circled areas on a diagram that corresponded to his center back and neck, he told the Respondent he was feeling pain ''[m]ore on my left.'' [Govt. Exh. 8 at 15; Govt. Exh. 13 at 4]. In the written documentation, Mr. Martinez had denied any ''lower back problems.'' [Govt. Exh. 13 at 2]. The Respondent did not address these inconsistencies.

66. The radiologist, interpreting an MRI of Mr. Martinez dated May 27, 2010, found a disc bulge at L3–4 which approached the canal where the nerve leaves at that level, but there was no evidence that the spinal cord was encroached. [Tr. 75; Govt. Exh. 13 at 12]. The radiologist also noted that at L4–5, there was a disc bulge that touched the front of the region where the spinal cord sat. The disc bulge ''was narrowing the canals where the nerves would leave on either side between the fourth and fifth vertebrae of the lumbar spine.'' [Tr. 75–76]. Also, at L5/S1 there were similar findings of enchroachment on both sides. [Tr. 76]. Dr. Rubenstein credibly opined that an MRI, alone, does not justify the prescribing of controlled substances. [Tr. 76]. However, these MRI results could lead a doctor to believe that ''there were some significant changes in the lower back that could be a pain generator.'' [Tr. 104]. Dr. Rubenstein also found a significant disconnect between Mr. Martinez's complaints and the actual diagnosis. Dr. Rubenstein found that Mr. Martinez's complaints of pain in his middle back and neck were not consistent with the MRI. [Tr. 77].

67. The Respondent made a diagnosis of Mr. Martinez, finding ''chronic lumbar pain with stenosis, and in parentheses, spasm, multiple bulges with spondylosis with neural foraminal enchroachment, which is the NFE, canal stenosis and lumbosacral stenosis, which is the LSS. No radicular pain.'' [Tr. 77; Govt. Exh. 13 at 15]. Yet Dr. Rubenstein opined that this is a radiologic diagnosis based on the MRI, not on the complaint of Mr. Martinez, for he complained of pain in his cervical and thoracic region, not the lumbar region. [Tr. 77–78, 106; Govt. Exh. 13 at 4]. Such an inconsistency raised a ''pink'' flag for Dr. Rubenstein. [Tr. 79]. Neither the medical record nor the transcript of the patient visit contain evidence that the Respondent explored this inconsistency with Mr. Martinez. [Tr. 79; Govt. Exhs. 13, 8]. Dr. Rubenstein pointed out that the Respondent seemed only to treat the pathology included in the MRI, while ignoring the fact that Mr. Martinez had identified pain in his middle back and neck. [Tr. 106–07; Govt. Exh. 13 at 4].

68. Mr. Martinez had indicated on his intake forms that he had only taken over-the-counter medications and that they provided temporary relief. [Tr. 79, 228; Govt. Exhs. 8 at 13–14, 13 at 4]. He also told the Respondent that he had taken some ''blues'' [17] and that he had purchased them from someone that he knew had them. [Tr. 228; Govt. Exh. 8 at 12–13; Govt. Exh. 21 and 21A].

69. However, the Respondent prescribed controlled substances to Mr. Martinez on his first visit, Percocet 10mg, 120 tablets, totaling 1200 mg of oxycodone. [Tr. 81; Govt. Exh. 13 at 15–16]. Dr. Rubenstein thought such prescribing would not be appropriate. [Tr. 80]. Specifically, he credibly testified that ''I think the prescription was excessive and not warranted based on the history and physical examination presented.'' [Tr. 81].

70. Mr. Martinez paid $250.00 in cash for this visit and $156.00 for his medication. [Tr. 226, 232–33]. There was no explanation of his diagnosis and no discussion about physical therapy or any other modalities. [Govt. Exh. 8].

71. Next, Mr. Martinez saw Mr. Cohen on June 17, 2010. [Tr. 314; Govt. Exhs. 9, 22, 22A]. Mr. Martinez told Mr. Cohen that the medication did not agree with him and that he wanted a different prescription. [Tr. 233–34]. Mr. Cohen refused to prescribe another medication. He offered to give Mr. Martinez a shot of pain medication, but he refused the offer. [Tr. 234–35]. In answer to a question concerning how he had managed his pain prior to coming to the clinic, Mr. Martinez told Mr. Cohen that he bought ''stuff'' off the street. [Tr. 235–36]. Mr. Cohen advised Mr. Martinez that he would have to ''go back to'' purchasing controlled substances on the street. [Tr. 236; Govt. Exh. 9 at 4–5]. He insisted that Dr. Perper would not change a prescsription for a patient who came back a week later. [Govt. Exh. 9 at 3].[18]

72. Next, the Respondent treated Mr. Martinez on July 28, 2010. [Tr. 82, 238, 314; Govt. Exh. 13 at 19, Govt. Exhs. 10, 23]. Again, Mr. Martinez told the Respondent that he had gotten meds off of the street. [Govt. Exh. 10 at 13]. The Respondent prescribed Roxicodone 30 mg, 90 tablets, a total of 2700 mg of oxycodone. [Tr. 82; Govt. Exh. 13 at 19–20]. This prescription was an increase in the dosage strength of the oxycodone prescribed at the initial visit. [Tr. 83–84]. Again, Dr. Rubenstein found that such prescribing was not warranted, given the lack of any physical examination noting an abnormality ''or focal neurologic deficit to be consistent with his MRI finding or even his complaints.'' [Tr. 85]. Dr. Rubenstein would have expected the Respondent to 're-examine strengths, sensation and reflexes; or at a minimum strength and reflexes at subsequent visits with those types of complaints. And gait would be something I would expect him to assess, too, at least to a degree.'' [Tr. 114]. Yet the medical record fails to indicate that any of these tests were performed at subsequent visits. [Govt. Exh. 13].

73. Lastly, the Respondent saw Mr. Martinez on August 25, 2010. [Tr. 85, 314; Govt. Exhs. 13 at 23–24, Govt. Exhs. 11, 24, 24A]. Again, the Respondent increased the amount of oxycodone given to Mr. Martinez by prescribing Percocet 10mg, 60 tablets for break-through pain, Roxycodone, also an oxycodone containing medication, 30mg, 90 tablets, with a total of 3300 mg of oxycodone. [Tr. 85–86; Govt. Exh. 13 at 24]. The only justification given for increasing the dosage was that Mr. Martinez ran out of his medication early, had purchased controlled substances illegally,[19] and was still complaining of unrelieved pain. [Tr. 86; Govt. Exh. 11 at 20–21; Govt. Exh. 13 at 23]. The Respondent was clearly suspicious of Mr. Martinez, for when Mr. Martinez attempted to argue that the Respondent had decreased his medications, the Respondent urged him to ''do the math.'' [Govt. Exh. 11 at 21]. Yet, in response to Mr. Martinez's statement that he had to get more, the Respondent issued him another prescription for Percocet, the same medication that Mr. Martinez had told Mr. Cohen had made him ill. [Govt. Exh. 11 at 22; Govt. Exhs. 24 and 24A; Govt. Exh. 9 at 3–4].

74. Dr. Rubenstein opined that ''[j]ust simply his complaint of pain without a physical exam that would correlate with the need for same, wouldn't be a reason to titrate the medications.'' [Tr. 86]. Dr. Rubenstein concluded that, based on the history, physical, and objective information available in Mr. Martinez's file, the increase in medication was not a legitimate medical justification. [Tr. 86–87].

75. Dr. Rubenstein did not believe that the Respondent's prescribing of controlled substances to Mr. Martinez was within the acceptable standard of care. [Tr. 87]. The

[17] ''Blues'' are street slang for Roxicodone which contains oxycodone. [*See* Tr. 75].

[18] Although this is inconsistent with Dr. Perper's treatment of David Hays. [*See* FOF 30–33].

[19] The Respondent made no comment regarding this break of the pain management agreement. [Tr. 245–46].

Respondent's prescribing demonstrated a lack of reasonable safety given Mr. Martinez's complaints. [Tr. 87–88].

76. Further, Mr. Martinez had also told the Respondent that he had purchased controlled substances on the street. [Tr. 88–89, 245–46; Govt. Exh. 11 at 20]. Per Dr. Rubenstein, the Respondent's prescribing of controlled substances did not evidence the diligence needed to prevent the risk of diversion or to monitor for such risk. [Tr. 88–89].

77. The Respondent told Mr. Martinez to get a liver function test, but Mr. Martinez did not do that. [Tr. 249–50]. Dr. Rubenstein was concerned that the Respondent failed to consider any treatment options other than prescribing controlled substances. For instance, Mr. Martinez had stated that over-the-counter medications provided ''temporary'' relief, yet no such approach was attempted. [Tr. 79–80].

78. In total, Dr. Rubenstein concluded that ''I don't believe that this patient's history and physical met that criteria for those prescriptions.'' [Tr. 90].

F. The Respondent

79. The Government called the Respondent as a witness, and he asserted his Fifth Amendment rights against self-incrimination and refused to answer any questions beyond stating his name and business address. [Tr. 116–117].

G. Audit

80. Diversion Investigator Janice Barnes (''DI Barnes'') conducted an accountability audit based on the Respondent's records. [Tr. 280–81]. Specifically, she reviewed the Respondent's inventory records of controlled substances on hand, receiving records to include DEA Form 222 for Schedule II controlled substances, and dispensing records, to include prescriptions. [Tr. 281–82].

81. The audit covered the timeframe of March 2, 2010, to February 23, 2011. The beginning inventory came from the Respondent's computerized inventory. The beginning inventory and the amount of controlled substances received during the audit period are added together to reflect the total number of controlled substances for which the Respondent would be accountable. [Tr. 283]. For oxycodone 30 mg. that total number accountable was 199,752. [Tr. 283; Govt. Exh. 32]. On the date of the closing inventory, February 23, 2011, the Respondent had no controlled substances on hand. [Tr. 284; Govt. Exh. 32]. The Respondent was able to account for, using his prescriptions, 180,559 tablets of oxycodone 30 mg. [Tr. 284; Govt. Exh. 32]. Thus, he did not have records showing the dispensing of 19,193 tablets of oxycodone 30 mg. [Tr. 284; Govt. Exh. 32]. However, after verifying the receiving documents with the Respondent's suppliers, in fact the Respondent should have received an additional 4800 tablets of oxycodone 30 mg. [Tr. 285; Govt. Exh. 32 at 2]. Thus, the Respondent was actually responsible for 202,980, and the total accountable is now 204,552 tablets. The Respondent's records still only showed his dispensing of 180,559 tablets, resulting in his being unable to account for 23,993 tablets of oxycodone 30 mg. [Tr. 286–87; Govt. Exh. 32 at 2].

82. Using the same computation method and the Respondent's records, the DEA's audit disclosed that the Respondent had an overage, and therefore, was unable to account for 4808 tablets of oxycodone 15 mg. [Tr. 288; Govt. Exh. 32 at 1]. However, using the suppliers' records, the Respondent was only unable to account for 8 tablets of oxycodone 15 mg. [Tr. 288; Govt. Exh. 32 at 2].

83. Using the same computation method and the Respondent's records, the DEA's audit disclosed that the Respondent was unable to account for 38 tablets of oxycodone 40 mg., 71 tablets of oxycodone 80 mg., 2,565 Endocet 10/325 mg. and 365 tablets of Endocet 10/650 mg. [Tr. 289–293; Govt. Exh. 32 at 1]. Although DEA personnel searched for records disclosing controlled substances returned from customers, returns to suppliers, thefts, or surrenders of controlled substances, no such records were found. [Tr. 291; Govt. Exh. 32 at 1].

84. Lastly, the DEA personnel were unable to find an initial inventory which should have been taken on the date the Respondent moved to the North Swinton Avenue address. [Tr. 294]. Even if the Respondent had no controlled substances on hand, he needed to take an initial, written inventory reflecting this zero balance. [Tr. 294].

IV. STATEMENT OF LAW AND DISCUSSION

A. Position of the Parties

1. Position of the Government

The Government asserts that the Respondent's DEA Certificates of Registration should be revoked. As a basis for that assertion, the Government argues that the Respondent prescribed controlled substances to patients without a legitimate medical purpose and outside the course of professional practice, in violation of DEA regulations and precedent. Further, the Respondent violated Florida law when he prescribed controlled substances after an inadequate physical examination and history which failed to justify such prescribing. [Government's Proposed Findings of Fact, Conclusions of Law and Argument (''Government's Brief'') at 26–28]. The medical records actually contained inaccuracies and possibly false statements, the Government argues. [*Id.*]. Further, the Respondent failed to discuss the risks and benefits of using controlled substances, and he failed to refer Mr. Hays and Mr. Martinez for ''additional evaluation and treatment.'' [Government's Brief at 26–27].

Next the Government asserts that the Respondent issued controlled substance prescriptions knowing that his patients could be drug abusers or diverters. [Government's Brief at 27]. Prescribing under such circumstances ''constitutes prescribing outside the usual course of professional practice'' and is contrary to DEA regulations. [Government's Brief at 27]. Further, the Respondent increased the amount of controlled substances without a legitimate medical reason. The Respondent also prescribed additional types of controlled substances without medical justification. The Respondent ''demonstrated no skill when issuing prescriptions to the obviously opiate naïve DEA officers and issued those prescriptions without regard for their safety.'' [Government's Brief at 27–28].

The Government further asserts that the Respondent failed to follow the steps outlined in the Florida Administrative Code prior to prescribing pain medication. [Government's Brief at 28].

The Government also asserts that the Respondent violated DEA regulations when he failed to guard against diversion of controlled substances. The Respondent overlooked numerous instances of drug seeking behavior and prescribed controlled substances to such patients anyway. [Government's Brief at 28]. The Respondent's decision to keep providing those patients with controlled substance prescriptions increased the risk of illegal diversion. [Government's Brief at 29].

As for the actions taken by the physician assistant, Mr. Cohen, under both Florida law and DEA precedent, the Respondent is liable for Mr. Cohen's conduct. Mr. Cohen issued prescriptions for controlled substances signed by the Respondent, instructed Mr. Hays in ways to ensure pharmacists would fill controlled substances prescriptions, and he advised Mr. Martinez to go back to purchasing controlled substances on the street. The fact that Mr. Cohen performed these actions does not absolve the Respondent from his responsibilities in supervising Mr. Cohen. [Government's Brief at 29].

The Government argues that the Respondent's failure to maintain accurate medical records threatens the public health and safety. ''Moreover, Respondent's employment of a physician assistant who provides advice to patients to assist them in obtaining drugs for abuse and/or diversion is both troubling and inconsistent with the public interest.'' [Government's Brief at 30].

Lastly, the Respondent's failure to admit fault or to accept responsibility for his misconduct also weighs heavily in the public interest determination under DEA precedent. The fact that the Respondent neither testified nor presented any evidence to rebut the Government's *prima facie* case weighs in favor of revocation. The Government argues that an adverse inference should be taken from the Respondent's refusal to testify, and the record clearly lacks any evidence of mitigating circumstances to consider on the Respondent's behalf. In conclusion, the Government requests revocation of the Respondent's DEA Certificates of Registration. [Government's Brief at 30–32].

2. *Position of the Respondent*

The Respondent requests that his DEA Certificate of Registration be reinstated. He argues that the Government has failed to meet its burden of proof regarding his prescribing of pain medication; for he prescribed controlled substances for a legitimate medical purpose and in compliance with the standards set forth by the Florida Medical Board Guidelines. [Respondent Zvi H. Perper, M.D.'s Post-Hearing Brief (Resp. Brief) at 2,4,6]. Further, the Government has not met its burden of proof that the Respondent's registration is inconsistent with the public interest. [Resp. Brief at 6].

The Respondent next argues that the Court lacked subject matter jurisdiction of Certificate of Registration numbers BP7732349, BP7622752, BP7622764, BP3429835, and BP8477639 because the Order to Show Cause only addressed Certificate of Registration number FP1312406. He asserts that the DEA did not issue an Order to Show Cause for the remaining DEA registration numbers. [Resp. Brief at 2–3, 5].[20]

B. Statement of Law

Pursuant to 21 U.S.C. § 824(a)(4), the Deputy Administrator[21] may revoke a DEA Certificate of Registration if she determines that the continuance of such registration would be ''inconsistent with the public interest'' as determined pursuant to 21 U.S.C. § 823(f). Section 823(f) requires that the following factors be considered:

(1) The recommendation of the appropriate State licensing board or professional disciplinary authority.

(2) The applicant's experience in dispensing, or conducting research with respect to controlled substances.

(3) The applicant's conviction record under Federal or State laws relating to the manufacture, distribution, or dispensing of controlled substances.

(4) Compliance with applicable State, Federal, or local laws relating to controlled substances.

(5) Such other conduct which may threaten the public health and safety.

These factors may be considered in the disjunctive: The Deputy Administrator may properly rely on any one or a combination of these factors, and may give each factor the weight she deems appropriate, in determining whether a registration should be revoked or an application for registration denied. Marvin L. Gibbs, Jr., M.D., 69 Fed. Reg. 18299, 18302 (DEA 2004) (citing Henry J. Schwarz, Jr., M.D., 54 Fed. Reg. 16,422 (DEA 1989)).

Also, in an action to revoke a registrant's certificate, the DEA has the burden of proving that the requirements for revocation are satisfied. [21 C.F.R. § 1301.44(e)]. The burden of proof shifts to the Respondent once the Government has made its prima facie case. [Medicine Shoppe, 73 Fed. Reg. 364, 387 (DEA 2008); Thomas Johnston, 45 Fed. Reg. 72,311 (DEA 1980)].

As the Supreme Court recently explained, ''the prescription requirement * * * ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, [it] also bars doctors from peddling to patients who crave the drugs for those prohibited uses.'' [Gonzales v. Oregon, 546 U.S. 243, 274 (2006) (citing United States v. Moore, 423 U.S. 122, 135, 143 (1975))]. When an administrative tribunal elects to disregard the uncontradicted opinion of an expert, it runs the risk of improperly declaring itself as an interpreter of medical knowledge. [Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966)].

DEA precedent has also held that ''past performance is the best predictor of future performance.'' [ALRA Labs, Inc. v. DEA, 54 F.3d 450, 452 (7th Cir. 1995)]. Further, DEA has repeatedly held that ''where a registrant has committed acts inconsistent with the public interest, the registrant must accept responsibility for his actions and demonstrate that he will not engage in future misconduct.'' [*Medicine Shoppe,* 73 Fed. Reg. at 387; *see also* Samuel S. Jackson, 72 Fed. Reg. 23,848, 23,853 (DEA 2007)].

In this matter, factors two, four and five are relevant in determining the appropriate resolution.

C. Discussion

1. Factors 2 and 4: The applicant's experience in dispensing, or conducting research with respect to controlled substances; Compliance with applicable State, Federal, or local laws relating to controlled substances

a. Patient Care

Under a longstanding DEA regulation, a prescription for a controlled substance is not ''effective'' unless it is ''issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.'' [21 C.F.R. § 1306.04(a); George C. Aycock, M.D., 74 Fed. Reg. 17529, 17541 (DEA 2009)]. This regulation further provides that ''an order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. § 829] and . . . the person issuing it, shall be subject to the penalties provided for violations of the provisions of law related to controlled substances.'' [*Id. See also* 21 U.S.C. § 802(10) (defining the term ''dispense'' as meaning ''to deliver a controlled substance to an ultimate user by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance'')].

Likewise, under Florida law, grounds for disciplinary action or denial of state licensure include ''prescribing . . . any controlled substance, other than in the course of the physician's professional practice,'' and prescribing such substances ''inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.'' [Fla. Stat. § 458.331(q)(2009)].

Rulemaking authority regarding the practice of medicine within the state of Florida has been delegated to the Florida Board of Medicine (Florida Board). [Fla. Stat. § 458.326 (2009)]. Florida has promulgated a regulation, ''Standards for the Use of Controlled Substances for Treatment of Pain,'' Fla. Admin. Code r 64B8–9.013 (2009) (''Florida Standards''), which recognize that ''inappropriate prescribing of controlled substances . . . may lead to drug diversion and abuse by individuals who seek them for other than legitimate medical use.'' [*Id.* at § 9.013(d)]. The language employed by the regulation under the preamble section entitled ''Pain Management Principles'' makes clear that the standards ''are not intended to define complete or best practice, but rather to communicate what the [Florida Board] considers to be within the boundaries of professional practice.'' *Id.* at 9.013(1)(g). Thus, the plain text supports an inference that the standards provide the minimum requirements for establishing conduct that meets the professional practice of controlled substance-based pain management within the state. Likewise, the range of acceptable practice that is built into the regulation underscores the importance of seeking an expert opinion in reaching a correct adjudication of whether a registrant has met the applicable Florida standard.

Here, Dr. Rubenstein found that the Respondent issued prescriptions that were not for a legitimate medical purpose or in the course of usual medical practice. Specifically, he found that the prescriptions issued to Mr. Hays were not within the acceptable standard of care, given the quantities and frequency of such prescriptions. [FOF 56]. Also, given the medical history, the physical examination, and other objective information, Dr. Rubenstein opined that the prescriptions were not based on sound clinical grounds. Thus, he concluded that the prescriptions issued to Mr. Hays were issued outside the usual course of professional practice and were not issued for a legitimate medical purpose. [FOF 56].

Likewise, Dr. Rubenstein found that the Respondent issued prescriptions to Mr. Martinez outside the acceptable standard of care. [FOF 74–75]. Specifically, he found that the Respondent demonstrated a lack of reasonable safety in his prescribing, given Mr. Martinez's complaints. As he credibly concluded, ''I don't believe that this patient's history and physical met the criteria for those prescriptions.'' [FOF 78].

For both Mr. Hays and Mr. Martinez, the Respondent shifted medications, either increasing the dosages or adding Dilaudid and Valium without medical justification. [FOF 48, 53, 72, 73, 74]. In addition, the circumstances surrounding the Respondent's prescription of Valium nearly equates to outright drug dealing. [*See* FOF 53 (suggesting patient had trouble sleeping in response to his request that Mr. Cohen find a ''creative way to deal with him.'')].

Dr. Rubenstein found that the Respondent's physical examinations failed to provide an adequate basis for his prescribing of controlled substances. [*See* FOF 26, 27, 52]. Likewise, relying upon the MRI interpretation as a sole basis for prescribing controlled substances is not appropriate. [FOF 24]. However, it appears that the Respondent did so rely. For example, while Mr. Hays experienced no pain during the neurological examination, the Respondent prescribed controlled substances for him. [FOF 24, 26, 28, 52]. In addition, when treating Mr. Martinez, the Respondent, per Dr. Rubenstein, seemed only to treat the pathology included in the MRI, while ignoring the fact that Mr. Martinez had identified pain in his middle back and neck. [FOF 67]. [*See* Laurence T. McKinney, 73 Fed. Reg. 43260, 43265 n. 22 (DEA 2008)]. Further, the Respondent prescribed controlled substances to Mr. Hays too often, and in one instance prescribed controlled

[20] *But see* ALJ Exhibit 2 which shows that Order II had been served on the Respondent.

[21] The Deputy Administrator has the authority to make such determinations pursuant to 28 C.F.R. §§ 0.100(b) and 0.104 (2011).

substances prior to the date he had told Mr. Hays to return without even discussing the early dispensing of controlled substances. [FOF 39, 41, 42]. This occurred despite the Respondent's assertion that he only gives out pills for one month, and Mr. Cohen's statement that Dr. Perper would not change a prescription for a patient that came back a week later. [FOF 25, 71]. Thus, based on the foregoing, it is clear that the Respondent issued prescriptions for excessive amounts without an adequate basis. Therefore, his prescriptions were for an illegitimate medical purpose in violation of both Federal and Florida law.

Subsequent to the initiation of treatment, ''the physician should adjust drug therapy to the individual medical needs of each patient. Other treatment modalities or a rehabilitation program may be necessary depending on the etiology of the pain and the extent to which the pain is associated with physical and psychosocial impairment.'' Fla. Admin. Code r 64B8–9.013(3)(b). Here, the Respondent failed to meet this standard. The Respondent failed to discuss other treatment modalities or physical therapy with Mr. Martinez, despite an indication in his case, that non-controlled substances had been utilized to control his pain in the past. [FOF 70, 77]. Although he ordered liver function tests, the Respondent failed to take action when the patients refused to comply other than to discuss their non-compliance. Both this failure to comply and decision not to discuss other treatment options concerned Dr. Rubenstein. [FOF 44, 54, 58, 77].

Further, the Respondent failed to adjust his drug therapy to the individual medical needs of each patient. Dr. Rubenstein found that the doses and frequency of prescribing to Mr. Hays were excessive given the medical indications. [FOF 30, 34, 53]. Subsequently, the Respondent [22] prescribed controlled substances at the patient's request, without medical justification for the increase in controlled substances. [FOF 38, 39].

Likewise, Dr. Rubenstein found that the Respondent's prescribing to Mr. Martinez on the first visit ''was excessive and not warranted based on the history and physical examination presented.'' [FOF 69].

Another standard adopted by the Medical Board, under the subheading ''Informed Consent and Agreement for Treatment,'' is the directive that ''[t]he physician should discuss the risks and benefits of the use of controlled substances with the patient, persons designated by the patient, or with the patient's surrogate or guardian if the patient is incompetent.'' [Fla. Admin. Code r 64B8–9.003(3)(c)]. Here the Respondent failed to discuss the risks associated with the use of controlled substances. [FOF 57].

The Florida Standards also state that, ''if the patient is determined to be at high risk for medication abuse or have a history of substance abuse, the physician should employ the use of a written agreement between the physician and patient outlining patient responsibilities, including, but not limited to: ''1. Urine/serum medication levels screening when requested; 2. Number and frequency of all prescription refills; and 3. Reasons for which drug therapy may be discontinued (i.e. violation of agreement.)'' Yet the Respondent was provided with information from the patients that clearly showed a violation of the agreement, and the Respondent failed to take any action in response. [FOF 48, 73]. [Fla. Admin. Code r 64B8–9.003(3)(c)]. In addition, despite these red flags of diversion, the Respondent failed to follow up with urine screens beyond the first visit, to ensure the prescribed controlled substances were being consumed by the patient and not diverted. [FOF 64]. Yet, the Respondent utilized pain management agreements. [FOF 20, 63].

The Florida Standards direct that ''[p]hysicians should be diligent in preventing the diversion of drugs for illegitimate purposes.'' [*Id.* at 9.013(1)(d). Here, the Respondent and Mr. Cohen were given direct evidence of diversion and failed to act. Mr. Martinez clearly told the Respondent and Mr. Cohen that he had purchased controlled substances off the street. [FOF 68, 71, 76]. Yet neither one took any action in response to this information. Mr. Hays told Mr. Cohen that he had shared his controlled substances with his girlfriend, and again, Mr. Cohen failed to take any action. [FOF 49]. A practitioner who takes no ''precautions against . . . misuse and diversion'' exceeds the bounds of professional practice when he prescribes controlled substances. [United States v. Moore, 423 U.S. 122, 142–43 (1975)]. Such inaction violates the standard of diligence expected of a DEA registrant.

Florida law further provides that grounds for such disciplinary action also include:

> Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician . . . and that justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

[Id. § 458.331(m)].

Inherent in this law is the requirement that the medical records accurately report the required data. [*See* Fla. Admin. Code r. 64B8–9.013(3)]. Here, Mr. Martinez failed to complete his intake documentation, leaving critical portions, such as his level of pain, blank. [FOF 60]. The Respondent did not discuss the missing data with Mr. Martinez and made no effort to complete the medical history. [*Id.*].

Further, the Respondent charted inaccurately. For example, despite no discussion about the relief of pain Mr. Hays experienced from the Percocet, the Respondent wrote that Mr. Hays had experienced ''no relief (from) pain.'' [FOF 33]. Likewise, the Respondent charted ''break-through pain'' and utilized this information to justify increasing the amount of controlled substances dispensed to Mr. Hays. Yet Mr. Hays had not complained of break-through pain. [FOF 43, 47].

b. Inventory and Audit

Under Florida law, a dispensing physician is required to abide by the statutory and regulatory recordkeeping provisions identical to those levied against a pharmacy. [Fla. Stat. Ann. § 465.0276(2)(b) (2009)]. That includes compliance with 21 C.F.R. § 1304.04, which requires dispensed prescriptions to be maintained in a readily retrievable manner for two years after dispensing. [*See* Fla. Admin. Code r. 64B16–28.140 (2009) (stating a pharmacy must comply with § 1304.04)].

In addition, under federal law, a dispensing physician is required to keep certain records similar to those kept by retail pharmacies. For example, 21 C.F.R § 1304.03(d) requires a registered practitioner who regularly dispenses to keep records of Schedule II–V controlled substances that he dispenses. Specifically, the registrant is required to keep inventories of schedules I and II controlled substances. In addition, the registrant is required to keep inventories of schedules III through V controlled substances either separate from all other records of the registrant or in a manner that is readily retrievable. [§ 1304.04 (f)(1) and (2); *See also* § 1304.04(g) (imposing this requirement on registered practitioners required to maintain records)]. Federal regulations also set out in detail the requirements of those inventories. [*See* § 1304.11(e)(3) (specifying that a dispensing practitioner's inventory of Schedules I and II must be conducted by hand count but that Schedules III through V can be estimated provided the container holds less than 1000 tablets and requiring the practitioner to maintain records identical to those maintained by manufacturers under § 1304.11(e)(1)(iii) and (iv))].

Here, the Respondent failed to meet such requirements. Specifically, the Respondent failed to conduct the required initial inventory after moving to a new practice location. [FOF 84]. Next, when conducting an accountability audit, the DEA found that the Respondent was unable to account for, among other discrepancies, 23,993 dosage units of oxycodone 30 mg tablets, [FOF 81], and 2,565 dosage units of Endocet 10/325, [FOF 83].

Factor Five: Such other conduct which may threaten the public health and safety.

Although factor five is quite broad, the Deputy Administrator has qualified its breadth by limiting the considerations made under that factor to those where there is ''a substantial relationship between the conduct and the CSA's purpose of preventing drug abuse and diversion.'' [Tony T. Bui, 75 Fed. Reg. 49,979, 49,988 (DEA 2010)].

Here, I find that Mr. Cohen advised Mr. Hays on ways to present prescriptions so that the pharmacy would not be ''suspicious.'' Specifically, Mr. Hays was to hand in one of the controlled substances prescriptions and then wait to hand in the other one. [FOF 49]. Further, Mr. Cohen gave Mr. Hays a prescription for ibuprofen, to be used to waylay the pharmacist's suspicion. If the pharmacist was not suspicious, Mr. Hays was to destroy the ibuprofen prescription. [FOF 49]. Such deception in handling

[22] The Respondent remains liable for Mr. Cohen's actions. Florida law states that ''[e]ach physician . . . supervising a licensed physician assistant must be qualified in the medical areas in which the physician assistant is to perform and shall be individually . . . responsible and liable for the performance and the acts and omissions of [the] physician assistant.'' Fla. Stat. Ann. § 458.347(3) (2009).

prescriptions for controlled substances threatens the public health and safety, for it circumvents the checks and balances available in the pharmacist's corresponding liability for the dispensing of controlled substances. [*See* 21 C.F.R. 1306.04].

Next Mr. Cohen advised Mr. Martinez to go back to buying controlled substances on the street if he needed more drugs than the ones already prescribed. [FOF 71]. Advising Mr. Martinez to engage in illegal activity in purchasing controlled substances in this manner promotes diversion and therefore, directly threatens the public health and safety.

Lastly, Dr. Rubenstein found that the Respondent lacked concern for patient safety. He prescribed large amounts of controlled substances to opioid naïve patients. [FOF 30, 53, 56]. He also increased the amounts of controlled substances he prescribed, and such increases were unjustified and reflect a lack of concern for patient safety. [FOF 69, 72–74]. Dr. Rubenstein concluded that the increase in medication was not medically justified. [FOF 74].

The Respondent did not testify in this proceeding.[23] Therefore, he neither took responsibility for his misconduct nor provided any assurances that he has implemented remedial measures to ensure such conduct is not repeated. Such silence weighs against the Respondent's continued registration. [Medicine Shoppe, 73 Fed. Reg. at 387; *see also* Samuel S. Jackson, 72 Fed. Reg. 23,848, 23,853 (DEA 2007)].

V. CONCLUSION AND RECOMMENDATION

Consistent with the analysis in this matter, I conclude that the Government has met its burden and established its *prima facie* case for revocation. The Respondent has failed to provide any explanation for his conduct or any assurances regarding his future conduct. Therefore, I recommend that the Respondent's viable DEA registrations FP1312406, BP3429835, and BP8477639, be revoked and any pending applications for renewal or modification of such registrations be denied.

Dated: July 19, 2011

Gail A. Randall, Administrative Law Judge

[FR Doc. 2012–25618 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

[23] The Government asks me to take an adverse inference from the Respondent's failure to testify. However, the Government does not assert what adverse inference it believes such silence establishes. Although I agree that the Government is entitled to such an inference as established by the cited case law, without a requested inference, I am at a loss in granting the Government's request.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances, Notice of Application, Noramco, Inc.

Pursuant to Title 21, Code of Federal Regulations (CFR), 1301.34(a), this is notice that on August 6, 2012, Noramco, Inc., 500 Swedes Landing Road, Wilmington, Delaware 19801–4417, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of the following basic classes of controlled substances:

Drug	Schedule
Phenylacetone (8501)	II
Opium, raw (9600)	II
Poppy Straw Concentrate (9670)	II
Tapentadol (9780)	II

The company plans to import raw Opium (9600) and Poppy Straw Concentrate (9670) to manufacture other controlled substances. The company plans to import Tapentadol (9780) in intermediate form for the bulk manufacture of Tapentadol (9780) for distribution to its customers. The company plans to import Phenylacetone (8501) in bulk for the manufacture of a controlled substance.

Comments and requests for hearings on applications to import narcotic raw material are not appropriate. 72 FR 3417 (2007).

In regard to the non-narcotic raw material, any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances listed in schedules I or II, which fall under the authority of section 1002(a)(2)(B) of the Act (21 U.S.C. 952(a)(2)(B)) may, in the circumstances set forth in 21 U.S.C. 958(i), file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, **Federal Register** Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than November 19, 2012.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substance in schedules I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25644 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances, Notice of Registration, ISP Freetown Fine Chemicals

By Notice dated July 2, 2012, and published in the **Federal Register** on July 11, 2012, 77 FR 40910, ISP Freetown Fine Chemicals, 238 South Main Street, Assonet, Massachusetts 02702, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Phenylacetone (8501), a basic class of controlled substance listed in schedule II.

The company plans to import the controlled substance to manufacture amphetamine.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of ISP Freetown Fine Chemicals to import the basic class of controlled substance is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated ISP Freetown Fine Chemicals to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25640 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances, Notice of Registration, Akorn, Inc.

By Notice dated July 17, 2012, and published in the **Federal Register** on July 26, 2012, 77 FR 43861, Akorn, Inc., 1222 W. Grand Avenue, Decatur, Illinois 62522, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of Remifentanil (9739), a basic class of controlled substance listed in schedule II.

The company plans to import Remifentanil in bulk for use in dosage-form manufacturing.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of Akorn, Inc., to import the basic class of controlled substance is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Akorn Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25643 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application; Noramco, Inc.

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on July 27, 2012, Noramco, Inc., 500 Swedes Landing Road, Wilmington, Delaware 19801–4417, made application by renewal to the Drug Enforcement Administration (DEA) as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Codeine-N-oxide (9053)	I
Dihydromorphine (9145)	I
Morphine-N-oxide (9307)	I
Amphetamine (1100)	II
Methylphenidate (1724)	II
Phenylacetone (8501)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II
Morphine (9300)	II
Oripavine (9330)	II
Thebaine (9333)	II
Opium extracts (9610)	II
Opium fluid extract (9620)	II
Opium tincture (9630)	II
Opium, powdered (9639)	II
Opium, granulated (9640)	II
Oxymorphone (9652)	II
Noroxymorphone (9668)	II
Tapentadol (9780)	II

The company plans to manufacture the listed controlled substances in bulk for distribution to its customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than December 17, 2012.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25638 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Cambridge Isotope Lab

By Notice dated June 18, 2012, and published in the **Federal Register** on June 26, 2012, 77 FR 38086, Cambridge Isotope Lab, 50 Frontage Road, Andover, Massachusetts 01810, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Morphine (9300), a basic class of controlled substance listed in schedule II.

The company plans to utilize small quantities of the listed controlled substance in the preparation of analytical standards.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Cambridge Isotope Lab to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Cambridge Isotope Lab to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25634 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Chattem Chemicals, Inc.

By Notice dated June 18, 2012, and published in the **Federal Register** on June 26, 2012, 77 FR 38086, Chattem Chemicals, Inc., 3801 St. Elmo Avenue, Building 18, Chattanooga, Tennessee 37409, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Gamma Hydroxybutyric Acid (2010).	I
4-Methoxyamphetamine (7411)	I
Dihydromorphine (9145)	I
Amphetamine (1100)	II
Methamphetamine (1105)	II
Lisdexamfetamine (1205)	II
Methylphenidate (1724)	II
Pentobarbital (2270)	II
Codeine (9050)	II
Dihydrocodeine (9120)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II
Hydrocodone (9193)	II

Drug	Schedule
Meperidine (9230)	II
Methadone (9250)	II
Methadone intermediate (9254)	II
Morphine (9300)	II
Oripavine (9330)	II
Thebaine (9333)	II
Opium tincture (9630)	II
Opium, powdered (9639)	II
Opium, granulated (9640)	II
Oxymorphone (9652)	II
Noroxymorphone (9668)	II
Alfentanil (9737)	II
Remifentanil (9739)	II
Sufentanil (9740)	II
Tapentadol (9780)	II
Fentanyl (9801)	II

The company plans to manufacture the listed controlled substances in bulk for distribution and sale to its customers. Regarding (9640) the company plans to manufacture another controlled substance for sale to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Chattem Chemicals, Inc., to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Chattem Chemicals, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25637 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Lin Zhi International, Inc.

By Notice dated May 15, 2012, and published in the **Federal Register** on May 22, 2012, 77 FR 30326, Lin Zhi International, Inc., 670 Almanor Avenue, Sunnyvale, California 94085, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances:

Drug	Schedule
Tetrahydrocannabinols (7370)	I
3,4-Methylenedioxymethamphetamine (MDMA) (7405).	I
Cocaine (9041)	II
Oxycodone (9143)	II
Hydrocodone (9193)	II
Methadone (9250)	II
Dextropropoxyphene, bulk (non-dosage forms) (9273).	II
Morphine (9300)	II

The company plans to manufacture the listed controlled substances as bulk reagents for use in drug abuse testing.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Lin Zhi International, Inc., to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Lin Zhi International Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25635 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances, Notice of Registration, Chemica

By Notice dated June 18, 2012, and published in the **Federal Register** on June 26, 2012, 77 FR 38086, Chemica, 316 West 130th Street, Los Angeles, California 90061, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Methamphetamine (1105), a basic class of controlled substance listed in schedule II.

The above listed controlled substance is an intermediate in the manufacture of Benzphetamine, a schedule III non-narcotic controlled substance. The methamphetamine will not be sold as a commercial product. The company plans to utilize a bulk active pharmaceutical ingredient (API), as an intermediate for the development of another controlled substance, and further distribution to its customers.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a), and determined that the registration of Chemica to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Chemica to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 823, and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: October 9, 2012.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2012–25633 Filed 10–17–12; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

Affirmative Decisions on Petitions for Modification Granted in Whole or in Part

AGENCY: Mine Safety and Health Administration (MSHA), 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 **Federal Register** Notice notifies the public that MSHA has investigated and issued a final decision on certain mine operator petitions to modify a safety standard.

ADDRESSES: Copies of the final decisions are posted on MSHA's Web Site at *http://www.msha.gov/indexes/*

petition.htm. The public may inspect the petitions and final decisions during normal business hours in MSHA's Office of Standards, Regulations and Variances, 1100 Wilson Boulevard, Room 2349, Arlington, Virginia 22209. All visitors must first stop at the receptionist desk on the 21st Floor to sign in.

FOR FURTHER INFORMATION CONTACT: Roslyn B. Fontaine, Office of Standards, Regulations and Variances at 202–693–9475 (Voice), *fontaine.roslyn@dol.gov* (Email), or 202–693–9441 (Telefax), or Barbara Barron at 202–693–9447 (Voice), *barron.barbara@dol.gov* (Email), or 202–693–9441 (Telefax). [These are not toll-free numbers].

SUPPLEMENTARY INFORMATION:

I. Introduction

Under section 101 of the Federal Mine Safety and Health Act of 1977, a mine operator may petition and the Secretary of Labor (Secretary) may modify the application of a mandatory safety standard to that mine if the Secretary determines that: (1) An alternative method exists that will guarantee no less protection for the miners affected than that provided by the standard; or (2) that the application of the standard will result in a diminution of safety to the affected miners.

MSHA bases the final decision on the petitioner's statements, any comments and information submitted by interested persons, and a field investigation of the conditions at the mine. In some instances, MSHA may approve a petition for modification on the condition that the mine operator complies with other requirements noted in the decision.

II. Granted Petitions for Modification

On the basis of the findings of MSHA's investigation, and as designee of the Secretary, MSHA has granted or partially granted the following petitions for modification:

• *Docket Number:* M–2010–036–C.
FR Notice: 75 FR 75499 (12/3/2010).
Petitioner: Sequoia Energy, LLC, P.O. Box 838, Middlesboro, Kentucky 40965.
Mine: Sequoia Preparation Facility, MSHA I.D. No. 15–12428, located in Harlan County, Kentucky.
Regulation Affected: 30 CFR 77.214 (Refuse piles; general).

• *Docket Number:* M–2011–004–C.
FR Notice: 76 FR 22153 (4/20/2011).
Petitioner: AMFIRE Mining Company, LLC, One Energy Place, Latrobe, Pennsylvania 15650.
Mine: Barrett Mine, MSHA I.D. No. 36–09342, located in Indiana County, Pennsylvania.
Regulation Affected: 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35(a)(5)(i) (Portable (trailing) cables and cords).

• *Docket Number:* M–2011–005–C.
FR Notice: 76 FR 22153 (4/20/2011).
Petitioner: AMFIRE Mining Company, LLC, One Energy Place, Latrobe, Pennsylvania 15650.
Mine: Gillhouser Run Mine, MSHA I.D. No. 36–09033, located in Indiana County, Pennsylvania.
Regulation Affected: 30 CFR 75.503 (Permissible electric face equipment; maintenance) and 30 CFR 18.35(a)(5)(i) (Portable (trailing) cables and cords).

• *Docket Number:* M–2011–018–C.
FR Notice: 76 FR 37835 (6/28/2011).
Petitioner: Dominion Coal Corporation, P.O. Box 70, Vansant, Virginia 24656.
Mine: Mine No. 36, MSHA I.D. No. 44–06759, located in Buchanan County, Virginia.
Regulation Affected: 30 CFR 75.1700 (Oil and gas wells).

• *Docket Number:* M–2011–020–C.
FR Notice: 76 FR 37833 (6/28/2011).
Petitioner: Luminant Mining Company, 500 N Akard Street, Dallas, Texas 75201.
Mines: Bremond Strip Mine, MSHA I.D. No. 41–02788, located in Robertson County, Texas; Three Oaks Strip Mine, MSHA I.D. No. 41–04085, located in Lee County, Texas; Leesburg Strip Mine, MSHA I.D. No. 41–04444, located in Titus County, Texas; Kosse Strip Mine, MSHA I.D. No. 41–04586, located in Limestone County, Texas; and Turlington Strip Mine, MSHA I.D. No. 41–04802, located in Freestone County, Texas;
Regulation Affected: 30 CFR 77.803 (Fail safe ground check circuits on high-voltage resistance grounded systems).

• *Docket Number:* M–2011–021–C.
FR Notice: 76 FR 37834 (6/28/2011).
Petitioner: Buckskin Mining Company (Previously Triton Coal Company), P.O. Box 3027, Gillette, Wyoming 87217–3027.
Mine: Buckskin Mine, MSHA I.D. No. 48–01200, located in Campbell County, Wyoming.
Regulation Affected: 30 CFR 77.1607(u) (Loading and haulage equipment; operation).

• *Docket Number:* M–2011–025–C.
FR Notice: 76 FR 54803 (9/2/2011).
Petitioner: AMFIRE Mining Company, LLC, One Energy Place, Latrobe, Pennsylvania 15650.
Mine: Dora 8 Mine, MSHA I.D. No. 36–08704, located in Jefferson County, Pennsylvania.
Regulation Affected: 30 CFR 75.503 (Permissible electric equipment; maintenance) and 30 CFR 18.35(a)(5)(i) (Portable (trailing) cables and cords).

• *Docket Number:* M–2011–027–C.
FR Notice: 76 FR 54804 (9/2/2011).
Petitioner: Midland Trail Energy, LLC, 3301 Point Lick Drive, Charleston, West Virginia 25306.
Mine: Blue Creek No. 1 Deep Mine, MSHA I.D. No. 46–09297, located in Kanawha County, West Virginia.
Regulation Affected: 30 CFR 75.1700 (Oil and gas wells).

• *Docket Number:* M–2011–041–C.
FR Notice: 77 FR 811 (1/6/2012).
Petitioner: D & F Deep Mine, 15 Motter Drive, Pine Grove, Pennsylvania 17963.
Mine: Buck Drift #2 Mine, MSHA I.D. No. 36–09963, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1200(d) & (i) (Mine map).

• *Docket Number:* M–2011–042–C.
FR Notice: 77 FR 811 (1/6/2012).
Petitioner: D & F Deep Mine, 15 Motter Drive, Pine Grove, Pennsylvania 17963.
Mine: Buck Drift #2 Mine, MSHA I.D. No. 36–099963, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1202 and 75.1202–1(a) (Temporary notations, revisions and requirements).

• *Docket Number:* M–2011–043–C.
FR Notice: 77 FR 811 (1/6/2012).
Petitioner: D & F Deep Mine, 15 Motter Drive, Pine Grove, Pennsylvania 17963.
Mine: Buck Drift #2 Mine, MSHA I.D. No. 36–09963, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1400 (Hoisting equipment; general).

• *Docket Number:* M–2012–004–C.
FR Notice: 77 FR 14439 (3/9/2012).
Petitioner: Little Buck Coal Company #2, 33 Pine Lane, Pine Grove, Pennsylvania 17963.
Mine: Little Buck Slope Mine, MSHA I.D. No. 36–09958, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1200(d) and (i) (Mine maps).

• *Docket Number:* M–2012–005–C.
FR Notice: 77 FR 14439 (3/9/2012).
Petitioner: Little Buck Coal Company #2, 33 Pine Lane, Pine Grove, Pennsylvania 17963.
Mine: Little Buck Slope Mine, MSHA I.D. No. 36–09958, located in Schuylkill County, Pennsylvania.
Regulation Affected: 30 CFR 75.1202 and 75.1202–1(a) (Temporary notations, revisions and requirements).

• *Docket Number:* M–2012–006–C.
FR Notice: 77 FR 14439 (3/9/2012).
Petitioner: Little Buck Coal Company #2, 33 Pine Lane, Pine Grove, Pennsylvania 17963.

Mine: Little Buck Slope Mine, MSHA I.D. No. 36–09958, located in Schuylkill County, Pennsylvania.

Regulation Affected: 30 CFR 75.1400 (Hoisting equipment; general).

Dated: October 15, 2012.

George F. Triebsch,

Director, Office of Standards, Regulations and Variances.

[FR Doc. 2012–25658 Filed 10–17–12; 8:45 am]

BILLING CODE 4510–43–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Arts and Artifacts Indemnity Panel Advisory Committee

AGENCY: Federal Council on the Arts and the Humanities, National Endowment for the Humanities.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.), notice is hereby given that the Federal Council on the Arts and the Humanities will hold a meeting of the Arts and Artifacts International Indemnity Panel. The purpose of the meeting is for panel review, discussion, evaluation, and recommendation of applications for Certificates of Indemnity submitted to the Federal Council on the Arts and the Humanities for exhibitions beginning after January 1, 2013.

DATES: The meeting will be held on Tuesday, November 13, 2012, from 9:00 a.m. to 5:00 p.m.

ADDRESSES: The meeting will be held at the Old Post Office Building, 1100 Pennsylvania Ave. NW., Washington, DC 20506, in Room 730.

FOR FURTHER INFORMATION CONTACT: Lisette Voyatzis, Committee Management Officer, 1100 Pennsylvania Avenue NW., Room 529, Washington, DC 20506, or call (202) 606–8322. Hearing-impaired individuals are advised that information on this matter may be obtained by contacting the National Endowment for the Humanities' TDD terminal at (202) 606–8282.

SUPPLEMENTARY INFORMATION: Because the meeting will consider proprietary financial and commercial data provided in confidence by indemnity applicants, and material that is likely to disclose trade secrets or other privileged or confidential information, and because it is important to keep the values of objects to be indemnified and the methods of transportation and security measures confidential, the meeting will be closed to the public pursuant to section 552b(c)(4) of Title 5 U.S.C., as amended. I have made this determination under the authority granted me by the Chairman's Delegation of Authority to Close Advisory Committee Meetings dated July 19, 1993.

Dated: October 11, 2012.

Lisette Voyatzis,

Committee Management Officer.

[FR Doc. 2012–25612 Filed 10–17–12; 8:45 am]

BILLING CODE 7536–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meetings

TIME AND DATE: 9:30 a.m., Tuesday, October 30, 2012.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The one item is open to the public.

Matter To Be Considered

8431A Highway Accident Report—Highway-Railroad Grade Crossing Collision, U.S. Highway 95, Miriam, Nevada, June 24, 2011.

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting specific accommodations should contact Rochelle Hall at (202) 314–6305 by Friday, October 26, 2012.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *www.ntsb.gov.*

Schedule updates including weather-related cancellations are also available at *www.ntsb.gov.*

FOR MORE INFORMATION CONTACT: Candi Bing, (202) 314–6403 or by email at *bingc@ntsb.gov.*

FOR MEDIA INFORMATION CONTACT: Peter Knudson, (202) 314–6219 or by email at *peter.knudson@ntsb.gov.*

Dated: October 12, 2012.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2012–25762 Filed 10–16–12; 11:15 am]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards; Procedures for Meetings

Background

This notice describes procedures to be followed with respect to meetings conducted by the U.S. Nuclear Regulatory Commission's (NRC's) Advisory Committee on Reactor Safeguards (ACRS) pursuant to the Federal Advisory Committee Act (FACA). These procedures are set forth so that they may be incorporated by reference in future notices for individual meetings.

The ACRS is a statutory group established by Congress to review and report on nuclear safety matters and applications for the licensing of nuclear facilities. The Committee's reports become a part of the public record.

The ACRS meetings are conducted in accordance with FACA; they are normally open to the public and provide opportunities for oral or written statements from members of the public to be considered as part of the Committee's information gathering process. ACRS reviews do not normally encompass matters pertaining to environmental impacts other than those related to radiological safety.

The ACRS meetings are not adjudicatory hearings such as those conducted by the NRC's Atomic Safety and Licensing Board Panel as part of the Commission's licensing process.

General Rules Regarding ACRS Full Committee Meetings

An agenda will be published in the **Federal Register** for each full Committee meeting. There may be a need to make changes to the agenda to facilitate the conduct of the meeting. The Chairman of the Committee is empowered to conduct the meeting in a manner that, in his/her judgment, will facilitate the orderly conduct of business, including making provisions to continue the discussion of matters not completed on the scheduled day on another day of the same meeting. Persons planning to attend the meeting may contact the Designated Federal Officer (DFO) specified in the **Federal Register** Notice prior to the meeting to be advised of any changes to the agenda that may have occurred.

The following requirements shall apply to public participation in ACRS full Committee meetings:

(a) Persons who plan to submit written comments at the meeting should provide 35 copies to the DFO at the beginning of the meeting. Persons who

cannot attend the meeting, but wish to submit written comments regarding the agenda items may do so by sending a readily reproducible copy addressed to the DFO specified in the **Federal Register** Notice, care of the Advisory Committee on Reactor Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001. Comments should be limited to items being considered by the Committee. Comments should be in the possession of the DFO 5 days prior to the meeting to allow time for reproduction and distribution.

(b) Persons desiring to make oral statements at the meeting should make a request to do so to the DFO; if possible, the request should be made 5 days before the meeting, identifying the topic(s) on which oral statements will be made and the amount of time needed for presentation so that orderly arrangements can be made. The Committee will hear oral statements on topics being reviewed at an appropriate time during the meeting as scheduled by the Chairman.

(c) Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained by contacting the DFO.

(d) The use of still, motion picture, and television cameras will be permitted at the discretion of the Chairman and subject to the condition that the use of such equipment will not interfere with the conduct of the meeting. The DFO will have to be notified prior to the meeting and will authorize the use of such equipment after consultation with the Chairman. The use of such equipment will be restricted as is necessary to protect proprietary or privileged information that may be in documents, folders, etc., in the meeting room. Electronic recordings will be permitted only during those portions of the meeting that are open to the public.

(e) A transcript will be kept for certain open portions of the meeting and will be available in the NRC Public Document Room (PDR), One White Flint North, Room O–1F21, 11555 Rockville Pike, Rockville, MD 20852–2738. A copy of the certified minutes of the meeting will be available at the same location 3 months following the meeting. Copies may be obtained upon payment of appropriate reproduction charges. ACRS meeting agenda, transcripts, and letter reports are available through the PDR at *pdr@nrc.gov,* by calling the PDR at 1–800–394–4209, or from the Publicly Available Records System (PARS) component of NRC's document system (ADAMS) which is accessible from the NRC Web site at *http://www.nrc.gov/reading-rm/adams.html* or *http://www.nrc.gov/reading-rm/doc-collections/* (ACRS & ACNW Mtg schedules/agendas).

(f) Video teleconferencing service is available for observing open sessions of ACRS meetings. Those wishing to use this service for observing ACRS meetings should contact Mr. Theron Brown, ACRS Audio Visual Specialist, (301–415–8066) between 7:30 a.m. and 3:45 p.m. Eastern Time at least 10 days before the meeting to ensure the availability of this service. Individuals or organizations requesting this service will be responsible for telephone line charges and for providing the equipment and facilities that they use to establish the video teleconferencing link. The availability of video teleconferencing services is not guaranteed.

ACRS Subcommittee Meetings

In accordance with the revised FACA, the agency is no longer required to apply the FACA requirements to meetings conducted by the Subcommittees of the NRC Advisory Committees, if the Subcommittee's recommendations would be independently reviewed by its parent Committee.

The ACRS, however, chose to conduct its Subcommittee meetings in accordance with the procedures noted above for ACRS full Committee meetings, as appropriate, to facilitate public participation, and to provide a forum for stakeholders to express their views on regulatory matters being considered by the ACRS. When Subcommittee meetings are held at locations other than at NRC facilities, reproduction facilities may not be available at a reasonable cost. Accordingly, 50 copies of the materials to be used during the meeting should be provided for distribution at such meetings.

Special Provisions When Proprietary Sessions Are To Be Held

If it is necessary to hold closed sessions for the purpose of discussing matters involving proprietary information, persons with agreements permitting access to such information may attend those portions of the ACRS meetings where this material is being discussed upon confirmation that such agreements are effective and related to the material being discussed.

The DFO should be informed of such an agreement at least 5 working days prior to the meeting so that it can be confirmed, and a determination can be made regarding the applicability of the agreement to the material that will be discussed during the meeting. The minimum information provided should include information regarding the date of the agreement, the scope of material included in the agreement, the project or projects involved, and the names and titles of the persons signing the agreement. Additional information may be requested to identify the specific agreement involved. A copy of the executed agreement should be provided to the DFO prior to the beginning of the meeting for admittance to the closed session.

Dated: October 15, 2012.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2012–25630 Filed 10–17–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Fukushima; Notice of Meeting

The ACRS Subcommittee on Fukushima will hold a meeting on October 31, 2012, Room T–2B1, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Wednesday, October 31, 2012—1:00 p.m. Until 5:00 p.m.

The Subcommittee will review and discuss the staff's development of a position paper addressing the value of filtered vents. The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Antonio Dias (Telephone 301–415–6805 or Email: *Antonio.Dias@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy

cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011 (76 FR 64126–64127).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (Telephone 240–888–9835) to be escorted to the meeting room.

Dated: October 10, 2012.

Hipolito Gonzalez,

Chief, Technical Support Branch, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–25632 Filed 10–17–12; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS) Meeting of the ACRS Subcommittee on Regulatory Policies & Practices; Notice of Meeting

The ACRS Subcommittee on Regulatory Policies & Practices will hold a meeting on October 30, 2012, Room T–2B3, 11545 Rockville Pike, Rockville, Maryland.

The entire meeting will be open to public attendance.

The agenda for the subject meeting shall be as follows:

Tuesday, October 30th, 2012—8:30 a.m. until 12:00 p.m.

The Subcommittee will review Draft Final Regulatory Guides (RG) RG 1.79, ''''Preoperational Testing of Emergency Core Cooling Systems for Pressurized Water Reactors,'' Revision 2 and RG 1.79.1, ''Initial Test Program of Emergency Core Cooling Systems for Boiling-Water Reactors,'' Revision 0 (DG–1277).'' The Subcommittee will hear presentations by and hold discussions with the NRC staff and other interested persons regarding this matter. The Subcommittee will gather information, analyze relevant issues and facts, and formulate proposed positions and actions, as appropriate, for deliberation by the Full Committee.

Members of the public desiring to provide oral statements and/or written comments should notify the Designated Federal Official (DFO), Zena Abdullahi (Telephone 301–415–8716 or Email: *Zena.Abdullahi@nrc.gov*) five days prior to the meeting, if possible, so that appropriate arrangements can be made. Thirty-five hard copies of each presentation or handout should be provided to the DFO thirty minutes before the meeting. In addition, one electronic copy of each presentation should be emailed to the DFO one day before the meeting. If an electronic copy cannot be provided within this timeframe, presenters should provide the DFO with a CD containing each presentation at least thirty minutes before the meeting. Electronic recordings will be permitted only during those portions of the meeting that are open to the public. Detailed procedures for the conduct of and participation in ACRS meetings were published in the **Federal Register** on October 17, 2011, (76 FR 64127–64128).

Detailed meeting agendas and meeting transcripts are available on the NRC Web site at *http://www.nrc.gov/reading-rm/doc-collections/acrs.* Information regarding topics to be discussed, changes to the agenda, whether the meeting has been canceled or rescheduled, and the time allotted to present oral statements can be obtained from the Web site cited above or by contacting the identified DFO. Moreover, in view of the possibility that the schedule for ACRS meetings may be adjusted by the Chairman as necessary to facilitate the conduct of the meeting, persons planning to attend should check with these references if such rescheduling would result in a major inconvenience.

If attending this meeting, please enter through the One White Flint North building, 11555 Rockville Pike, Rockville, MD. After registering with security, please contact Mr. Theron Brown (240–888–9835) to be escorted to the meeting room.

Dated: October 10, 2012.

Antonio Dias,

Technical Advisor, Advisory Committee on Reactor Safeguards.

[FR Doc. 2012–25631 Filed 10–17–12; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2013–3; Order No. 1500]

Postal Rate and Classification Changes

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: This document provides the public with notice that the Postal Service has filed notice of its intention of planned rate and classification changes for competitive postal products. The changes have an anticipated effective date of January 27, 2013. The Postal Service's filing triggers a review process, which includes an opportunity for the public to comment. This document addresses the comment process and other matters that pertain to the planned changes.

DATES: *Comments are due:* October 26, 2012.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http:www.prc.gov.* Commenters who cannot submit their views electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** portion of the preamble for advice on alternatives to electronic filing.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6824.

SUPPLEMENTARY INFORMATION: October 11, 2012, the Postal Service filed notice with the Commission concerning changes in rates of general applicability for competitive products.[1] The Notice also includes related classification changes. The Postal Service represents that, as required by the Commission's rules, 39 CFR 3015.2(b), the Notice includes an explanation and justification for the changes, the effective date, and a schedule of the changed rates. The changes are

[1] Notice of the United States Postal Service of Changes in Rates of General Applicability for Competitive Products Established in Governors' Decision No. 12–2, October 11, 2012 (Notice). The Notice is available on the Commission's Web site, *www.prc.gov.* Pursuant to 39 U.S.C. 3632(b)(2), the Postal Service is obligated to publish the Governors' Decision and record of proceedings in the **Federal Register** at least 30 days before the effective date of the new rates or classes.

scheduled to become effective January 27, 2013.

Attached to the Notice is Governors' Decision No. 12–2, which evaluates the new prices and classification changes in accordance with 39 U.S.C. 3632–33 and 39 CFR 3015.2. The Governors' Decision provides an analysis of the competitive products' price and classification changes intended to demonstrate that the changes comply with 39 U.S.C. 3633(a) and 39 CFR part 3015.

The attachment to the Governors' Decision sets forth the price changes and includes draft Mail Classification Schedule language for competitive products of general applicability. Selected highlights of the price and classification changes follow.

Express Mail. Overall, Express Mail prices increase by 5.8 percent. Retail prices increase, on average, by 6.5 percent. The existing structure of the pricing categories for zoned Retail, Commercial Base, and Commercial Plus price categories does not change. Prices in the Commercial Base category, which offers lower prices to customers who use online or other authorized postage payment methods, increase by 2.0 percent. Prices in the Commercial Plus category, which offers even lower prices to large-volume customers, receive a 1.0 percent increase. Prices for Retail Flat Rate Envelopes and Legal Flat Rate Envelopes increase by 5.3 percent. The recently-introduced Padded Flat Rate Envelope increases to $19.95.

Priority Mail. Price increases for Priority Mail vary by rate cell and price tier. Priority Mail prices increase by 6.3 percent overall, with average retail prices increasing 9.0 percent. The Postal Service notes that approximately 3.0 percent of this 9.0 percent increase is due to the addition of free tracking. Priority Mail Flat Rate Box prices change to the following: Small ($5.80), Medium ($12.35), Large ($16.85), and Large APO/FPO/DPO ($14.85).

The existing structure of Retail, Commercial Base, and Commercial Plus price categories does not change. Commercial Base category prices increase by 3.7 percent. The Commercial Plus category prices receive a 3.8 percent increase. The Commercial Plus price category continues to offer Critical Mail letters and flats, a half-pound price, an assortment of Flat Rate packaging, and Commercial Plus Cubic pricing.

As a new offering, customers sending Critical Mail letters and flats have the option of receiving a signature upon delivery. The new letter option is priced at $4.60 while the flat option is priced at $5.35.

Parcel Select. Parcel Select Service prices increase, on average, by 9.0 percent. For destination entry parcels, the average price increases 8.0 percent for dropshipping at a destination delivery unit, 4.9 percent for parcels entered at a destination sectional center facility, and 4.8 percent for parcels entered at a destination Network Distribution Center (NDC).

For nondestination-entered parcels, the average price increase is 5.7 percent for origin NDC presort, 4.3 percent for NDC presort, and 4.2 percent for nonpresort. Lightweight Parcel Select (formerly Standard Mail commercial parcels) prices increase by 9.8 percent. The Regional Ground category is eliminated.

Parcel Return. Parcel Return Service prices increase, on average, by 4.8 percent. The price for returned parcels retrieved at a NDC increases by 1.0 percent, and the price for parcels picked up at a return delivery unit increases by 8.5 percent. Additionally, the Postal Service introduces a full network return solution for high-volume mailers of at least 50,000 pieces annually.

First-Class Package Service. First-Class Package Service prices increase, overall, by 3.0 percent, with no structural changes. First-Class Package Service was transferred to the competitive product list on April 6, 2011.

Parcel Post/Standard Post. On July 20, 2012, the Commission conditionally approved a Postal Service request to transfer Parcel Post from the market dominant product list to the competitive product list. As part of the Commission's conditional approval, the Postal Service must increase the prices for Parcel Post to achieve at least 100 percent cost coverage. To satisfy this condition, the Postal Service proposes to increase the prices for Parcel Post by 21 percent to achieve 100 percent cost coverage in this docket. It also seeks to rename the transferred Parcel Post product as Standard Post.

Domestic Extra Services. Premium Forwarding Service prices increase by 10.5 percent. The weekly reshipment fee increases to $17.00. On average, Address Enhancement Service prices increase between 3.7 and 17.7 percent. Competitive Post Office Box prices increase by 2.6 percent. The Pick-up On Demand fee increases to $20.00. As a new offering, customers ordering flat rate packaging supplies online can pay a fee to get these supplies delivered faster. This new service is priced at $2.50 and a price range will be established by the Postal Service.

Global Express Guaranteed and Express Mail International. Global Express Guaranteed (GXG) service prices increase, on average, by 9.6 percent. Express Mail International (EMI) service prices increase, on average, by 13.2 percent.

For both GXG and EMI, most of the existing price structure remains the same. However, the maximum weight of the EMI Flat Rate Envelope will decrease from 20 pounds to 4 pounds. Additionally, the Postal Service may offer a promotional discount or rebate on certain GXG and EMI items.

Priority Mail International. Overall, Priority Mail International (PMI) prices increase by 15.1 percent. The existing price structure of PMI Flat Rate, Retail, Commercial Base, and Commercial Plus price categories is maintained. Classification changes include the availability of Electronic USPS Delivery Confirmation International, which is optionally provided on certain Priority Mail International Flat Rate Envelope and Small Flat Rate Box offerings to select destinations at no change. Electronic USPS Delivery Confirmation International offers scan events for customers using certain software or online tools. Additionally, the Postal Service may offer a promotional discount or rebate on certain PMI items.

International Priority Airmail. International Priority Airmail has a price increase of 1.9 percent.

International Surface Air Lift. International Surface Air Lift has a price increase of 4.4 percent.

Airmail M-Bags. The published prices for Airmail M-Bags increase by 7.3 percent.

First-Class Package International Service. On September 10, 2012, the Commission approved a Postal Service request to transfer First-Class Mail International Packages and Rolls from the market dominant product list to the competitive product list. The Postal Service identifies the newly-transferred product as First-Class Package International Service (FCPIS). Due to anticipated cost increases and market conditions, FCPIS will receive a 58.6 percent increase. As part of FCPIS, the Postal Service will offer (1) Electronic USPS Delivery Confirmation International for certain FCPIS mailpieces meeting certain physical characteristics sent to select destinations; and (2) Commercial Base and Commercial Plus discounts. Additionally, the Postal Service may offer a promotional discount or rebate on certain Outbound Single-Piece FCPIS items.

International Ancillary Services. Several international ancillary services and paper money orders receive price increases. Certificates of Mailing prices

increase by 4.3 percent. Registered Mail prices increase by 10.2 percent. International Return Receipt also receives price increases, and International Postal Money Order prices increase by 1.1 percent. The amount of merchandise insurance coverage available for no fee increases from $100 to $200. Because the Postal Service is eliminating the $0.85 fee for the $100.01–$200 merchandise insurance coverage tier, the overall price increase for international ancillary services is zero percent.

Details of these changes may be found in the attachment to Governors' Decision No. 12–2 which is included as part of the Notice.

The Notice also includes three additional attachments:

- A redacted table showing FY 2013 projected volumes, revenues, attributable costs, contribution, and cost coverage for each product, assuming implementation of the new prices on January 27, 2013.
- A redacted table showing FY 2013 projected volumes, revenues, attributable costs, contribution, and cost coverage for each product, assuming a hypothetical implementation of the new prices on October 1, 2012.
- An application for non-public treatment of the attributable costs, contribution, and cost coverage data in the unredacted version of the annex to Governors' Decision No. 12–2, as well as the supporting materials for the data.

The table referenced above shows that the share of institutional cost generated by competitive products, assuming implementation of new prices on January 27, 2013, is expected to be 10.4 percent.

Notice. The Commission establishes Docket No. CP2013–3 to consider the Postal Service's Notice. Interested persons may express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, 3642, 39 CFR part 3015, and 39 CFR 3020 subparts B and E. Comments are due no later than October 26, 2012.

Pursuant to 39 U.S.C. 505, Emmett Rand Costich is appointed to serve as Public Representative to represent the interests of the general public in this docket.

It is ordered:

1. The Commission establishes Docket No. CP2013–3 to provide interested persons an opportunity to express views and offer comments on whether the planned changes are consistent with 39 U.S.C. 3632, 3633, 3642, 39 CFR part 3015, and 39 CFR 3020 subparts B and E.

2. Comments on the Notice are due no later than October 26, 2012.

3. The Commission appoints Emmett Rand Costich to serve as Public Representative to represent the interests of the general public in this proceeding.

4. The Secretary shall arrange for publication of this Order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2012–25655 Filed 10–17–12; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

Product Change—Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* October 18, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 10, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Priority Mail Contract 44 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–2, CP2013–2.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–25596 Filed 10–17–12; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Product Change—Express Mail and Priority Mail Negotiated Service Agreement

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service gives notice of filing a request with the Postal Regulatory Commission to add a domestic shipping services contract to the list of Negotiated Service Agreements in the Mail Classification Schedule's Competitive Products List.

DATES: *Effective date:* October 18, 2012.

FOR FURTHER INFORMATION CONTACT: Elizabeth A. Reed, 202–268–3179.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 3632(b)(3), on October 10, 2012, it filed with the Postal Regulatory Commission a *Request of the United States Postal Service to Add Express Mail & Priority Mail Contract 11 to Competitive Product List.* Documents are available at *www.prc.gov,* Docket Nos. MC2013–1, CP2013–1.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2012–25597 Filed 10–17–12; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:
Rule 17Ad–13; SEC File No. 270–263; OMB Control No. 3235–0275.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget (''OMB'') for extension and approval.

Rule 17Ad–13 (17 CFR 240.17Ad–13) requires an annual study and evaluation of internal accounting controls under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*). It requires approximately 150 registered transfer agents to obtain an annual report on the adequacy of their internal accounting controls from an independent accountant. In addition, transfer agents must maintain copies of any reports prepared pursuant to Rule 17Ad–13 plus any documents prepared to notify the Commission and appropriate regulatory agencies in the event that the transfer agent is required to take any corrective action. These recordkeeping requirements assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule. Small transfer agents are exempt from Rule 17Ad–13 as are transfer agents that service only their own companies' securities.

Approximately 150 independent, professional transfer agents must file the independent accountant's report annually. We estimate that the annual internal time burden for each transfer agent to comply with Rule 17Ad–13 by submitting the report prepared by the independent accountant to the Commission is minimal. The time required for the independent accountant to prepare the accountant's report varies with each transfer agent depending on the size and nature of the transfer agent's operations. The Commission estimates that, on average, each report can be completed by the independent accountant in 120 hours, resulting in a total of 18,000 external hours annually (120 hours × 150 reports). The burden was estimated using Commission review of filed Rule 17Ad–13 reports and Commission conversations with transfer agents and accountants. The Commission estimates that, on average, 120 hours are needed to perform the study, prepare the report, and retain the required records on an annual basis. Assuming an average hourly rate of an independent accountant of $60, the average total annual cost of the report is $7,200. The total annual cost for the approximate 150 respondents is approximately $1,080,000.

The retention period for the recordkeeping requirement under Rule 17Ad–13 is three years following the date of a report prepared pursuant to the rule. The recordkeeping requirement under Rule 17Ad–13 is mandatory to assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule. This rule does not involve the collection of confidential information.

Written comments are invited on: (a) Whether this proposed collection of information is necessary for the performance of the functions of the agency, including whether the information will have any practical utility; (b) the accuracy of the agency's estimate of the burden imposed by the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

The Commission may not conduct or sponsor a collection of information unless it displays a currently valid OMB control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid OMB control number.

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312; or send an email to: *PRA Mail Box@sec.gov.*

Dated: October 12, 2012.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25602 Filed 10–17–12; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68051; File No. SR–BX–2012–067]

Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify BX's Fee Schedule Governing Order Execution and Routing

October 12, 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 1, 2012, NASDAQ OMX BX, Inc. (''BX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, 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 the Substance of the Proposed Rule Change

BX proposes to modify BX's fee schedule governing order execution and routing. BX will implement the proposed change on October 1, 2012. 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

BX is amending its fee schedule governing order execution and routing. The general purposes of the fee changes are to (i) encourage greater provision of liquidity through BX by expanding BX's Qualified Liquidity Provider program, and (ii) increase fees for routing orders to the New York Stock Exchange (''NYSE'') to reflect announced price increases by that exchange.[3] All of the changes pertain to securities priced at $1 or more per share.

First, BX is expanding its Qualified Liquidity Provider program. Under the program, a qualifying member is eligible to pay a reduced fee for liquidity-providing orders ($0.0015 per share executed versus the usual fee of $0.0018 per share executed) entered through an eligible market participant identifier (''MPID''). Currently, a Qualified Liquidity Provider must have (i) shares of liquidity provided and (ii) total shares of liquidity accessed and provided in all securities through one or more of its NASDAQ OMX BX Equities System MPIDs that represent more than 0.40% and 0.50%, respectively, of the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities (''Consolidated Volume'') during the month. If a member satisfies these criteria, it is then eligible to pay the reduced fee for liquidity-providing orders entered through a ''Qualified MPID.'' A Qualified MPID is an MPID of a Qualified Liquidity Provider through which, for at least 150 securities, it quotes at the national best bid or offer (''NBBO'') an average of at least 25% of the time during regular market hours (9:30 a.m. through 4:00 p.m.) during the month. Under the proposed change, BX will add an additional means of becoming a Qualified Liquidity Provider. Specifically, a Qualified Liquidity Provider may also be a member with (i) shares of liquidity provided and (ii) total shares of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* SR–NYSE–2012–50 (September 26, 2012).

liquidity accessed and provided in all securities through one or more of its NASDAQ OMX BX Equities System MPIDs that represent more than 0.35% and 0.45%, respectively, of Consolidated Volume during the month. For a member qualifying under this method, a Qualified MPID is an MPID through which, for at least 400 securities, the member quotes at the NBBO an average of at least 25% of the time during regular market hours during the month. The change is designed to encourage more members to become active liquidity providers in a wider range of securities, thereby enhancing the number of stock [sic] in which BX is able to provide liquidity at the NBBO and the depth of such liquidity.

Second, to reflect recent increases in the fees charged by NYSE with respect to orders routed to it by BX, BX is raising the fee for BSTG, BSCN, and BTFY orders routed to NYSE from $0.0023 per share executed to $0.0025 per share executed; and the fee for BMOP orders routed to NYSE from $0.0025 per share executed to $0.0027 per share executed.

2. Statutory Basis

BX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[4] in general, and with Sections 6(b)(4) and (5) of the Act,[5] 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 BX operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. All similarly situated members are subject to the same fee structure, and access to BX is offered on fair and non-discriminatory terms.

BX believes that the proposed expansion of the Qualified Liquidity Provider program is reasonable because it will enable fee reductions for members that opt to provide and add liquidity and maintain quotes at the NBBO to the extent required by either of the two tiers established under the program. The proposed change is consistent with an equitable allocation of fees because it uses pricing incentives in order encourage [sic] usage of the market and the quoting of a range of securities at the NBBO for a significant portion of the trading day, activities that benefit both the exchange and its other market participants. Finally, the proposed change is not unfairly discriminatory because the offered pricing reduction does not result in an excessive deviation from the otherwise prevailing charge to access liquidity, and because the change has the potential to benefit other market participants by enhancing market quality.

The change to routing fees is reasonable because the proposed fees for routing orders to NYSE reflect the increase in the fee that will be charged by NYSE to BX with respect to such orders. The change is consistent with an equitable allocation of fees because it will bring the economic attributes of routing orders to NYSE in line with the cost of executing orders there. Finally, the change is not unfairly discriminatory because it solely applies to members that opt to route orders to NYSE.

Finally, BX notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, BX must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. BX believes that the proposed rule change reflects this competitive environment because it is designed to use pricing incentives to attract liquidity at the NBBO to BX, and to ensure that the charges for use of the BX routing facility to route to NYSE reflect an increase in the cost of such routing.

B. Self-Regulatory Organization's Statement on Burden on Competition

BX 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. Because the market for order execution is extremely competitive, members may readily opt to disfavor BX's execution and routing services if they believe that alternatives offer them better value. The proposed change is designed to enhance competition by using pricing incentives to encourage greater use of BX's trading services. The proposed change is also designed to ensure that the charges for use of the BX routing facility to route to NYSE reflect an increase in the cost of such routing, thereby ensuring that BX does not incur a loss when routing to NYSE.

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)(ii) of the Act.[6] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–BX–2012–067 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–2012–067. 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

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4) and (5).

[6] 15 U.S.C. 78s(b)(3)(a)(ii).

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–BX–2012–067, and should be submitted on or before November 8, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25653 Filed 10–17–12; 8:45 am]

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[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68043; File No. SR–NYSEArca–2012–108]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Listing and Trading of Shares of the NYSE Arca U.S. Equity Synthetic Reverse Convertible Index Fund Under NYSE Arca Equities Rule 5.2(j)(3)

October 12, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on September 27, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On October 2, 2012, the Exchange submitted Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following issue under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3) (''Investment Company Units''): NYSE Arca U.S. Equity Synthetic Reverse Convertible Index Fund. 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 Exchange proposes to list and trade shares (''Shares'') of the NYSE Arca U.S. Equity Synthetic Reverse Convertible Index Fund (''Fund'') under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3), which governs the listing and trading of Investment Company Units.[4] The Shares will be issued by the ALPS ETF Trust (''Trust''). ALPS Advisors, Inc. will be the Fund's investment adviser (''Adviser''), and Rich Investment Solutions, LLC, will be the Fund's investment sub-adviser (''Sub-Adviser'').[5] The Bank of New York Mellon (''BNY'') will serve as custodian, Fund accounting agent, and transfer agent for the Fund. ALPS Distributors, Inc. will be the Fund's distributor (''Distributor'').[6]

The Adviser is affiliated with a broker-dealer and will implement and maintain procedures designed to prevent the use and dissemination of material, non-public information regarding the Fund's portfolio. The Sub-Adviser is not affiliated with a broker-dealer. In the event (a) the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall and maintain procedures designed to prevent the use and dissemination of material, non-public information regarding the Fund's portfolio.

NYSE Arca will be the ''Index Provider'' for the Fund. NYSE Arca is not affiliated with the Trust, the Adviser, the Sub-Adviser, or the Distributor. NYSE Arca is affiliated with a broker-dealer and will implement a fire wall and maintain procedures designed to prevent the use and dissemination of material, non-public information regarding the Index.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Amendment No. 1, the Exchange amended the filing to specify that a list of components of the Index (as defined below), with percentage weightings, will be available on the Exchange's Web site, and that the Exchange may halt trading in the Shares (as defined below) if the Index value, or the value of the components of the Index, is not available or not disseminated as required.

[4] NYSE Arca Equities Rule 5.2(j)(3)(A) provides that an Investment Company Unit is a security that represents an interest in a registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities (or holds securities in another registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities).

[5] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[6] The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). On June 22, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–148826 and 811–22175) (''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 812–13430 (May 1, 2008) (''Exemptive Order'').

Description of the Fund

According to the Registration Statement, the Fund will seek investment results that correspond generally to the performance, before the Fund's fees and expenses, of the NYSE Arca U.S. Equity Synthetic Reverse Convertible Index (''Index''). The Index reflects the performance of a portfolio consisting of short over-the-counter (''OTC'') put options that have been written on 20 of the most volatile U.S. stocks that also have market capitalization of at least $5 billion.

In seeking to replicate, before expenses, the performance of the Index, the Fund will generally sell (*i.e.,* write) 90-day OTC ''down and in'' put options, as described below, in proportion to their weightings in the Index on economic terms which mirror those of the Index. Each option written by the Fund will be covered through investments in three month Treasury bills (''T-bills'') at least equal to the Fund's maximum liability under the option (*i.e.,* the strike price). The Sub-Adviser will seek a correlation over time of 0.95 or better between the Fund's performance and the performance of the Index. A figure of 1.00 would represent perfect correlation.[7]

Index Methodology and Construction

According to the Registration Statement, the Index measures the return of a hypothetical portfolio consisting of OTC put options which have been written on each of 20 stocks and a cash position calculated as described below. The 20 stocks on which options will be written are those 20 stocks from a selection of the largest capitalized (over $5 billion in market capitalization) stocks which also have listed options and which have the highest volatility, as determined by the Index Provider. These stocks will be NMS stocks as defined in Rule 600 of Regulation NMS under the Exchange Act.[8]

The options are of the type known as ''down and in'' put options. A down and in option is a contract that becomes a typical option (*i.e.,* the option ''knocks in'' at a predetermined strike price) once the underlying stock declines to a specified price (''barrier price''). These types of options are found in ''reverse convertible'' securities, which convert into the underlying stock (or settle in cash) only upon a decline in the value of the underlying stock rather than a rise (as is the case with typical convertible instruments).

According to the Registration Statement, each option included in the Index is a ''European-style'' option (*i.e.,* an option which can only be exercised at its expiration) with a 90-day term. The strike prices of the option positions included in the Index are determined based on the closing prices of the options' underlying stocks as of the beginning of each 90-day period. The barrier price of each such option is 80% of the strike price. At the expiration of each 90-day period, if an underlying stock closes at or below its respective barrier price, a cash settlement payment in an amount equal to the difference between the strike price and the closing price of the stock is deemed to be made, and the Index value is correspondingly reduced. If the underlying stock does not close at or below the barrier price, then the option expires worthless and the entire amount of the premium payment is retained within the Index.

The components of the Index will be OTC down and in puts written on 20 equally weighted stocks selected based on the following screening parameters:

(1) U.S. listing of U.S. companies;

(2) Publicly listed and traded options available;

(3) Listed market capitalization greater than $5 billion;

(4) Top 20 stocks when ranked by 3-month implied volatility;

(5) The underlying company equity securities will have a minimum trading volume of at least 50 million shares for the preceding six months; and

(6) Underlying company equity securities will have a minimum average daily trading volume of at least one million shares and a minimum average daily trading value of at least $10 million for the preceding six months.

The selection of the twenty underlying stocks will occur each quarter (March, June, September, and December) two days prior to the third Friday of the month, in line with option expiration for listed options. The selection of the twenty underlying stocks will not, however, be limited to those with listed options expiring in March, June, September, or December.

The Index value will reflect a cash amount invested in on-the-run 3-month T-Bills plus the premium collected on the short position in the 20 down-and-in puts written by the Index each quarter. The notional amount of each of the 20 down-and-in puts will be equal to 1/20th of the cash amount in the Index at the beginning of each quarter. The cash amount (initially 1,000 for the origination date of the Index) will be incremented by premiums generated each quarter from the 20 down-and-in puts sold, then decremented by cash settlements of any down-and-in puts expiring in-the-money and the distribution amount (as defined below). The cash amount will be invested in T-Bills and will accrete by interest earned on the T-Bills.

The End of Day Index Value will be calculated as follows: End of Day Index Value = Beginning of Quarter Index Value + Premium Generated − Option Values + Accrued Interest − distribution amount, where:

- Beginning of Quarter Index Value is 1,000 for the origination date of the Index; thereafter, it is the previous quarter-end End of Day Index Value;
- Premium Generated is the sum of Option Values for each of the 20 down-and-in puts sold by the Index at the end of the previous quarter;
- Option Value is the value of each of the 20 down-and-in puts written by the Index at the end of each quarter. The notional amount of each down-and-in put sold by the Index for the current quarter is 1/20th of the Beginning of Quarter Index Value;
- Accrued Interest is the daily interest earned on the cash amount held by the Index and invested in T-Bills;
- Cash amount of the Index for any quarter is the Beginning of Quarter Index Value plus the Premium Generated for that quarter;
- Distribution amount for any quarter and paid out at the beginning of the next relevant quarter is 2.5% of the End of Day Index Value for the final day of the relevant quarter. If 2.5% of the End of Day Index Value for the final day of the relevant quarter exceeds the amount of the Premium Generated, then the distribution amount will equal the Premium Generated.
- A total return level for the Index will be calculated and published at the end of each day. The total return calculation will assume the quarterly index distribution is invested directly in the Index at the beginning of the quarter in which it is paid.

The Registration Statement provides the following example. A stock ''ABC'' trades at $50 per share at the start of the 90-day period, and a down and in 90-day put was written at an 80% barrier (resulting in a strike price of $50 per share and a barrier price of $40 per share) for a premium of $4 per share:

Settlement above the barrier price: If at the end of 90 days the ABC stock closed at any value above the barrier

[7] According to the Registration Statement, while the Fund will not invest in traditional reverse convertible securities (*i.e.,* those which convert into the underlying stock), the down and in put options written by the Fund will have the effect of exposing the Fund to the return of reverse convertible securities (based on equity securities) as if the Fund owned such reverse convertible securities directly.

[8] Terms relating to the Trust, the Fund, and the Shares referred to, but not defined, herein are defined in the Registration Statement.

price of $40, then the option would expire worthless and the Index's value would reflect the retention of the $4 per share premium. The Index's value thus would be increased by $4 per share on the ABC option position.

Settlement at the barrier price: If at the end of 90 days ABC closed at the barrier price of $40, then the option would settle in cash at the closing price of $40, and the Index's value would be reduced by $10 per share to reflect the settlement of the option. However, the Index's value would reflect the retention of the $4 per share premium, so the net loss to the Index's value would be $6 per share on the ABC option position.

Settlement below the barrier price: If at the end of 90 days, ABC closed at $35, then the option would settle in cash at the closing price of $35, and the Index's value would be reduced by $15 per share to reflect the settlement of the option. However, the Index's value would reflect the retention of the $4 per share premium, so the net loss to the Index's value would be $11 per share on the ABC option position.

According to the Registration Statement, the Index's value is equal to the value of the options positions comprising the Index plus a cash position. The cash position starts at a base of 1,000. The cash position is increased by option premiums generated by the option positions comprising the Index and interest on the cash position at an annual rate equal to the three month T-Bill rate. The cash position is decreased by cash settlement on options which ''knock in'' (*i.e.,* where the closing price of the underlying stock at the end of the 90-day period is at or below the barrier price). The cash position is also decreased by a deemed quarterly cash distribution, currently targeted at the rate of 2.5% of the value of the Index. However, if the option premiums generated during the quarter are less than 2.5%, the deemed distribution will be reduced by the amount of the shortfall.

The Fund's Investments

According to the Registration Statement, the Fund, under normal circumstances,[9] will invest at least 80% of its total assets in component securities that comprise the Index and in T- Bills which will be collateral for the options positions. The Fund will invest in the option positions determined by the Index Provider by writing (*i.e.,* selling) OTC 90-day down and in put options in proportion to their weightings in the Index on economic terms which mirror those of the Index. By writing an option, the Fund will receive premiums from the buyer of the option, which will increase the Fund's return if the option does not ''knock in'' and thus expires worthless. However, if the option's underlying stock declines by a specified amount (or more), the option will ''knock in'' and the Fund will be required to pay the buyer the difference between the option's strike price and the closing price. Therefore, by writing a put option, the Fund will be exposed to the amount by which the price of the underlying is less than the strike price. Accordingly, the potential return to the Fund will be limited to the amount of option premiums it receives, while the Fund can potentially lose up to the entire strike price of each option it sells. Further, if the value of the stocks underlying the options sold by the Fund increases, the Fund's returns will not increase accordingly.

Typically, the writer of a put option incurs an obligation to buy the underlying instrument from the purchaser of the option at the option's exercise price, upon exercise by the option purchaser. However, the put options to be sold by the Fund will be settled in cash only. The Fund may need to sell down and in put options on stocks other than those underlying the option positions contained in the Index if the Fund is unable to obtain a competitive market from OTC option dealers on a stock underlying a particular option position in the Index, thus preventing the Fund from writing an option on that stock.[10]

Every 90 days, the options included within the Index are cash settled or expire, and new option positions are established. The Fund will enter into new option positions accordingly. This 90-day cycle likely will cause the Fund to have frequent and substantial portfolio turnover. If the Fund receives additional inflows (and issues more Shares accordingly in large numbers known as ''Creation Units,'' as further defined below) during a 90-day period, the Fund will sell additional OTC down and in put options which will be exercised or expire at the end of such 90-day period. Conversely, if the Fund redeems Shares in Creation Unit size during a 90-day period, the Fund will terminate the appropriate portion of the options it has sold accordingly.

Secondary Investment Strategies

The Fund may invest its remaining assets in money market instruments,[11] including repurchase agreements [12] or other funds which invest exclusively in money market instruments, convertible securities, structured notes (notes on which the amount of principal repayment and interest payments are based on the movement of one or more specified factors, such as the movement of a particular stock or stock index), forward foreign currency exchange contracts, and in swaps,[13] options (other than options in which the Fund principally will invest), and futures

[9] The term ''under normal circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the equities or options markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

[10] The Fund will transact only with OTC options dealers that have in place an International Swaps and Derivatives Association agreement with the Fund.

[11] The Fund may invest a portion of its assets in high-quality money market instruments on an ongoing basis to provide liquidity. The instruments in which the Fund may invest include: (i) Short-term obligations issued by the U.S. Government; (ii) negotiable certificates of deposit (''CDs''), fixed time deposits, and bankers' acceptances of U.S. and foreign banks and similar institutions; (iii) commercial paper rated at the date of purchase ''Prime-1'' by Moody's Investors Service, Inc. or ''A–1+'' or ''A–1'' by Standard & Poor's or, if unrated, of comparable quality as determined by the Adviser; (iv) repurchase agreements; and (v) money market mutual funds. CDs are short-term negotiable obligations of commercial banks. Time deposits are non-negotiable deposits maintained in banking institutions for specified periods of time at stated interest rates. Banker's acceptances are time drafts drawn on commercial banks by borrowers, usually in connection with international transactions.

[12] Repurchase agreements are agreements pursuant to which securities are acquired by the Fund from a third party with the understanding that they will be repurchased by the seller at a fixed price on an agreed date. These agreements may be made with respect to any of the portfolio securities in which the Fund is authorized to invest. Repurchase agreements may be characterized as loans secured by the underlying securities. The Fund may enter into repurchase agreements with (i) member banks of the Federal Reserve System having total assets in excess of $500 million and (ii) securities dealers (''Qualified Institutions''). The Adviser will monitor the continued creditworthiness of Qualified Institutions. The Fund also may enter into reverse repurchase agreements, which involve the sale of securities with an agreement to repurchase the securities at an agreed-upon price, date, and interest payment and have the characteristics of borrowing.

[13] Swap agreements are contracts between parties in which one party agrees to make periodic payments to the other party (''Counterparty'') based on the change in market value or level of a specified rate, index, or asset. In return, the Counterparty agrees to make periodic payments to the first party based on the return of a different specified rate, index, or asset. Swap agreements will usually be done on a net basis, the Fund receiving or paying only the net amount of the two payments. The net amount of the excess, if any, of the Fund's obligations over its entitlements with respect to each swap will be accrued on a daily basis and an amount of cash or highly liquid securities having an aggregate value at least equal to the accrued excess will be maintained in an account at the Trust's custodian bank.

contracts.[14] Swaps, options (other than options in which the Fund principally will invest), and futures contracts (and convertible securities and structured notes) may be used by the Fund in seeking performance that corresponds to the Index and in managing cash flows.[15] The Fund will not invest in money market instruments as part of a temporary defensive strategy to protect against potential stock market declines. The Adviser anticipates that it may take approximately three business days (*i.e.,* each day the New York Stock Exchange (''NYSE'') is open) for additions and deletions to the Index to be reflected in the portfolio composition of the Fund.

The Fund may invest in the securities of other investment companies (including money market funds). Under the 1940 Act, the Fund's investment in investment companies is limited to, subject to certain exceptions, (i) 3% of the total outstanding voting stock of any one investment company, (ii) 5% of the Fund's total assets with respect to any one investment company, and (iii) 10% of the Fund's total assets of investment companies in the aggregate.[16]

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including Rule 144A securities. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[17]

The Fund intends to qualify for and to elect to be treated as a separate regulated investment company (''RIC'') under Subchapter M of the Internal Revenue Code of 1986, as amended.[18] As a RIC, the Fund will not be subject to U.S. federal income tax on the portion of its taxable investment income and capital gain it distributes to its shareholders. To qualify for treatment as a RIC, a company must annually distribute at least 90% of its net investment company taxable income (which includes dividends, interest, and net capital gains) and meet several other requirements relating to the nature of its income and the diversification of its assets. If the Fund fails to qualify for any taxable year as a RIC, all of its taxable income will be subject to tax at regular corporate income tax rates without any deduction for distributions to shareholders, and such distributions generally will be taxable to shareholders as ordinary dividends to the extent of the Fund's current and accumulated earnings and profits.

The Fund will not invest in non-U.S. equity securities. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage.

As described above, the Index components must be based upon 20 equally weighted U.S. listed U.S. companies and have publicly listed and traded options. In addition, the underlying companies will have a market capitalization greater than $5 billion. Furthermore, the underlying company equity securities will have a minimum trading volume of at least 50 million shares for each of the preceding six months and a minimum average daily trading value of at least $10 million for the preceding six months. As such, the Exchange believes that the Index is sufficiently broad based in scope and, as such, is less susceptible to potential manipulation in view of the market capitalization and liquidity criteria.

Pricing Fund Shares

According to the Registration Statement, the Fund's OTC put options on equity securities will be valued pursuant to a third-party option pricing model. Debt securities will be valued at the mean between the last available bid and ask prices for such securities or, if such prices are not available, at prices for securities of comparable maturity, quality, and type. Securities for which market quotations are not readily available, including restricted securities, will be valued by a method that the Fund's Board of Trustees believe accurately reflects fair value. Securities will be valued at fair value when market quotations are not readily available or are deemed unreliable, such as when a security's value or meaningful portion of the Fund's portfolio is believed to have been materially affected by a significant event. Such events may include a natural disaster, an economic event like a bankruptcy filing, trading halt in a security, an unscheduled early market close, or a substantial fluctuation in domestic and foreign markets that has occurred between the close of the principal exchange and the NYSE. In such a case, the value for a security is likely to be different from the last quoted market price. In addition, due to the subjective and variable nature of fair market value pricing, it is possible that the value determined for a particular asset may be materially different from the value realized upon such asset's sale.

Creations and Redemptions

Creation of Shares

The Trust will issue and sell Shares of the Fund only in Creation Units of 100,000 Shares each on a continuous basis through the Distributor, without a sales load, at its net asset value (''NAV'') next determined after receipt, on any business day, of an order in proper form. Creation Units of the Fund generally will be sold for cash only, calculated based on the NAV per Share multiplied by the number of Shares representing a Creation Unit (''Deposit Cash''), plus a transaction fee.

The Custodian, through the National Securities Clearing Corporation (''NSCC''), will make available on each business day, prior to the opening of business on NYSE Arca (currently 9:30

[14] The Fund may utilize U.S. listed exchange-traded futures. According to the Registration Statement, the Commodity Futures Trading Commission has eliminated limitations on futures trading by certain regulated entities, including registered investment companies, and consequently registered investment companies may engage in unlimited futures transactions and options thereon provided that the investment adviser to the company claims an exclusion from regulation as a commodity pool operator. In connection with its management of the Trust, the Adviser has claimed such an exclusion from registration as a commodity pool operator under the Commodity Exchange Act (7 U.S.C. 1) (''CEA''). Therefore, it is not subject to the registration and regulatory requirements of the CEA, and there are no limitations on the extent to which the Fund may engage in non-hedging transactions involving futures and options thereon, except as set forth in the Registration Statement.

[15] Swaps, options (other than options in which the Fund principally will invest), and futures contracts will not be included in the Fund's investment, under normal market circumstances, of at least 80% of its total assets in component securities that comprise the Index and in T-Bills, as described above.

[16] 15 U.S.C. 80a–12(d).

[17] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the 1933 Act).

[18] 26 U.S.C. 851.

a.m. Eastern Time (''E.T.'')), the amount of the Deposit Cash to be deposited in exchange for a Creation Unit of the Fund.

To be eligible to place orders with the Distributor and to create a Creation Unit of the Fund, an entity must be (i) a ''Participating Party,'' *i.e.,* a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC (''Clearing Process''); or (ii) a Depository Trust Company (''DTC'') participant, and, in each case, must have executed an agreement with the Distributor, with respect to creations and redemptions of Creation Units. A Participating Party and DTC participant are collectively referred to as an ''Authorized Participant.''

All orders to create Creation Units, whether through a Participating Party or a DTC participant, must be received by the Distributor no later than the closing time of the regular trading session on the NYSE (ordinarily 4:00 p.m. E.T.) in each case on the date such order is placed in order for creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form.

Redemption of Shares

Fund Shares may be redeemed only in Creation Units at the NAV next determined after receipt of a redemption request in proper form by the Fund through BNY and only on a business day. The Fund will not redeem Shares in amounts less than a Creation Unit.

With respect to the Fund, BNY, through the NSCC, will make available prior to the opening of business on NYSE Arca (currently 9:30 a.m. E.T.) on each business day, the amount of cash that will be paid (subject to possible amendment or correction) in respect of redemption requests received in proper form on that day (''Redemption Cash'').

The redemption proceeds for a Creation Unit generally will consist of the Redemption Cash, as announced on the business day of the request for redemption received in proper form, less a redemption transaction fee.

Initial and Continued Listing

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2), except that the Index is comprised of options based on ''US Component Stocks'' [19] rather than US Component Stocks themselves. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Exchange Act,[20] as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV will be calculated daily and made available to all market participants at the same time.

Availability of Information

The Fund's Web site (*www.alpsetfs.com*), which will be publicly available prior to the public offering of the Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (''Bid/Ask Price''),[21] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.[22]

On a daily basis, the Adviser will disclose for each portfolio security and other financial instrument of the Fund the following information: ticker symbol (if applicable), name of security and financial instrument, number of securities or dollar value of financial instruments held in the portfolio, and percentage weighting of the security and financial instrument in the portfolio. The Fund's portfolio holdings, including information regarding its option positions, will be disclosed each day on the Fund's Web site. The Web site information will be publicly available at no charge.

The NAV per Share for the Fund will be determined once daily as of the close of the NYSE, usually 4:00 p.m. E.T., each day the NYSE is open for trading. NAV per Share will be determined by dividing the value of the Fund's portfolio securities, cash and other assets (including accrued interest), less all liabilities (including accrued expenses), by the total number of Shares outstanding.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.* Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. The value of the Index and the values of the OTC put options components in the Index (which will each be weighted at 1/20 of the Index value) will be published by one or more major market data vendors every 15 seconds during the NYSE Arca Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. A list of components of the Index, with percentage weightings, will be available on the Exchange's Web site. Each of the stocks underlying the OTC put options in the Index also will underlie standardized options contracts traded on U.S. options exchanges, which will disseminate quotation and last-sale information with respect to such contracts. In addition, the Intraday Indicative Value will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session.[23] The dissemination of the Intraday Indicative Value will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close

[19] NYSE Arca Equities Rule 5.2(j)(3) defines the term ''US Component Stock'' to mean an equity security that is registered under Sections 12(b) or 12(g) of the Exchange Act or an American Depositary Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Exchange Act.

[20] 17 CFR 240.10A–3.

[21] The Bid/Ask Price of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[22] Under accounting procedures followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[23] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available Intraday Indicative Values taken from the CTA or other data feeds.

estimate of that value throughout the trading day.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes is included in the Registration Statement.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[24] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities comprising the Fund's portfolio holdings and/or the financial instruments of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the Intraday Indicative Value, the Index value, or the value of the components of the Index is not available or is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Exchange will obtain a representation from the Fund that the NAV for the Fund will be calculated daily and will be made available to all market participants at the same time. Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV for the Fund is not being disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m. E.T. in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which include Investment Company Units) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.[25]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Suitability

Currently, NYSE Arca Equities Rule 9.2(a) (Diligence as to Accounts) provides that an Equity Trading Permit (''ETP'') Holder, before recommending a transaction in any security, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to its other security holdings and as to its financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder must make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that such ETP Holder believes would be useful to make a recommendation.

Prior to the commencement of trading, the Exchange will inform its ETP Holders of the suitability requirements of NYSE Arca Equities Rule 9.2(a) in an Information Bulletin (''Bulletin''). Specifically, ETP Holders will be reminded in the Information Bulletin that, in recommending transactions in these securities, they must have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member, and (2) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in the Shares. In connection with the suitability obligation, the Information Bulletin will also provide that members must make reasonable efforts to obtain the following information: (1) The customer's financial status; (2) the customer's tax status; (3) the customer's investment objectives; and (4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

In addition, FINRA has issued a regulatory notice relating to sales practice procedures applicable to recommendations to customers by FINRA members of reverse convertibles, as described in FINRA Regulatory Notice 10–09 (February 2010) (''FINRA Regulatory Notice'').[26] As described above, while the Fund will not invest in traditional reverse convertible securities, the down and in put options written by the Fund will have the effect of exposing the Fund to the return of reverse convertible securities as if the Fund owned such reverse convertible securities directly. Therefore, the Bulletin will state that ETP Holders that carry customer accounts should follow the FINRA guidance set forth in the FINRA Regulatory Notice.

As disclosed in the Registration Statement, the Fund is designed for investors who seek to obtain income through selling options on select equity securities which the Index Provider determines to have the highest volatility. Because of the high volatility of the stocks underlying the options

[24] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

[25] For a list of the current members of ISG, see *www.isgportal.org*. The Exchange notes that not all components of the portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[26] The Exchange notes that NASD Rule 2310 relating to suitability, referenced in the FINRA Regulatory Notice, has been superseded by FINRA Rule 2111. *See* FINRA Regulatory Notice 12–25 (May 2012).

sold by the Fund, it is possible that the value of such stocks will decline in sufficient magnitude to trigger the exercise of the options and cause a loss which may outweigh the income from selling such options. The Registration Statement states that, accordingly, the Fund should be considered a speculative trading instrument and is not necessarily appropriate for investors who seek to avoid or minimize their exposure to stock market volatility. The Exchange's Information Bulletin regarding the Fund, described below, will provide information regarding the suitability of an investment in the Shares, as stated in the Registration Statement.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in the Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (4) how information regarding the Intraday Indicative Value is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5) [27] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial listing criteria in NYSE Arca Equities Rule 5.2(j)(3) and Commentary .01 thereto and continued listing criteria in NYSE Arca Equities Rule 5.5(g)(2). The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. The 20 stocks on which options will be written will be from a selection of the largest capitalized (over $5 billion in market capitalization) stocks which also have listed options and which have the highest volatility, as determined by the Index Provider, and will be NMS stocks as defined in Rule 600 of Regulation NMS under the Exchange Act. Each option written by the Fund will be covered through investments in three month T-Bills at least equal to the Fund's maximum liability under the option (*i.e.,* the strike price). The Fund will not invest in non-U.S. equity securities and the Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. FINRA has issued a regulatory notice relating to sales practice procedures applicable to recommendations to customers by FINRA members of reverse convertibles, as described in the FINRA Regulatory Notice, and ETP Holders that carry customer accounts should follow the FINRA guidance set forth therein. Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. The Information Bulletin will state that ETP Holders that carry customer accounts should follow FINRA guidance set forth in the FINRA Regulatory Notice.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that, if the Intraday Indicative Value, the Index value, or the value of the components of the Index is not available or is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Exchange will obtain a representation from the Fund that the NAV for the Fund will be calculated daily and will be made available to all market participants at the same time. Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV for the Fund is not being disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants. The Fund's portfolio holdings, including information regarding its option positions, will be disclosed each day on the Fund's Web site. The Web site information will be publicly available at no charge. Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Quotation and last-sale information for the Shares will be available via the CTA high-speed line. The value of the Index and the values of the OTC put options components in the Index (which will each be weighted at 1/20 of the Index value) will be published by one or more major market data vendors every 15 seconds during the NYSE Arca Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T. A list of components of the Index, with percentage weightings, will be available on the Exchange's Web site. Each of the stocks underlying the OTC put options in the Index also will underlie standardized options contracts traded on U.S. options exchanges, which will disseminate quotation and last-sale information with respect to such contracts. In addition, the Intraday Indicative Value will be disseminated by one or more major market data vendors at least every 15 seconds during the NYSE Arca Core Trading Session.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or

[27] 15 U.S.C. 78f(b)(5).

with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's portfolio holdings, the Intraday Indicative Value, and quotation and last-sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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–2012–108 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–2012–108. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–108 and should be submitted on or before November 8, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25598 Filed 10–17–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68044; File No. SR–NYSEArca–2012–109]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to the Listing and Trading of Shares of the U.S. Equity High Volatility Put Write Index Fund Under NYSE Arca Equities Rule 5.2(j)(3)

October 12, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on September 27, 2012, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to list and trade shares of the following issue under NYSE Arca Equities Rule 5.2(j)(3) (''Investment Company Units''): the U.S. Equity High Volatility Put Write Index Fund. 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to list and trade shares (''Shares'') of the U.S. Equity High Volatility Put Write Index Fund (''Fund'') under Commentary .01 to NYSE Arca Equities Rule 5.2(j)(3), which governs the listing and trading of Investment Company Units.[3] The Shares will be issued by the ALPS ETF Trust

[28] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] NYSE Arca Equities Rule 5.2(j)(3)(A) provides that an Investment Company Unit is a security that represents an interest in a registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities (or holds securities in another registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities).

(''Trust'').[4] ALPS Advisors, Inc. will be the Fund's investment adviser (''Adviser''), and Rich Investment Solutions, LLC will be the Fund's investment sub-adviser (''Sub-Adviser'').[5] The Bank of New York Mellon (''BNY'') will serve as custodian, fund accounting agent, and transfer agent for the Fund. ALPS Distributors, Inc. will be the Fund's distributor (''Distributor'').

The Adviser is affiliated with a broker-dealer and will implement and maintain procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. The Sub-Adviser is not affiliated with a broker-dealer. In the event (a) the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement and maintain procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio.

NYSE Arca will be the ''Index Provider'' for the Fund. NYSE Arca is not affiliated with the Trust, the Adviser, the Sub-Adviser, or the Distributor. NYSE Arca is affiliated with a broker-dealer and will implement a fire wall and maintain procedures designed to prevent the use and dissemination of material non-public information regarding the Index.

Description of the Fund

According to the Registration Statement, the Fund will seek investment results that correspond generally to the performance, before the Fund's fees and expenses, of the NYSE Arca U.S. Equity High Volatility Put Write Index (''Index''). The Index measures the return of a hypothetical portfolio consisting of U.S. exchange traded put options which have been sold on each of 20 stocks and a cash position calculated as described below. The 20 stocks on which options are sold (''written'') are those 20 stocks from a selection of the largest capitalized (over $5 billion in market capitalization) stocks which also have listed options and which have the highest volatility, as determined by the Index Provider.

The Sub-Adviser will seek a correlation over time of 0.95 or better between the Fund's performance and the performance of the Index. A figure of 1.00 would represent perfect correlation.

Index Methodology and Construction

According to the Registration Statement, the Index consists of at least twenty components (''Index Components''), selected in accordance with NYSE Arca's rules-based methodology for the Index. In selecting the stocks underlying the Index Components, the Index Provider begins with the universe of all U.S. exchange-listed stocks, and then screens for those stocks that meet the following criteria: (1) Minimum market capitalization of at least $5 billion; (2) minimum trading volume of at least 50 million shares during the preceding 6 months; (3) minimum average daily trading volume of one million shares during the preceding 6 months; (4) minimum average daily trading value of at least $10 million during the preceding 6 months; (5) share price of $10 or higher; (6) the availability of U.S. exchange-listed options.[6] The Index is reconstituted/rebalanced every two months (*i.e.,* six times a year).

Stocks meeting the above criteria are then sorted in descending order based upon the two month implied volatility as measured on Bloomberg using the field labeled 2M_PUT_IMP_VOL_50DELTA_DFLT, which is derived from at the money listed put options on each of such stocks.[7] The 20 stocks with the highest volatility are selected for inclusion. The industry sector of each stock is also noted, and the Index will not allow more than 10 of the 20 stocks to be from any one industry sector.

Each listed put option included in the Index will be an ''American-style'' option (*i.e.,* an option which can be exercised at the strike price at any time prior to its expiration) and have a 60-day term. The strike price (*i.e.,* the price at which a put option can be exercised) of each put option included in the Index must be as close as possible to 85% of the closing price of the option's underlying stock price as of the beginning of each 60-day period.[8] The listed put options included in the Index can be exercised at any time prior to their expiration, but the Index will reflect the value of each such option throughout the 60-day period as if the option is not exercised until its expiration. Each such option will automatically be deemed exercised on its expiration date if its underlying stock price is below its strike price. If the stock underlying the put option closes below the option's strike price, a cash settlement payment in an amount equal to the difference between the strike price and the closing price of the stock is deemed to be made and the Index value is correspondingly reduced. If the underlying stock does not close below its strike price, then the option expires worthless and the entire amount of the premium payment is retained within the Index.[9]

The Registration Statement provides the following example. Suppose a stock ''ABC'' trades at $50 per share at the start of the 60 day period, and a listed put option with a term of 60 days was sold with a strike price of $42.50 per share for a premium of $2 per share:

Settlement at or above the strike price: If at the end of 60 days the ABC stock closed at or above the strike price of $42.50, then the option would expire

[4] The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). On May 3, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N–1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333–148826 and 811–22175) (''Registration Statement''). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. *See* Investment Company Act Release No. 28262 (May 1, 2008) (File No. 812–13430) (''Exemptive Order'').

[5] An investment adviser to an open-end fund is required to be registered under the Investment Advisers Act of 1940 (''Advisers Act''). As a result, the Adviser and Sub-Adviser and their related personnel are subject to the provisions of Rule 204A–1 under the Advisers Act relating to codes of ethics. This Rule requires investment advisers to adopt a code of ethics that reflects the fiduciary nature of the relationship to clients as well as compliance with other applicable securities laws. Accordingly, procedures designed to prevent the communication and misuse of non-public information by an investment adviser must be consistent with Rule 204A–1 under the Advisers Act. In addition, Rule 206(4)–7 under the Advisers Act makes it unlawful for an investment adviser to provide investment advice to clients unless such investment adviser has (i) adopted and implemented written policies and procedures reasonably designed to prevent violation, by the investment adviser and its supervised persons, of the Advisers Act and the Commission rules adopted thereunder; (ii) implemented, at a minimum, an annual review regarding the adequacy of the policies and procedures established pursuant to subparagraph (i) above and the effectiveness of their implementation; and (iii) designated an individual (who is a supervised person) responsible for administering the policies and procedures adopted under subparagraph (i) above.

[6] Terms relating to the Trust, the Fund, and the Shares referred to, but not defined, herein are defined in the Registration Statement.

[7] The Adviser represents that Bloomberg defines implied volatility as Delta Ivol, which is volatility as expressed in delta. Delta values range from 0 to 100, with 50 delta as the theoretical at-the-money strike. A delta of less than 50 is considered out-of-the-money, while a delta of greater than 50 is considered in-the-money.

[8] The Adviser represents that a specific percentage cannot be indicated because options are listed by an exchange in pre-defined increments (*i.e.,* 1, 1.5, or 2 increments) around the market price of the stock, rounded to the nearest dollar.

[9] The Adviser anticipates that it may take approximately three business days (*i.e.,* each day the New York Stock Exchange (''NYSE'') is open) for additions and deletions to the Index to be reflected in the portfolio composition of the Fund.

worthless and the Index's value would reflect the retention of the $2 per share premium. The Index's value thus would be increased by $2 per share on the ABC option position.

Settlement below the strike price: If at the end of 60 days, ABC closed at $35, then the option would automatically be deemed exercised on its expiration date. The Index's value would change as if the Index had been put (*i.e.,* would buy) ABC at the strike price of $42.50 and would sell ABC immediately at the closing price of $35. As a result, the Index's value would be reduced by $7.50 per share. However, the Index's value would also reflect the retention of the $2 per share premium, so the net loss to the Index's value would be $5.50 per share on the ABC option position.

The Index's value is equal to the value of the options positions comprising the Index plus a cash position. The options positions are equally weighted in the Index and the Fund's portfolio; that is, 1/20th of the net asset value (''NAV'') of Shares of the Fund will be invested in each option position at the beginning of the applicable 60-day period. The cash position starts at a base of 1,000. The cash position is increased by option premiums generated by the option positions comprising the Index and interest on the cash position at an annual rate equal to the three month Treasury-bill (''T-Bill'') rate. The cash position is decreased by cash settlement on options which finish in the money (*i.e.,* where the closing price of the underlying stock at the end of the 60-day period is below the strike price). The cash position is also decreased by a deemed cash distribution paid following each 60-day period, currently targeted at the rate of 1.5% of the value of the Index. However, if the option premiums generated during the period are less than 1.5%, the deemed distribution will be reduced by the amount of the shortfall.

Primary Investments

The Fund under normal circumstances [10] will invest at least 80% of its total assets in component securities that comprise the Index (*i.e.,* the Fund's option positions) and in T-Bills.

The Fund will seek to track the performance of the Index by selling listed 60-day put options in proportion to their weightings in the Index. By selling an option, the Fund will receive premiums from the buyer of the option, which will increase the Fund's return if the option is not exercised and thus expires worthless. However, if the option's underlying stock declines below the strike price, the option will finish in-the-money and the Fund will be required to buy the underlying stock at the strike price, effectively paying the buyer the difference between the strike price and the closing price. Therefore, by writing a put option, the Fund will be exposed to the amount by which the price of the underlying stock is less than the strike price. As the seller of a listed put option, the Fund will incur an obligation to buy the underlying instrument from the purchaser of the option at the option's strike price, upon exercise by the option purchaser. If a listed put option sold by the Fund is exercised prior to the end of a 60-day period, the Fund will buy the underlying stock at the time of exercise and at the strike price, and will hold the stock until the end of the 60-day period.

Each put option sold by the Fund will be covered through investments in three month T-Bills at least equal to the Fund's maximum liability under the option (*i.e.,* the strike price).

Every 60 days, the options included within the Index are exercised or expire and new option positions are established, and the Fund will enter into new option positions accordingly and sell any underlying stocks it owns as a result of the Fund's prior option positions having been exercised. This 60-day cycle likely will cause the Fund to have frequent and substantial portfolio turnover.[11]

Secondary Investment Strategies

The Fund may invest its remaining assets in money market instruments,[12] including repurchase agreements [13] or other funds which invest exclusively in money market instruments, convertible securities, and structured notes (notes on which the amount of principal repayment and interest payments are based on the movement of one or more specified factors, such as the movement of a particular stock or stock index). Furthermore, the Fund may invest in one or more financial instruments, including but not limited to futures contracts, swap agreements [14] and forward contracts, and options on securities (other than options in which the Fund principally will invest), indices and futures contracts.[15] Swaps, options (other than options in which the Fund principally will invest), and futures contracts [16] may be used by the

[10] The term ''under normal circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the equities or options markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

[11] If the Fund receives additional inflows (and issues more Shares accordingly in large numbers known as ''Creation Units,'' as further described below under ''Creation of Shares'') during a 60-day period, the Fund will sell additional listed put options which will be exercised or expire at the end of such 60-day period. Conversely, if the Fund redeems Shares in Creation Unit size during a 60-day period, the Fund will terminate the appropriate portion of the options it has sold accordingly.

[12] The Fund may invest a portion of its assets in high-quality money market instruments on an ongoing basis to provide liquidity. The instruments in which the Fund may invest include: (i) short-term obligations issued by the U.S. Government; (ii) negotiable certificates of deposit (''CDs''), fixed time deposits, and bankers' acceptances of U.S. and foreign banks and similar institutions; (iii) commercial paper rated at the date of purchase ''Prime-1'' by Moody's Investors Service, Inc. or ''A – 1+'' or ''A – 1'' by Standard & Poor's or, if unrated, of comparable quality as determined by the Adviser; and (iv) money market mutual funds. CDs are short-term negotiable obligations of commercial banks. Time deposits are non-negotiable deposits maintained in banking institutions for specified periods of time at stated interest rates. Banker's acceptances are time drafts drawn on commercial banks by borrowers, usually in connection with international transactions. The Fund will not invest in money market instruments as part of a temporary defensive strategy to protect against potential stock market declines.

[13] Repurchase agreements are agreements pursuant to which securities are acquired by the Fund from a third party with the understanding that they will be repurchased by the seller at a fixed price on an agreed date. These agreements may be made with respect to any of the portfolio securities in which the Fund is authorized to invest. Repurchase agreements may be characterized as loans secured by the underlying securities. The Fund may enter into repurchase agreements with (i) member banks of the Federal Reserve System having total assets in excess of $500 million and (ii) securities dealers (''Qualified Institutions''). The Adviser will monitor the continued creditworthiness of Qualified Institutions. The Fund also may enter into reverse repurchase agreements, which involve the sale of securities with an agreement to repurchase the securities at an agreed-upon price, date, and interest payment and have the characteristics of borrowing.

[14] Swap agreements are contracts between parties in which one party agrees to make periodic payments to the other party (''Counterparty'') based on the change in market value or level of a specified rate, index, or asset. In return, the Counterparty agrees to make periodic payments to the first party based on the return of a different specified rate, index, or asset. Swap agreements will usually be done on a net basis, the Fund receiving or paying only the net amount of the two payments. The net amount of the excess, if any, of the Fund's obligations over its entitlements with respect to each swap will be accrued on a daily basis and an amount of cash or highly liquid securities having an aggregate value at least equal to the accrued excess will be maintained in an account at the Trust's custodian bank.

[15] As an example of the use of such financial instruments, the Fund may use total return swaps on one or more Index Components in order to achieve exposures that are similar to those of the Index.

[16] The Fund may utilize U.S. listed exchange-traded futures. According to the Registration Statement, the Commodity Futures Trading Commission has eliminated limitations on futures trading by certain regulated entities, including registered investment companies, and consequently registered investment companies may engage in

Fund in seeking performance that corresponds to the Index and in managing cash flows.[17]

The Fund may invest up to 20% of its net assets in investments not included in its Index, but which the Adviser believes will help the Fund track the Index. For example, there may be instances in which the Adviser may choose to purchase (or sell) securities not in the Index which the Adviser believes are appropriate to substitute for one or more Index Components in seeking to replicate, before fees and expenses, the performance of the Index.

The Fund may borrow money from a bank up to a limit of 10% of the value of its assets, but only for temporary or emergency purposes.

The Fund may not invest 25% of its total assets in the securities of issuers conducting their principal business activities in the same industry or group of industries (excluding the U.S. government or any of its agencies or instrumentalities). Nonetheless, to the extent the Fund's Index is concentrated in a particular industry or group of industries, the Fund's investments will exceed this 25% limitation to the extent that it is necessary to gain exposure to Index Components to track its Index.[18]

The Fund may invest in the securities of other investment companies (including money market funds). Under the 1940 Act, the Fund's investment in investment companies is limited to, subject to certain exceptions, (i) 3% of the total outstanding voting stock of any one investment company, (ii) 5% of the Fund's total assets with respect to any one investment company, and (iii) 10% of the Fund's total assets of investment companies in the aggregate.[19]

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment). The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid securities. Illiquid securities include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.[20]

The Fund intends to qualify for and to elect to be treated as a separate regulated investment company (''RIC'') under Subchapter M of the Internal Revenue Code of 1986, as amended.[21] As a RIC, the Fund will not be subject to U.S. federal income tax on the portion of its taxable investment income and capital gain it distributes to its shareholders. To qualify for treatment as a RIC, a company must annually distribute at least 90% of its net investment company taxable income (which includes dividends, interest, and net capital gains) and meet several other requirements relating to the nature of its income and the diversification of its assets. If the Fund fails to qualify for any taxable year as a RIC, all of its taxable income will be subject to tax at regular corporate income tax rates without any deduction for distributions to shareholders, and such distributions generally will be taxable to shareholders as ordinary dividends to the extent of the Fund's current and accumulated earnings and profits.

The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. The Fund will not invest in non-U.S. equity securities.

Pricing Fund Shares

The NAV per Share for the Fund will be determined once daily as of the close of the NYSE, usually 4:00 p.m. Eastern time (''E.T.''), each day the NYSE is open for trading. NAV per Share will be determined by dividing the value of the Fund's portfolio securities, cash, and other assets (including accrued interest), less all liabilities (including accrued expenses), by the total number of Shares outstanding.

The Fund's listed put options, as well as equity securities held by the Fund, if any, will be valued at the last reported sale price on the principal exchange on which such securities are traded, as of the close of regular trading on the NYSE on the day the securities are being valued or, if there are no sales, at the mean of the most recent bid and ask prices. Debt securities will be valued at the mean between the last available bid and asked prices for such securities or, if such prices are not available, at prices for securities of comparable maturity, quality, and type. Securities for which market quotations are not readily available, including restricted securities, will be valued by a method that the Fund's Board of Trustees believes accurately reflects fair value. Securities will be valued at fair value when market quotations are not readily available or are deemed unreliable, such as when a security's value or meaningful portion of the Fund's portfolio is believed to have been materially affected by a significant event. Such events may include a natural disaster, an economic event like a bankruptcy filing, a trading halt in a security, an unscheduled early market close, or a substantial fluctuation in domestic and foreign markets that has occurred between the close of the principal exchange and the NYSE. In such a case, the value for a security is likely to be different from the last quoted market price. In addition, due to the subjective and variable nature of fair market value pricing, it is possible that the value determined for a particular asset may be materially different from the value realized upon such asset's sale.

Creation of Shares

The Trust will issue and sell Shares of the Fund only in Creation Units of 100,000 Shares each on a continuous basis through the Distributor, without a sales load, at its NAV next determined after receipt, on any business day, of an order in proper form. Creation Units of the Fund generally will be sold for cash only, calculated based on the NAV per

unlimited futures transactions and options thereon provided that the investment adviser to the company claims an exclusion from regulation as a commodity pool operator. In connection with its management of the Trust, the Adviser has claimed such an exclusion from registration as a commodity pool operator under the Commodity Exchange Act (7 U.S.C. 1) (''CEA''). Therefore, it is not subject to the registration and regulatory requirements of the CEA, and there are no limitations on the extent to which the Fund may engage in non-hedging transactions involving futures and options thereon, except as set forth in the Registration Statement.

[17] Swaps, options (other than options in which the Fund principally will invest), and futures contracts will not be included in the Fund's investment, under normal market circumstances, of at least 80% of its total assets in component securities that comprise the Index and in T-Bills, as described above.

[18] *See* Form N–1A, Item 9. The Commission has taken the position that a fund is concentrated if it invests more than 25% of the value of its total assets in any one industry. *See, e.g.,* Investment Company Act Release No. 9011 (October 30, 1975), 40 FR 54241 (November 21, 1975).

[19] 15 U.S.C. 80a–12(d).

[20] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

[21] 26 U.S.C. 851.

Share multiplied by the number of Shares representing a Creation Unit (''Deposit Cash''), plus a transaction fee.

The Custodian, through the National Securities Clearing Corporation (''NSCC''), will make available on each business day, prior to the opening of business on NYSE Arca (currently 9:30 a.m. E.T.), the amount of the Deposit Cash to be deposited in exchange for a Creation Unit of the Fund.

To be eligible to place orders with the Distributor and to create a Creation Unit of the Fund, an entity must be (i) a ''Participating Party,'' *i.e.,* a broker-dealer or other participant in the clearing process through the Continuous Net Settlement System of the NSCC (''Clearing Process''); or (ii) a Depository Trust Company (''DTC'') participant, and, in each case, must have executed an agreement with the Distributor, with respect to creations and redemptions of Creation Units. A Participating Party and DTC participant are collectively referred to as an ''Authorized Participant.''

All orders to create Creation Units, whether through a Participating Party or a DTC participant, must be received by the Distributor no later than the closing time of the regular trading session on the NYSE (ordinarily 4:00 p.m. E.T.) in each case on the date such order is placed in order for creation of Creation Units to be effected based on the NAV of Shares of the Fund as next determined on such date after receipt of the order in proper form.

Redemption of Shares

Fund Shares may be redeemed only in Creation Units at the NAV next determined after receipt of a redemption request in proper form by the Fund through BNY and only on a business day. The Fund will not redeem Shares in amounts less than a Creation Unit.

With respect to the Fund, BNY, through the NSCC, will make available prior to the opening of business on NYSE Arca (currently 9:30 a.m. E.T.) on each business day, the amount of cash that will be paid (subject to possible amendment or correction) in respect of redemption requests received in proper form on that day (''Redemption Cash'').

The redemption proceeds for a Creation Unit generally will consist of the Redemption Cash, as announced on the business day of the request for redemption received in proper form, less a redemption transaction fee.

Initial and Continued Listing

The Shares will conform to the initial and continued listing criteria under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2), except that the Index is comprised of U.S. exchange-listed options based on ''US Component Stocks'' [22] rather than US Component Stocks themselves. The Exchange represents that, for initial and/or continued listing, the Fund will be in compliance with Rule 10A–3 under the Exchange Act,[23] as provided by NYSE Arca Equities Rule 5.3. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. The Exchange will obtain a representation from the issuer of the Shares that the NAV will be calculated daily and made available to all market participants at the same time.

Availability of Information

The Fund's Web site (*www.alpsetfs.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV (''Bid/Ask Price''),[24] and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters.[25]

On a daily basis, the Adviser will disclose for each portfolio security and other financial instrument of the Fund the following information: ticker symbol (if applicable), name of security and financial instrument, number of securities or dollar value of securities and financial instruments held in the portfolio, and percentage weighting of the security and financial instrument in the portfolio. The Fund's portfolio holdings, including information regarding its option positions, will be disclosed each day on the Fund's Web site. The Web site information will be publicly available at no charge.

An ''Intraday Indicative Value'' (''IIV'') of Shares of the Fund will be calculated and widely disseminated by one or more major market data vendors every fifteen seconds during the NYSE Arca Core Trading Session of 9:30 a.m. E.T. to 4:00 p.m. E.T.[26] The Exchange will calculate the IIV by dividing the ''Estimated Fund Value'' (as defined below) as of the time of the calculation by the total number of outstanding Shares. ''Estimated Fund Value'' is the sum of the estimated amount of cash held in the Fund's portfolio, the estimated amount of accrued interest owing to the Fund, and the estimated value of the securities held in the Fund's portfolio, minus the estimated amount of liabilities. The IIV will be calculated based on the same portfolio holdings disclosed on the Fund's Web site.

The dissemination of the IIV will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and to provide a close estimate of that value throughout the trading day. The IIV should not be viewed as a ''real-time'' update of the NAV per Share of the Fund because it may not be calculated in the same manner as the NAV, which will be computed once a day, generally at the end of the business day.

Investors can also obtain the Trust's Statement of Additional Information (''SAI''), the Fund's Shareholder Reports, and its Form N–CSR and Form N–SAR, filed twice a year. The Trust's SAI and Shareholder Reports are available free upon request from the Trust, and those documents and the Form N–CSR and Form N–SAR may be viewed on-screen or downloaded from the Commission's Web site at *www.sec.gov.* Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last-sale information for the Shares will be available via the CTA high-speed line. The value of the Index

[22] NYSE Arca Equities Rule 5.2(j)(3) defines the term ''US Component Stock'' to mean an equity security that is registered under Sections 12(b) or 12(g) of the Exchange Act or an American Depositary Receipt, the underlying equity security of which is registered under Sections 12(b) or 12(g) of the Exchange Act.

[23] 17 CFR 240.10A–3.

[24] The Bid/Ask Price of Shares of the Fund will be determined using the mid-point of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[25] Under accounting procedures to be followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund will be able to disclose at the beginning of the business day the portfolio that will form the basis for the NAV calculation at the end of the business day.

[26] Currently, it is the Exchange's understanding that several major market data vendors display and/or make widely available IIVs taken from the Consolidated Tape Association (''CTA'') or other data feeds.

will be published by one or more major market data vendors every 15 seconds during the NYSE Arca Core Trading Session.

Pricing information for the Index Components is available from the U.S. options exchanges on which such components are listed and traded. A list of the Index Components, with percentage weightings, will be available on the Exchange's Web site.

Additional information regarding the Trust and the Shares, including investment strategies, risks, creation and redemption procedures, fees, portfolio holdings disclosure policies, distributions, and taxes is included in the Registration Statement.

Suitability

Currently, NYSE Arca Equities Rule 9.2(a) (Diligence as to Accounts) provides that an Equity Trading Permit (''ETP'') Holder, before recommending a transaction in any security, must have reasonable grounds to believe that the recommendation is suitable for the customer based on any facts disclosed by the customer as to its other security holdings and as to its financial situation and needs. Further, the rule provides, with a limited exception, that prior to the execution of a transaction recommended to a non-institutional customer, the ETP Holder must make reasonable efforts to obtain information concerning the customer's financial status, tax status, investment objectives, and any other information that such ETP Holder believes would be useful to make a recommendation.

Prior to the commencement of trading, the Exchange will inform its ETP Holders of the suitability requirements of NYSE Arca Equities Rule 9.2(a) in an Information Bulletin (''Bulletin''). Specifically, ETP Holders will be reminded in the Bulletin that, in recommending transactions in these securities, they must have a reasonable basis to believe that (1) the recommendation is suitable for a customer given reasonable inquiry concerning the customer's investment objectives, financial situation, needs, and any other information known by such member, and (2) the customer can evaluate the special characteristics, and is able to bear the financial risks, of an investment in the Shares. In connection with the suitability obligation, the Bulletin will also provide that members must make reasonable efforts to obtain the following information: (1) The customer's financial status; (2) the customer's tax status; (3) the customer's investment objectives; and (4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

As described above, the Fund will seek to track the performance of the Index by selling listed 60-day put options in proportion to their weightings in the Index. If the option's underlying stock declines below the strike price, the option will finish in-the-money and the Fund will be required to buy the underlying stock at the strike price, effectively paying the buyer the difference between the strike price and the closing price. Therefore, by writing a put option, the Fund is exposed to the amount by which the price of the underlying stock is less than the strike price. FINRA has issued a regulatory notice relating to sales practice procedures applicable to recommendations to customers by FINRA members of reverse convertibles, as described in FINRA Regulatory Notice 10–09 (February 2010) (''FINRA Regulatory Notice'').[27] While the Fund will not invest in reverse convertibles, the Fund's options strategies may raise issues similar to those raised in the FINRA Regulatory Notice. Therefore, the Bulletin will state that ETP Holders that carry customer accounts should follow the FINRA Regulatory Notice with respect to suitability.

As disclosed in the Registration Statement, the Fund is designed for investors who seek to obtain income through selling put options on select equity securities which the Index Provider determines to have the highest volatility. Because of the high volatility of the stocks underlying the put options sold by the Fund, it is possible that the value of such stocks will decline in sufficient magnitude to trigger the exercise of the put options and cause a loss which may outweigh the income from selling such put options. Accordingly, the Fund should be considered a speculative trading instrument and is not necessarily appropriate for investors who seek to avoid or minimize their exposure to stock market volatility. The Exchange's Bulletin regarding the Fund, described below, will provide information regarding the suitability of an investment in the Shares, as stated in the Registration Statement.

Trading Halts

With respect to trading halts, the Exchange may consider all relevant factors in exercising its discretion to halt or suspend trading in the Shares of the Fund.[28] Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached. Trading also may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or financial instruments comprising the portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

If the IIV, the Index value, or the value of the Index Components is not available or is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Exchange will obtain a representation from the Fund that the NAV for the Fund will be calculated daily and will be made available to all market participants at the same time. Under NYSE Arca Equities Rule 7.34(a)(5), if the Exchange becomes aware that the NAV for the Fund is not being disseminated to all market participants at the same time, it will halt trading in the Shares until such time as the NAV is available to all market participants.

Trading Rules

The Exchange deems the Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Shares will trade on the NYSE Arca Marketplace from 4:00 a.m. to 8:00 p.m. E.T. in accordance with NYSE Arca Equities Rule 7.34 (Opening, Core, and Late Trading Sessions). The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in NYSE Arca Equities Rule 7.6, Commentary .03, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Surveillance

The Exchange intends to utilize its existing surveillance procedures applicable to derivative products (which

[27] The Exchange notes that NASD Rule 2310 relating to suitability, referenced in the FINRA Regulatory Notice, has been superseded by FINRA Rule 2111. *See* FINRA Regulatory Notice 12–25 (May 2012).

[28] *See* NYSE Arca Equities Rule 7.12, Commentary .04.

include Investment Company Units) to monitor trading in the Shares. The Exchange represents that these procedures are adequate to properly monitor Exchange trading of the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws.

The Exchange's current trading surveillance focuses on detecting securities trading outside their normal patterns. When such situations are detected, surveillance analysis follows and investigations are opened, where appropriate, to review the behavior of all relevant parties for all relevant trading violations.

The Exchange may obtain information via the Intermarket Surveillance Group (''ISG'') from other exchanges that are members of ISG, including all U.S. options exchanges on which Index Components are listed and traded.[29]

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in the Bulletin of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) NYSE Arca Equities Rule 9.2(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) the risks involved in trading the Shares during the Opening and Late Trading Sessions when an updated IIV will not be calculated or publicly disseminated; (4) how information regarding the IIV is disseminated; (5) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information.

In addition, the Bulletin will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Exchange Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m. E.T. each trading day.

2. Statutory Basis

The basis under the Exchange Act for this proposed rule change is the requirement under Section 6(b)(5)[30] that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 5.2(j)(3). The Exchange has in place surveillance procedures that are adequate to properly monitor trading in the Shares in all trading sessions and to deter and detect violations of Exchange rules and applicable federal securities laws. The Adviser is affiliated with a broker-dealer and will implement and maintain procedures designed to prevent the use and dissemination of material non-public information regarding the Index. The Sub-Adviser is not affiliated with a broker-dealer. NYSE Arca is affiliated with a broker-dealer and will implement and maintain procedures designed to prevent the use and dissemination of material non-public information regarding the Index. In selecting the stocks underlying the Index Components, the Index Provider begins with the universe of all U.S. exchange-listed stocks, and then screens for those stocks that meet the following criteria: (1) Minimum market capitalization of at least $5 billion; (2) minimum trading volume of at least 50 million shares during the preceding 6 months; (3) minimum average daily trading volume of one million shares during the preceding 6 months; (4) minimum average daily trading value of at least $10 million during the preceding 6 months; (5) share price of $10 or higher; (6) the availability of U.S. exchange-listed options. The put options which the Fund will sell will be listed on a national securities exchange. The Exchange may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. If the IIV, the Index value, or the value of the Index Components is not available or is not being disseminated as required, the Exchange may halt trading during the day in which the disruption occurs; if the interruption persists past the day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid securities. The Fund's investments will be consistent with the Fund's investment objective and will not be used to enhance leverage. The Fund will not invest in non-U.S. equity securities. The Fund's portfolio holdings, including information regarding its option positions, will be disclosed each day on its Web site. Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. The Information Bulletin will state that ETP Holders that carry customer accounts should follow the FINRA Regulatory Notice with respect to suitability.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the issuer of the Shares that the NAV will be made available to all market participants at the same time. In addition, a large amount of information will be publicly available regarding the Fund and the Shares, thereby promoting market transparency. Quotation and last-sale information for the Shares will be available via the CTA high-speed line. The value of the Index will be published by one or more major market data vendors every 15 seconds during the NYSE Arca Core Trading Session. In addition, the IIV will be widely disseminated by one or more major market data vendors at least every 15 seconds during the Core Trading Session. The Fund's Web site will include a form of the prospectus for the Fund that may be downloaded. The Fund's Web site will include additional quantitative information updated on a daily basis, including, for the Fund, (1) daily trading volume, the prior business day's reported closing price, NAV and mid-point of the bid/ask spread at the time of calculation of such NAV, and a calculation of the premium and discount of the Bid/Ask Price against the NAV, and (2) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. On a daily

[29] For a list of the current members of ISG, see *www.isgportal.org*. The Exchange notes that not all components of the portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[30] 15 U.S.C. 78f(b)(5).

basis, the Adviser will disclose for each portfolio security and other financial instrument of the Fund the following information: ticker symbol (if applicable), name of security and financial instrument, number of shares or dollar value of securities and financial instruments held in the portfolio, and percentage weighting of the security and financial instrument in the portfolio. The Fund's portfolio holdings, including information regarding its option positions, will be disclosed each day on the Fund's Web site. The Web site information will be publicly available at no charge. A list of the Index Components, with percentage weightings, will be available on the Exchange's Web site.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of issue of Investment Company Units that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the IIV, and quotation and last-sale information for the Shares.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

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–2012–109 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–2012–109. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2012–109 and should be submitted on or before November 8, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

Kevin M. O'Neill,

Deputy Secretary.

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[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68042; File No. SR–NASDAQ–2012–117]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change With Respect to INAV Pegged Orders for ETFs

October 12, 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 2, 2012, The NASDAQ Stock Market LLC (''NASDAQ'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ proposes to amend Rule 4751(f)(4) to include a new Intraday Net Asset Value (''INAV'') Pegged Order for Exchange-Traded Funds (''ETFs'') where the component stocks underlying the ETFs are U.S. Component Stocks as defined by Rule 5705(a)(1)(C) and 5705(b)(1)(D)—hereafter defined as ''U.S. Component Stock ETFs.''

The text of the proposed rule change is set forth below. Proposed new text is in italics and deleted text is in brackets.

4751. Definitions

The following definitions apply to the Rule 4600 and 4750 Series for the trading of securities listed on Nasdaq or a national securities exchange other than Nasdaq.

(a)–(e) No change.

(f) The term ''Order Type'' shall mean the unique processing prescribed for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

designated orders that are eligible for entry into the System, and shall include:

(1)–(3) No change.

(4) ''Pegged Orders'' are orders that, after entry, have their price automatically adjusted by the System in response to changes in either the Nasdaq Market Center inside bid or offer, [or] bids or offers in the national market system, *or in respect of Exchange Traded Funds of U.S. Component Stocks (as defined in Rule 5705), changes in the intraday net asset value (''INAV''),* as appropriate. A Pegged Order can specify that its price will equal the inside quote on the same side of the market (''Primary Peg''), the opposite side of the market (''Market Peg''), or the midpoint of the national best bid and offer (''Midpoint Peg'') *or, in the case of Exchange Traded Funds of U.S. Component Stocks, the INAV (''INAV Peg'').* A Pegged Order may have a limit price beyond which the order shall not be executed. In addition, the Primary Peg, [and] Market Peg *and INAV Peg* Orders may also establish their pricing relative to the appropriate bids, [or] offers *or INAV* by the selection of one or more offset amounts that will adjust the price of the order by the offset amount selected. A Midpoint Peg Order is priced based upon the national best bid and offer, excluding the effect that the Midpoint Peg Order itself has on the inside bid or inside offer. Midpoint Pegged Orders will never be displayed. A Midpoint Pegged Order may be executed in sub-pennies if necessary to obtain a midpoint price. A new timestamp is created for the order each time it is automatically adjusted.

(5)–(15) No change.

(g)–(i) No change.

* * * * *

The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaq.cchwallstreet.com*, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change 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

NASDAQ proposes to amend Rule 4751(f)(4) to establish INAV Pegged Orders which will be available for U.S. Component Stock ETFs. This new order type will serve market participants that utilize these ETFs as a vehicle to invest or trade in addition to serving the needs and interests of the Sponsors/Issuers of ETFs.

The ETF INAV Pegged Order will be priced relative to the Intraday Net Asset Value of the fund's underlying portfolio. The term ''INAV'' is synonymous with commonly used terms such as Intraday Indicative Value (IIV), Intraday Optimized Portfolio Value (IOPV) and Intraday Portfolio Value (IPV) amongst others. The INAV is intended to approximate the fair value of the securities held in the portfolio by the ETF and should closely represent the value of the fund during the trading day. Pursuant to NASDAQ listing rules, the INAV for NASDAQ-listed stocks is disseminated widely to vendors and their subscribers via multiple data feeds, including UTP Level 1, NASDAQ Basic, NASDAQ Level 2, and NASDAQ TotalView. INAVs are typically disseminated at least once every 15 seconds. Rule 5705(a)(3)(C), for example, requires that the IIV for NASDAQ listed portfolio depository receipts be disseminated at least every 15 seconds.

Typically, INAVs are calculated using the last sale prices of the fund's components. INAVs can vary from the fund's market price and/or can be valued outside of the fund's prevailing bid/ask spread as a result of the supply and demand characteristics of the fund and/or liquidity present in the marketplace. The INAV may remain unchanged for a certain period of time if the underlying values do not change, particularly in periods of low volatility. Additionally, the INAV may become stale as a result of a compromised data feed or disruption to the calculation and/or dissemination agent or other technology related malfunction.

The fair market price of an ETF is more objective than the market price of a cash equity. Mainly, the price of an ETF is based upon the price of the underlying portfolio of the ETF. Therefore, if the components of the portfolio increase in value, so does the fund and, conversely, if the components of the portfolio decrease in value, so does the fund. In the cash equities marketplace, pricing is more subjective in nature. Unfavorable executions occur in the ETF marketplace and this can be as a result of market participants not recognizing the liquidity characteristics of the product they are trading. Executions can occur with drastic variance from the INAV, usually as a result of participants relying on market orders for execution. The INAV Pegged Order type will be available for all U.S. Component Stock ETFs where there is dynamic INAV data and will offer market participants a greater level of transparency as to fair value, by bringing what has historically been a post-trade analytics tool into the pre-trade environment. More importantly, the INAV Pegged Order should minimize the disparity between the market execution price and the underlying fund's value.

Pegged Orders are orders that, once entered, adjust in price automatically in response to changes in factors such as the NBBO, depending upon the type of Pegged Order. An INAV Pegged Order will specify that its price will equal (or, to the extent an offset is used, be offset from) the prevailing INAV for the relevant ETF. As the INAV changes, so move the INAV Pegged Orders. In the event that the INAV data feed for a particular ETF were to be compromised or temporarily stopped being disseminated, the use of the INAV Pegged Order type for that ETF would be suspended (*i.e.,* no new INAV Pegged Orders would be accepted into the system) and orders utilizing the INAV pegged functionality for that ETF already in the system would be cancelled. The suspension of new INAV Pegged Orders would remain in effect until such time as the Exchange was confident that the integrity of the INAV data feed had been restored.

The proposed rule change is in accordance with Rule 612 of Regulation NMS,[3] which governs sub-penny quoting of National Market System stocks (''Sub-Penny Rule''). The proposed rule change would not result in the display, rank, or acceptance of a bid or offer, an order, quotation, or indication of interest in any NMS stock that is priced in an increment smaller than $0.01 per share, unless the price of the bid or offer, order, indication of interest is priced less than $1.00 per share.

NASDAQ intends to use an INAV as opposed to the end of day net asset value (''ED NAV'') for a number of reasons. While the ED NAV is more

[3] 17 CFR 242.600 *et seq. See also* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (''Regulation NMS Adopting Release'').

definitive in nature, it does not allow for an intraday fund valuation, thus limiting one of the greatest advantages of the ETF structure, mainly the ability to trade throughout the entire trading session, as compared to the traditional Mutual Fund (which uses ED NAV based execution). Conversely, use of the INAV, while only indicative of the ETF's value, offers investors a trade execution tool which should lead to a greater level of transparency as it relates to the ETF's current value. Relative to the current intraday order entry/execution order types, the INAV Pegged Order type would allow certainty of execution with a greater correlation to the ETF's fair value for those seeking to invest on a more informed basis. However, despite NASDAQ's rationale for using the INAV, investors should note that the INAV is only an estimation of a fund's value, and this might differ from the ED NAV which is more definitive and disseminated on a daily basis at the end of the trading day. Investors should also note that INAVs are only calculated and disseminated during the regular market session.

A Pegged Order may have a limit price beyond which the order shall not be executed. Currently, Primary Peg and Market Peg Orders may establish their pricing relative to the appropriate bids or offers by selecting one or more offset amounts that will adjust the price of the order by the offset amount selected. We propose to introduce this functionality for the INAV Peg also.

A Pegged Order (other than a Midpoint Peg Order) may be both displayed or non-displayed. We propose to introduce this functionality for the INAV Peg also. Where market participants see value in anonymity they can utilize the non-displayed order type, though by doing so, they will be placed lower in the priority queue within each price point. Conversely, those that do not value anonymity can utilize a displayed order type and benefit from a higher priority in the execution queue.

The following examples illustrate how the proposed rule change would operate (note that the price of the order updates in response to changes in the INAV):

Example 1

- The best bid is $20.00 and the best offer is $20.06 at 10:00:00 a.m. INAV is updated and published as $20.03 at 10:00:02.
- An INAV Peg Order to buy entered at 10:00:04 would be priced at $20.03.
- The best bid would update to $20.03 (at approximately 10:00:04).
- The best offer would remain at $20.06.

Example 2

- The best bid is $20.00 and the best offer is $20.06 at 10:00:00. INAV is updated and published as $19.98 at 10:00:02.
- An INAV Peg Order to sell entered at 10:00:04 would be priced at $19.98 and subsequently execute at $20.00 (at approximately 10:00:04).

Example 3

- The best bid is $20.00 and the best offer is $20.10 at 10:00:00 a.m. INAV is updated and published as $20.03 at 10:00:02.
- An INAV Peg Order to buy with a +.03 offset entered at 10:00:04 would be priced at $20.06 ($20.03 +.03) (at approximately 10:00:04).
- The best bid would update to $20.06 (approximately 10:00:04).
- The best offer would remain at $20.10.

INAV Peg Orders will allow the market participant to achieve a greater sense of control over the execution price as it relates to the fund's value by benchmarking to the estimated intraday fund's value. This added value to the investing public will be strongly supported by the ETF Sponsor community. ETF Sponsors routinely deal with investors that have been subject to inferior executions. These complaints are almost unanimously as a result of people using market orders where the prevailing bid/ask in the market does not necessarily correlate to the fund's value, and the quoted size does not meet the demand of the order. The INAV Peg will also help to protect investors against any unintended overpayment for the security.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[4] in general, and furthers the objectives of Section 6(b)(5),[5] 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, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The INAV Pegged Order will allow market participants the option to enter an order without concern about the value of the fund's underlying portfolio being drastically different and therefore resulting in an inferior execution, as the order will be dynamically repriced/updated throughout the life of the order as the value of the underlying portfolio changes. Additionally, it provides a more intelligent form of market order. Instead of having the order execute at the prevailing price (regardless of what that price might be relative to the fund's value) the INAV Pegged Order gives participants the option to collar the execution at a price that relates to the actual value of the fund's components. Whilst it is acknowledged that there is an inherent lack of execution determinism with a Pegged Order, market participants will be free to elect this order type for U.S. Component Stock ETFs where there is dynamic INAV data, but they will not be limited to this option, or required to use this option. For those market participants who are more interested in securing execution certainty, a conventional market order will still be available.

The Exchange believes that the proposed change to Rule 4751(f)(4) meets the requirements of Section 6(b)(5) of the Act[6] in that it will improve the stability, quality, and transparency of the national market system. In the event that the INAV data feed were to be compromised or temporarily stopped being disseminated, the use of the INAV Pegged Order type would be suspended (*i.e.,* no new INAV Pegged Orders would be accepted into the system) until such time as the Exchange was confident that the integrity of the INAV data feed had been restored and orders utilizing the INAV pegged functionality already in the system would be cancelled. In addition, the Exchange is not aware of any circumstance where this order type could be used to manipulate the underlying value of the fund, and Nasdaq MarketWatch will perform all usual market surveillance activity on the use of the INAV Pegged Order.

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. To the contrary, NASDAQ believes that the INAV Peg Order is pro-competitive in that it will offer enhance [sic] the attractiveness of NASDAQ's listings and trading venues.[7]

[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] *Id.*

[7] *See* Form 19b–4 at 11.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall:

A. By order approve or disapprove such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2012–117 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–2012–117.This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2012–117 and should be submitted on or before November 8, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25600 Filed 10–17–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68052; File No. SR–PHLX–2012–119]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Phlx's Fee Schedule Governing Order Execution on Its NASDAQ OMX PSX Facility

October 12, 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 1, 2012, NASDAQ OMX PHLX LLC (''Phlx'' 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 the Substance of the Proposed Rule Change

Phlx proposes to a modify Phlx's fee schedule governing order execution and routing through its NASDAQ OMX PSX (''PSX'') facility. Phlx will implement the proposed change on October 1, 2012. The text of the proposed rule change is available at *http://nasdaqomxphlx.cchwallstreet.com/nasdaqomxphlx/phlx/,* at Phlx's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the 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 modify its fee schedule governing order execution and routing on PSX. The general purposes of the fee changes are to (i) encourage greater provision of liquidity through PSX by instituting an increase in the rebates paid with respect to liquidity-providing orders, (ii) make certain increases to the fees for accessing liquidity and routing orders, and (iii) increase fees for routing orders to the New York Stock Exchange (''NYSE'') to reflect an announced price increase by that exchange.[3] All of the changes pertain to securities priced at $1 or more per share. Phlx is, however, moving the fees governing execution and routing of orders for securities priced at less than $1 per share to a new paragraph of the fee schedule.

Under the change, PSX will pay a rebate of $0.0028 per share executed for displayed orders entered through a NASDAQ OMX PSX market participant identifier (''MPID'') through which a member organization provides shares of liquidity that represent more than 0.10% of the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities (''Consolidated Volume'') during the month. In addition, in recognition of the convergence of trading in which

[8] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* SR–NYSE–2012–50 (September 26, 2012).

member organizations simultaneously trade different asset classes, Phlx is introducing a pricing incentive to encourage market participants that are active in the Phlx Options Market also to trade on PSX.[4] Specifically, Phlx will also pay a rebate of $0.0028 per share executed with respect to displayed orders entered through a NASDAQ OMX PSX MPID through which the member organization provides shares of liquidity that represent more than 0.05% of Consolidated Volume during the month; provided that the member organization and any affiliated member organizations [5] also have an average daily volume during the month of 1,000 or more electronically-delivered and executed customer contracts that add liquidity on Phlx's Options Market. Phlx will pay a rebate of $0.0026 per share executed with respect to all other displayed orders that provide liquidity, and will pay a rebate of $0.0010 per share executed with respect to non-displayed orders that provide liquidity. These new rebate provisions replace provisions under which Phlx paid a maximum rebate of $0.0026 per share executed with respect to minimum life orders and displayed orders with an original size of 2,000 shares or more, but lower rebates with respect to orders for securities listed on NYSE, displayed orders with a smaller size, and non-displayed orders. Under the proposed change, the rebate paid with respect to both displayed and non-displayed orders that provide liquidity will equal or exceed currently available rebates in all cases.

In order to offset the cost of these higher rebates, Phlx is making corresponding changes to the fees charged for accessing liquidity. Specifically, PSX will charge $0.0028 per share executed for orders entered through a NASDAQ OMX PSX MPID through which a member organization provides shares of liquidity that represent more than 0.10% of Consolidated Volume during the month. PSX will also charge $0.0028 per share executed with respect to the execution on PSX of any order that is designated as eligible for routing, and $0.0030 per share executed for all other orders that execute on PSX. The discount for routable orders, as compared with non-routable orders, is designed to provide incentives for member organizations to make use of PSX's routing services. By contrast, PSX had previously charged $0.0019 per share executed for orders in securities listed on NSYE and $0.0027 per share executed for other orders. The increases are necessary to ensure that Phlx covers the costs associated with the increased rebates it is offering.

With respect to fees for executions on other markets of routed orders, PSX is adopting minor increases in the fees charged for certain orders that execute on the other trading venues. Thus, with respect to PSTG and PSCN orders that execute on venues other than NYSE or NASDAQ OMX BX, and with respect to PTFY and PCRT orders that execute at the NASDAQ Stock Market, Phlx is increasing the fee from $0.0027 per share executed to $0.0028 per share executed. These changes will ensure that routable orders that execute at other venues pay a fee that is consistent with the fee paid with respect to such orders when they execute at PSX.

Finally, to reflect recent increases in the fees charged by NYSE with respect to orders routed to it by PSX, Phlx is raising the fee for PSTG and PSCN orders routed to NYSE from $0.0023 per share executed to $0.0025 per share executed; the fee for PMOP orders routed to NYSE from $0.0025 per share executed to $0.0027 per share executed; and the fee for PTFY orders routed to NYSE from $0.0022 per share executed to $0.0024 per share executed.

2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[6] in general, and with Sections 6(b)(4) and (5) of the Act,[7] 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 Phlx operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers or dealers. All similarly situated member organizations are subject to the same fee structure, and access to Phlx is offered on fair and non-discriminatory terms.

The Exchange believes that the proposed fees for accessing liquidity are reasonable because they are consistent with the limitations imposed by SEC Rule 610 [8] on access fees. The Exchange further believes that the proposed access fees are consistent with an equitable allocation of fees, in that they are set at levels that allow the Exchange to pay a credit to liquidity providers. Because the payment of such credits encourages liquidity providers to post orders in PSX, they also benefit liquidity accessors by increasing the likelihood of execution at or near the inside market. Phlx further believes that the discounted access fees for orders entered through MPIDs that satisfy a volume requirement are not unreasonably discriminatory because they are designed to provide incentives to member organizations to increase their participation in PSX and are consistent in their purpose with similar volume-based pricing incentives offered by numerous other exchanges. Similarly, Phlx believes that the discounted fee for orders that are eligible for routing is not unreasonably discriminatory because it is a reasonable means of encouraging member organizations to make use of PSX's routing services but does not differ to a great extent from the fees otherwise charged for order execution. Finally, PSX believes that these discounts are consistent with an equitable allocation of fees because they are designed to serve the appropriate purposes of encouraging greater use of PSX's execution and routing facilities but do not deviate to an unreasonable extent from the access fee otherwise charged by PSX.

Phlx further believes that the proposed rebates for liquidity providers are reasonable because they are set at levels that are equal to or higher than the rebates currently offered, and are designed to attract greater numbers of liquidity-providing orders to PSX. In addition, Phlx believes that the proposed rebates reflect an equitable allocation of fees because they are set at levels that do not deviate significantly from the access fees charged by PSX. Phlx further believes that the proposed higher rebates for displayed liquidity provided through MPIDs that satisfy a volume requirement are not unreasonably discriminatory because they are designed to provide incentives to member organizations to increase their participation in PSX and are consistent in their purpose with similar

[4] The incentive is similar to pricing incentives in place at the NASDAQ Stock Market with respect to its members that are also active in the NASDAQ Options Market. *See* NASDAQ Rule 7018.

[5] For this purpose, member organizations are deemed affiliates if there is at least 75% common ownership of the member organizations. This standard corresponds to standards currently used under the NASDAQ OMX PHLX Pricing Schedule for options. *See, e.g.,* NASDAQ OMX PHLX Pricing Schedule, Chapter II (Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs, indexes and HOLDRS which are Multiply Listed)) (''Specialists and Market Makers are subject to a 'Monthly Market Maker Cap' of $550,000 for equity option transaction fees and QCC Transaction Fees, as defined in this section above. The trading activity of separate Specialist and Market Maker member organizations will be aggregated in calculating the Monthly Market Maker Cap if there is at least 75% common ownership between the member organizations.'').

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4) and (5).

[8] 17 CFR 242.610.

volume-based pricing incentives offered by numerous other exchanges. Similarly, Phlx believes that the proposed higher rebate with respect to displayed liquidity provided by certain member organizations that are active in both PSX and Phlx's Options Market is not unreasonably discriminatory because it is responsive to the convergence of trading in which member organization [sic] simultaneously trade different asset classes within a single strategy. Phlx also notes that cash equities and options markets are linked, with liquidity and trading patterns on one market affecting those on the other. Accordingly, pricing incentives that encourage market participant activity in both markets recognize that activity in the options markets may also support price discovery and liquidity provision in PSX. This proposed rebate is also not unreasonably discriminatory because the Exchange is offering an alternative means of earning an identical rebate that does not require participation in Phlx's Options Market. Phlx further believes that the proposal to pay higher rebates with respect to displayed orders than with respect to non-displayed orders is not unreasonably discriminatory because Phlx believes that it is reasonable to use pricing incentives to encourage the use of displayed orders, which contribute more to price discovery and market transparency, than non-displayed orders.

The proposed changes to fees for routing orders to NYSE are reasonable because they reflect the increase in the fee that will be charged by NYSE to Phlx with respect to such orders. The change is consistent with an equitable allocation of fees because it will bring the economic attributes of routing orders to NYSE in line with the cost of executing orders there. Finally, the change is not unfairly discriminatory because it solely applies to member organizations that opt to route orders to NYSE.

The other proposed increases in routing fees are reasonable because they are very small in magnitude ($0.0001 per share executed for affected orders). The changes are consistent with an equitable allocation of fees because the resulting fees are consistent with the fee charged for the execution of routable orders at PSX. Thus, member organizations are encouraged to use routable orders through a favorable execution rate and the increased likelihood of finding liquidity at PSX that may be promoted through the higher liquidity provider rebates adopted through the proposal. Phlx believes that it is equitable under these circumstances to charge a fee for routing the orders to other venues that is more consistent with PSX's own execution fee. Finally, the change is not unreasonably discriminatory because it applies solely to member organizations that opt to use the routing strategies subject to the price change.

Phlx also notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, Phlx must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Phlx believes that the proposed rule change reflects this competitive environment because it is designed to create pricing incentives for greater use of PSX's trading and routing services.

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. Because the market for order execution is extremely competitive, member organizations may readily opt to disfavor Phlx's execution and routing services if they believe that alternatives offer them better value. The proposed change is designed to enhance competition by using pricing incentives to encourage greater use of PSX's trading and routing services.

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)(ii) of the Act.[9] 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.

[9] 15 U.S.C. 78s(b)(3)(a)(ii).

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–2012–119 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–PHLX–2012–119. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room 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–PHLX–2012–119, and should be submitted on or before November 8, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25654 Filed 10–17–12; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68047; File No. SR–Phlx–2012–121]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to a Customer Rebate Program, Multiply Listed Options Transaction Charges and PIXL

October 12, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that, on October 1, 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, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule to: (i) Clarify the Monthly Market Maker Cap [3] in Section II titled ''Multiply Listed Options Fees''; [4] (ii) amend PIXL pricing [5] in Section IV titled ''Other Transaction Fees'', Section A titled ''PIXL Pricing''; and amend and relocate the Customer Rebate Program in Section II to a new Section A.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXfilings,* 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 amend Sections II and III of the Exchange's Pricing Schedule and create a new Section A. Specifically, the Exchange is proposing to clarify its Pricing Schedule with respect to fees related to an order or quote that is contra to a PIXL Order and included in the Monthly Market Maker Cap calculation, increase the fee for certain orders executed once the Monthly Market Maker Cap has been exceeded and relocate the Customer Rebate Program from Section II to Section A and amend various pricing for that program. Also, the Exchange proposes to amend Section IV related to PIXL Pricing. Each of the amendments will be described below in greater detail.

Section II Amendments

The Exchange is proposing to amend the Monthly Market Maker Cap. Currently, the Monthly Market Maker Cap is $550,000 for equity options transaction fees and Qualified Contingent Cross (''QCC'') Transaction Fees.[6] The Exchange proposes to clarify the fees included in the Monthly Market Maker Cap. Today, the Exchange includes fees related to an order or quote that is contra to a PIXL Order or specifically responding to a PIXL auction executed resting and responding orders [7] that execute against a PIXL Initiating Order in the Monthly Market Maker Cap calculation. The Exchange proposes to clarify the Pricing Schedule by specifically delineating the various fees that are calculated to arrive at the Monthly Market Maker Cap. The Exchange proposes to amend the Pricing Schedule to note that in addition to equity options transaction fees and QCC Transaction Fees, fee related to an order or quote that is contra to a PIXL Order or specifically responding to a PIXL Auction are included in the Monthly Market Maker Cap calculation.

The Exchange also proposes to amend a fee which is assessed once a Specialist [8] or Market Maker [9] has reached the Monthly Market Maker Cap. Currently, Specialists and Market Makers that (i) are on the contra-side of an electronically-delivered and executed Customer order; and (ii) have reached the Monthly Market Maker Cap are assessed a $0.12 per contract fee, excluding PIXL Orders.[10] The Exchange is proposing to increase this fee from $0.12 per contract to $0.16 per contract and also remove the exclusion for PIXL Orders. The proposal would assess Specialists and Market Makers that (i) are on the contra-side of an electronically-delivered and executed Customer order; and (ii) have reached the Monthly Market Maker Cap a $0.16 per contract fee and this would now include PIXL Orders. The Exchange

[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Today, the Monthly Market Maker Cap is $550,000 for equity option transaction fees and QCC Transaction Fees. The trading activity of separate Specialist and Market Maker member organizations is aggregated in calculating the Monthly Market Maker Cap if there is at least 75% common ownership between the member organizations. All dividend, merger, short stock interest and reversal and conversion strategy executions are excluded from the Monthly Market Maker Cap.

[4] Section II includes options overlying equities, ETFs, ETNs, indexes and HOLDRs which are Multiply Listed.

[5] PIXL is the Exchange's price-improvement mechanism where a member may electronically submit for execution an order it represents as agent on behalf of a public customer, broker-dealer, or any other entity (''PIXL Order'') against principal interest or against any other order (except as provided in Rule 1080(n)(i)(E)) it represents as agent (''Initiating Order'') provided it submits the PIXL order for electronic execution into the PIXL Auction (''Auction'') pursuant to Rule 1080. *See* Exchange Rule 1080(n).

[6] QCC Transaction Fees are defined in Rules 1064(e) and 1080(o). The trading activity of separate Specialist and Market Maker member organizations is aggregated in calculating the Monthly Market Maker Cap if there is at least 75% common ownership between the member organizations. All dividend, merger, short stock interest and reversal and conversion strategy executions (as defined in this Section II of the Pricing Schedule) are excluded from the Monthly Market Maker Cap.

[7] When the Exchange receives a PIXL Order for auction processing, a PIXL Auction Notification (''PAN'') message is sent over the Exchange's TOPO Plus Orders data feed detailing the side, size, and the stop price of the PIXL Order. Any person or entity may submit a PAN response, provided such response is properly marked specifying the price, size, and side of the market. *See* Rule 1080(n).

[8] A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

[9] A ''market maker'' includes Specialists (*see* Rule 1020) and ROTs (Rule 1014(b)(i) and (ii), which includes SQTs (*see* Rule 1014(b)(ii)(A)) and RSQTs (*see* Rule 1014(b)(ii)(B))). Directed Participants are also market makers.

[10] A member may electronically submit for execution an order it represents as agent on behalf of a public customer, broker-dealer, or any other entity (''PIXL Order'') against principal interest or against any other order (except as provided in Rule 1080(n)(i)(E)) it represents as agent (''Initiating Order'') provided it submits the PIXL order for electronic execution into the PIXL Auction (''Auction'') pursuant to Rule 1080. *See* Exchange Rule 1080(n).

believes that this amendment will also permit the Exchange to pay certain Customer Rebates which are described below.

The Exchange also proposes to amend and relocate its Customer Rebate Program from Section II of the Pricing Schedule to a new ''Section A'' which would be located before Section I in the Pricing Schedule.[11] The Exchange is proposing to expand the three tier Customer Rebate Program to a four tier Customer Rebate Program. Currently, the Exchange pays rebates for the following Average Daily Volume Thresholds: (i) 0 to 49,999 contracts in a month; (ii) 50,000 to 99,999 contracts in a month; and (iii) over 100,000 contracts in a month. The Exchange is proposing to amend Tier 3 and adopt a Tier 4 so as to have the following tiers: (i) 0 to 49,999 contracts in a month; (ii) 50,000 to 99,999 contracts in a month; (iii) 100,000 to 274,999 contracts in a month; and (iii) over 275,000 contracts in a month. The Exchange believes offering the opportunity to obtain higher rebates, as described below, will incentivize market participants to send order flow to the Exchange.

The Exchange is also proposing to amend Categories A, B, C and D, which currently require the following:

- Category A: Rebate will be paid to members executing electronically-delivered Customer Simple Orders in Penny Pilot Options, Simple Orders in Non-Penny Pilot Options that remove liquidity and Complex Orders in Non-Penny Pilot Options.
- Category B: Rebate will be paid to members executing electronically-delivered Customer Complex Orders in Penny Pilot Options.
- Category C: Rebate will be paid to members executing electronically-delivered Customer Simple Orders in Non-Penny Pilot Options that add liquidity.
- Category D: Rebate will be paid to members executing electronically-delivered Customer Complex Orders in Select Symbols that add liquidity.

The Exchange is proposing to amend these Categories as follows:

- Category A: Rebate will be paid to members executing electronically-delivered Customer Simple Orders in Penny Pilot Options and Customer Simple Orders in Non-Penny Pilot Options in Section II. Rebate will be paid on PIXL Orders in Section II symbols that execute against non-Initiating Order interest.
- Category B: Rebate will be paid to members executing electronically-delivered Customer Complex Orders in Penny Pilot Options and Non-Penny Pilot Options in Section II.
- Category C: Rebate will be paid to members executing electronically-delivered Customer Complex Orders in Select Symbols in Section I.

In order to analyze the impact on rebates, it is relevant to note how the various Categories were amended in addition to the actual rebates. The proposed Customer Rebate Program[12] table is as follows:

Average daily volume threshold	Rebate per contract categories		
	Category A	Category B	Category C
0 to 49,999 contracts in a month	$0.00	$0.00	$0.00
50,000 to 99,999 contracts in a month	0.07	0.10	0.00
100,000 to 299,999 contracts in a month	0.10	0.14	0.05
over 300,000 contracts in a month	0.12	0.15	0.06

With respect to Category A, which today allows members who transact electronically-delivered Customer Simple Orders in Penny Pilot Options, Simple Orders in Non-Penny Pilot Options that remove liquidity and Complex Orders in Non-Penny Pilot Options to earn Category A rebates, the Exchange is amending this Category to now include all Simple Orders in Non-Penny Pilot Options in Section II (not just orders that remove liquidity). In addition, Complex Orders in Non-Penny Pilot Options will no longer be part of Category A. The fees in Category A will increase for volume over 100,000 contracts. Today, a rebate of $0.09 per contract is paid for volume over 100,000 contracts. The new pricing in Category A will pay a rebate of $0.10 per contract for volume between 100,000 and 274,999 contracts and a rebate of $0.12 per contract for volume over 275,000 contracts.[13] With respect to Simple Orders in Non-Penny Pilot Options that add liquidity that are today included in Category C, these will be included in Category A. These orders will now be subject to a decreased rebate of $0.07 per contract for volume between 50,000 to 99,999 contracts in a month. Today those orders receive a rebate of $0.10 per contract.[14] Finally, Category A will now include PIXL Orders in Section II, except for contracts of PIXL orders that execute against an Initiating Order.[15] These types of orders today are not subject to rebates in the Customer Rebate Program.

With respect to Category B, which today allows members executing electronically-delivered Customer Complex Orders in Penny Pilot Options in Section II to earn Category B rebates, the Exchange proposes to amend this Category to now also include Complex Orders in Non-Penny Pilot Options in Section II (not just Complex Orders in Penny Pilot Options). The fees in Category B will increase for volume over 100,000 contracts. Today, a rebate of $0.10 per contract is paid for volume over 100,000 contracts. The new pricing in Category B will pay a rebate of $0.14 per contract for volume between 100,000 and 274,999 contracts and a rebate of $0.15 per contract for volume over 275,000 contracts.[16] With respect to Complex Orders in Non-Penny Pilot Options that are today included in Category A, these will be included in Category B. These orders will now be subject to an increased rebate of $0.10

[11] The Exchange would also amend the Index to reflect the relocation of the Customer Rebate Program.

[12] The Customer Rebate Program only includes electronically-delivered orders.

[13] Category A will continue to pay no rebate for volume between 0 and 49,999 contracts and a rebate of $0.07 per contract for volume between 50,000 and 99,999 contracts in a month.

[14] Simple Orders in Non-Penny Pilot Options that add liquidity will continue to receive no rebate for volume between 0 to 49,999 contracts. Also, the $0.10 per contract rebate will remain the same for over 100,000 but the tier will now be amended to volume between 100,000 to 274,999 contracts. The $0.12 per contract rebate for volume over 275,000 contracts will also apply to these orders.

[15] A member may electronically submit for execution an order it represents as agent on behalf of a public customer, broker-dealer, or any other entity (''PIXL Order'') against principal interest or against any other order (except as provided in Rule 1080(n)(i)(E)) it represents as agent (''Initiating Order'') provided it submits the PIXL order for electronic execution into the PIXL Auction (''Auction'') pursuant to Rule 1080. *See* Exchange Rule 1080(n).

[16] Category B will continue to pay no rebate for volume between 0 and 49,999 contracts and a rebate of $0.10 per contract for volume between 50,000 and 99,999 contracts in a month.

per contract for volume between 50,000 to 99,999 contracts in a month. Today those orders receive a rebate of $0.07 per contract. Additionally, today for volume over 100,000 contracts, Complex Orders in Non-Penny Pilot Options receive a rebate of $0.09 per contract. This rebate will be increased in the new category, between 100,000 and 274,999 contracts, to $0.14 per contract.[17]

With respect to Category C, which today allows members executing electronically-delivered Customer Simple Orders in Non-Penny Pilot Options that add liquidity in Section II to earn Category C rebates, the Exchange proposes to amend this Category to now include Complex Orders in Select Symbols in Section I. The fees applicable to Complex Orders in Select Symbols that remove liquidity today receive rebates in Category D. These orders will continue to receive the same pricing, except that volume over 100,000 contracts which today pays a $0.05 per contract rebate will apply to contracts between 100,000 to 274,999 and pay the same rebate. Additionally, a rebate of $0.06 per contract will be paid for volume over 275,000 contracts.[18] With respect to Complex Orders in Non-Penny Pilot Options that are today included in Category A, these will be included in Category B. These orders will now be subject to an increased rebate of $0.10 per contract for volume between 50,000 to 99,999 contracts in a month. Today those orders receive a rebate of $0.07 per contract. Additionally, today for volume over 100,000 contracts, Complex Orders in Non-Penny Pilot Options receive a rebate of $0.09 per contract. This rebate will be increased in the new category, between 100,000 and 274,999 contracts, to $0.14 per contract.[19] Complex Orders in Select Symbols for adding liquidity today are not subject to rebates in the Customer Rebate Program. With respect to proposed Category D, as noted above, those Complex Orders in Select Symbols that add liquidity will become part of Category C. Category D will be eliminated.

Finally, the Exchange proposes to amend its Average Daily Volume Threshold calculation. Currently, the Average Daily Volume Threshold is calculated by totaling Customer volume in Multiply Listed Options [20] that are electronically-delivered and executed, except electronic QCC Orders as defined in Exchange Rule 1080(o), and including electronically-delivered and executed Customer Complex Orders in Select Symbols (''Threshold Volume''). Rebates are paid on Threshold Volume in a given month, excluding electronically delivered Customer volume associated with PIXL. The Exchange is proposing to amend the calculation of the Average Daily Volume Threshold to total Customer volume in Multiply Listed Options (including Select Symbols) that are electronically-delivered and executed, except: (i) electronically-delivered and executed Customer Simple Orders in Select Symbols that remove liquidity; and (ii) electronic QCC Orders, as defined in Exchange Rule 1080(o) (''Threshold Volume''). The Exchange would pay the rebates on the Threshold Volume.[21]

The Exchange believes that the proposed amendments to the Customer Rebate Program will attract additional Customer order flow to the Exchange to the benefit of all market participants.

Section III Amendments

The Exchange is proposing to amend its PIXL Pricing in Section IV of the Pricing Schedule at Part A. Currently, the Exchange assesses PIXL fees on Customers, Professionals,[22] Specialists,[23] Market Makers,[24] Firms and Broker-Dealers. All options traded on the Exchange are eligible for PIXL. Today, the Exchange assesses a fee of $0.07 per contract when an Initiating Order executes against a PIXL Order in the symbols listed in Section I, Select Symbols, and the symbols defined in Section II. The Exchange has different PIXL pricing depending on whether the PIXL order execution was in a Select Symbol (Section I) or Section II symbol.

With respect to the Select Symbols, today, when a PIXL order is contra to the Initiating Order the appropriate Multiply Listed Options Transaction Charge in Section II in Section II of the Pricing Schedule is assessed up to a maximum fee of $0.32 per contract. The Options Transaction Charges are as follows: a Customer is not assessed an Options Transaction Charge, a Professional is assessed a $0.25 per contract Options Transaction Charge in both Penny Pilot and non-Penny Pilot Options, a Specialist and Market Maker are assessed a $0.22 per contract Options Transaction Charge in a Penny Pilot and a $0.23 per contract Options Transaction Charge in a non-Penny Pilot Option, and a Broker-Dealer and Firm are assessed $0.32 per contact because the Options Transactions Charges are greater than the maximum fee.[25]

When a PIXL Order executes in an auction against a resting contra-side order or quote that was present upon the initial receipt of the PIXL Order, the Fee for Removing Liquidity in Section I is assessed on the PIXL Order. The Fees for Removing Liquidity are as follows: Customers are assessed $0.43 per contract, and all other market participants are assessed $0.45 per contract, therefore all market participants today are assessed the maximum fee of $0.32 per contract.[26] The resting contra-side order or quote in

[17] Complex Orders in Non-Penny Pilot Options will continue to receive no rebate for volume between 0 to 49,999 contracts. The $0.15 per contract rebate for volume over 275,000 contracts will also apply to these orders.

[18] Category C will continue to pay no rebate for volume between 0 and 49,999 contracts and 50,000 and 99,999 contracts in a month as is the case today for Complex Orders in Select Symbols that remove liquidity.

[19] Complex Orders in Non-Penny Pilot Options will continue to receive no rebate for volume between 0 to 49,999 contracts. The $0.15 per contract rebate for volume over 275,000 contracts will also apply to these orders.

[20] This includes all options classes defined in Sections I and II. This excludes PHLX Semiconductor Sector℠ (SOX℠), PHLX Housing Sector™ (HGX℠) and PHLX Oil Service Sector℠ (OSX℠) which are assessed Singly Listed Options fees in Section III of the Pricing Schedule despite the fact that these are Multiply-Listed index options. *See* Securities Exchange Act Release No. 66668 (April 3, 2012), 77 FR 20090 (March 28, 2012) (SR–Phlx–2012–35).

[21] Currently, the Customer Simple Orders in Select Symbols are not part of the Average Daily Volume Calculation as the Customer Rebate Program today is limited to the symbols subject to Section II pricing and only Complex Orders that add liquidity in Section I. The Exchange proposes to exclude electronically-delivered and executed Customer Simple Orders in Select Symbols that remove liquidity from the Average Daily Volume Threshold, along with electronic QCC Orders. Today, these excluded orders are not included in the Threshold Volume. The Exchange would pay a rebate on all Customer volume included in the Threshold Volume. Today Customer volume associated with PIXL is excluded from the Threshold Volume, this would be amended and PIXL orders would be subject to a rebate. Today Customer Simples Orders in Select Symbols that remove liquidity and QCC Orders are not entitled to rebates under the Customer Rebate program today and those orders will continue to be excluded.

[22] The term ''professional'' means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Rule 1000(b)(14).

[23] A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

[24] A ''market maker'' includes Specialists (*see* Rule 1020) and ROTs (Rule 1014(b)(i) and (ii), which includes SQTs (*see* Rule 1014(b)(ii)(A)) and RSQTs (*see* Rule 1014(b)(ii)(B)).

[25] The Broker-Dealer Options Transaction Charge in a Penny Pilot is $0.45 per contract and $0.60 per contact in a non-Penny Pilot. The Firm Options Transaction Charge in a Penny Pilot is $0.40 per contract and $0.45 per contact in a non-Penny Pilot. *See* Section II in the Pricing Schedule.

[26] *See* Section I, Part A Simple Order Pricing in the Pricing Schedule.

that scenario is paid the Rebate for Adding Liquidity in Section I.[27]

Today, if a PIXL Order executes in an auction against a Responder or contra-side quotes and/or orders sent in during the auction, the PIXL Order is paid the Rebate for Adding Liquidity in Section I.[28] The Responders and contra-side orders and quotes which were entered during the PIXL Auction, are assessed the Fee for Removing Liquidity in Section I, which is greater than the maximum fee of $0.32 per contract, therefore the PIXL Order is assessed $0.32 per contract.[29]

With respect to Section II symbols, the PIXL Order and the contra-side order or quote are assessed the appropriate Multiply Listed Option Transaction Charge in Section II of the Pricing Schedule up to a maximum fee of $0.32 per contract. Today, a Customer is not assessed an Options Transaction Charge, a Professional is assessed a $0.25 per contract Options Transaction Charge in both Penny Pilot and non-Penny Pilot Options, a Specialist and Market Maker are assessed a $0.22 per contract Options Transaction Charge in a Penny Pilot and a $0.23 per contract Options Transaction Charge in a non-Penny Pilot Option, a Broker-Dealer and Firm are assessed $0.32 per contact because the Options Transactions Charges are greater than the maximum fee.[30] With respect to Section III pricing related to Singly Listed Options, the fees for PIXL pricing are the Section III fees and this will remain the same.

The Exchange is proposing to amend the PIXL pricing. The Exchange proposes to continue to assess a $0.07 per contract Initiating Order fee, unless the market participant has greater than 275,000 contracts per day in a month of Threshold Volume in the Customer Rebate Program, in which case a reduced fee of $0.05 per contract fee would be assessed for the Initiating Order. With respect to the PIXL Order, the Exchange is amending the PIXL fees for Select Symbols (Section I) as follows:

- When the PIXL Order is contra to the Initiating Order a Customer PIXL Order will be assessed $0.00 and all non-Customer market participant PIXL Orders will be assessed $0.30 per contract when contra to the Initiating Order.
- When a PIXL Order is contra to a PIXL Auction Responder, the PIXL Order will either be paid the Rebate for Adding Liquidity or assessed the Fee for Adding Liquidity in Section I and the Responder will be assessed $0.30 per contract.
- When the PIXL Order is contra to a resting order or quote that was on the PHLX book prior to the auction, the PIXL Order will be assessed $0.30 per contract and the resting order or quote will either be paid the Rebate for Adding Liquidity or assessed the Fee for Adding Liquidity in Section I. If the resting order or quote that was on the PHLX was entered during the Auction, the PIXL Order will receive the Rebate for Adding Liquidity or assessed the Fee for Adding Liquidity in Section I and the resting order or quote will be assessed $0.30.

With respect to the PIXL Order, the Exchange is amending is amending the PIXL fees for Section II symbols as follows:

- When the PIXL Order is contra to the Initiating Order a Customer PIXL Order will be assessed $0.00 and non-Customer PIXL Orders will be assessed $0.30 per contract.
- When a PIXL Order is contra to a PIXL Auction Responder, a Customer PIXL Order will be assessed $0.00, other market participants will be assessed $0.30 per contract, and a Responder will be assessed $0.30 per contract, unless the Responder is a Customer, in which case the fee will be $0.00 per contract.
- When a PIXL Order is contra to a resting order or quote a Customer PIXL Order will be assessed $0.00, other market participants will be assessed $0.30 per contract and the resting order or quote will be assessed the appropriate Options Transaction Charge in Section II.

In analyzing the impact of these amendments, the Exchange's amendments to the Initiating Order provides market participants the opportunity to lower the fee by transacting a greater number of Customer Volume. With respect to the Select Symbols (Section I), the Exchange today assesses a PIXL Order the Options Transaction Charges in Section II with a maximum fee of $0.32 per contract. When a non-Customer PIXL order is contra to the Initiating Order a non-Customer PIXL Order that today is assessed the appropriate Options Transaction Charge in Section II, which is capped at $0.32 per contract, would instead pay $0.30 per contract. The Customer PIXL Order would not be assessed a fee. When a PIXL Order is contra to a resting order or quote that was on the PHLX book prior to the auction, the PIXL Order today is assessed the Fee for Removing Liquidity in Section I, which is capped at $0.32 per contract, would instead pay $0.30 per contract. The resting contra-side order or quote on the book prior to the auction will continue to be paid the Rebate/Fee for Adding Liquidity in Section I as they are today.[31] When a PIXL Order executes in an auction against a Responder that responds with either a contra-side quote or order sent in during the auction, the Responder is assessed the Fee for Removing Liquidity in Section I and will be capped at $0.30 per contract instead of the $0.32 cap that is assessed today. The PIXL Order will continue to receive the Rebate for Adding Liquidity or assessed the Fee for Adding Liquidity in Section I.

With respect to Section II symbols, the PIXL Order and the contra-side order or quote which today are assessed the appropriate Multiply Listed Option Fee in Section II of the Pricing Schedule, up to a maximum fee of $0.32 per contract, would be assessed $0.30 per contract, except for Customers, who are not assessed a fee, when a PIXL Order is contra an Initiating Order. When a PIXL Order is contra to a PIXL Auction Responder a Customer PIXL Order would be assessed $0.00 (which is the case today), and other market participants would be assessed $0.30 per contract as well as the Responder, unless the Responder is a Customer, in which case there is no fee. When a PIXL Order is contra to a resting order or quote the Customer would be assessed no fee, all other market participants would be assessed $0.30 per contract and the resting order or quote would continue to be assessed the Options Transaction Charges in Section II. The impact of these amendments with regard to non-Customer market participants is that a Professional which today is assessed a $0.25 per contract Options Transaction Charge in both Penny Pilot and non-Penny Pilot Options would pay an increased fee of $0.30 per contract, a Specialist and Market Maker that today are assessed a

[27] The Rebate for Adding Liquidity is $0.26 per contract for a Customer, $0.23 per contract for a Specialist, Market Maker or Professional. A Firm and Broker-Dealer do not receive a Rebate for Adding Liquidity. *See* Section I, Part A of the Pricing Schedule.

[28] *Id.*

[29] The Fees for Removing Liquidity are as follows: Customers are assessed $0.43 per contract, and all other market participants are assessed $0.45 per contract, therefore all market participants today are assessed the maximum fee of $0.32 per contract. *See* Section I, Part A.

[30] The Broker-Dealer Options Transaction Charge for a Penny Pilot Options is $0.45 per contract and $0.60 per contact in a non-Penny Pilot Option. The Firm Options Transaction Charge in a Penny Pilot Option is $0.40 per contract and $0.45 per contact in a non-Penny Pilot Option. *See* Section II in the Pricing Schedule.

[31] The Fee for Adding Liquidity in Section I is $0.05 per contact for Firms and Broker-Dealers. All other market participants are not assessed a Fee for Adding Liquidity. See Section I, Part A of the Pricing Schedule.

$0.22 per contract Options Transaction Charge in a Penny Pilot and a $0.23 per contract Options Transaction Charge in a non-Penny Pilot Option would pay an increased fee of $0.30 per contract, a Broker-Dealer and Firm which today are assessed $0.32 per contact would pay decreased fees of $0.30 per contract. In addition, the Exchange is proposing to note that the Monthly Market Maker Cap will apply except with respect to the Initiating Order fee which is not included in the cap. PIXL Orders are proposed as part of the Monthly Market Maker Cap as noted in this filing. The Exchange also proposes to specify in the Pricing Schedule that all other fees discussed in Section II, including Payment for Order Flow and surcharges will also apply as appropriate.[32] The Exchange believes that the PIXL fees which will be the same for all market participants, except Customers, in each Section I and II should encourage the initiation of price improvement auctions.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act[33] in general, and furthers the objectives of Section 6(b)(4) of the Act[34] in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities.

Section II Amendments

Monthly Market Maker Cap

The Exchange's clarification to the Monthly Market Maker Cap is reasonable, equitable and not unfairly discriminatory because it would clarify in the Pricing Schedule that the fees related to an order or quote that is contra to a PIXL Order or specifically responding to a PIXL auction is included in the Monthly Market Maker Cap calculation. In addition, all Specialists and Market Makers are afforded the opportunity to cap their fees.

The Exchange's proposal to amend a fee which is assessed once a Specialist or Market Maker has reached the Monthly Market Maker Cap is reasonable because the Exchange is now including fees related to an order or quote that is contra to a PIXL Order or specifically responding to a PIXL auction in the Monthly Market Maker Cap. The proposal to remove the exclusion for PIXL Orders and increase fee (from $0.12 to $0.16 per contract) once the Monthly Market Maker Cap is exceeded and a Specialist or Market Maker is contra an electronic Customer order is reasonable because the Exchange is affording Specialists and Market Makers the opportunity to reach the Monthly Market Maker Cap earlier, by including PIXL orders. Also, the fee is assessed only when the Monthly Market Maker Cap is exceeded and Specialists and Market Makers are on the contra-side of an electronically-delivered and executed Customer order.[35] The Exchange believes that this amendment will also permit the Exchange to pay certain Customer Rebates based on tiers and average daily volume thresholds which are described below and now also permits rebates for PIXL Orders.

The Exchange's proposal to increase the fee (from $0.12 to $0.16 per contract) which is assessed once a Specialist or Market Maker has reached the Monthly Market Maker Cap is equitable and not unfairly discriminatory because all Specialist and Market Makers would be uniformly assessed the fee as long as they have reached the cap and are contra to an electronically-delivered Customer order.

Customer Rebate Program

The Exchange's proposal to amend the current three tier Customer Rebate Program to a four tier program is reasonable, equitable and not unfairly discriminatory because it will further incentivize a greater number of market participants to take advantage of the Customer Rebate Program because of the added categories of orders eligible for the Customer Rebate Program and also because the Exchange is offering market participants the opportunity to obtain higher rebates with the addition of the new tier.

The Exchange also believes that the amendments to the Customer Rebate Program are reasonable because the Customer liquidity that this program attracts to the market benefits all market participants. The program now includes new categories of orders that were not previously included in the Average Daily Volume Threshold such as PIXL Orders in Section II and Complex Orders in Select Symbols (Select I) that add liquidity.

The Exchange also believes that the amendments to the Customer Rebate Program are equitable because other than the Simple Orders in Non-Penny Pilot Options that add liquidity, which today are included in Category C, all other order types will receive the same or higher rebates as described in the purpose section.[36] With respect to the Average Daily Volume calculation, the Exchange believes that the amendments are reasonable, equitable and not unfairly discriminatory because Select Symbols will now be included with the exception of Simple Orders that remove liquidity (Simple Orders that add liquidity will be included in Threshold Volume)[37] and rebates will now be paid on PIXL volume. The Exchange believes the amendments are reasonable because the Exchange is offering market participants an opportunity to earn rebates on order not subject to the Customer Rebate Program today and market participants also have an opportunity to earn higher rebates. The Exchange believes that the amendments are equitable and not unfairly discriminatory because they will be uniformly applied to all market participants.

Section III Amendments—PIXL

The Exchange believes that the amendments to the PIXL pricing are reasonable, because the Exchange is proposing to simplify the PIXL pricing to assess no fees to Customers uniformly and to assess all non-Customer market participants the same fees except with respect to Section II when a PIXL Order is contra to a resting order or quote. In this case the resting contra-side orders or quotes will continue to pay the appropriate Options Transaction Charges in Section II. Also, while there will be fee increases for Professionals, Specialists and Market Makers in Section II, the Exchange is now proposing to include PIXL Orders as orders that are eligible for rebates in the Customer Rebate Program. The Exchange also believes that its fees are reasonable because they are within the range of fees that are assessed by the International Securities Exchange, LLC (''ISE'') for price improving orders

[32] Payment for Order Flow fees apply today as well.

[33] 15 U.S.C. 78f(b).

[34] 15 U.S.C. 78f(b)(4).

[35] The contra-side Customer is not assessed a fee in this scenario.

[36] These orders will now be subject to a decreased rebate of $0.07 per contract for volume between 50,000 to 99,999 contracts in a month. Today those orders receive a rebate of $0.10 per contract. Simple Orders in Non-Penny Pilot Options that add liquidity will continue to receive no rebate for volume between 0 to 49,999 contracts. Also, the $0.10 per contract rebate will remain the same for overs 100,000 but the tier will now be amended to volume between 100,000 to 274,999 contracts. The $0.12 per contract rebate for volume over 275,000 contracts will also apply to these orders.

[37] Complex Orders in Select Symbols are included in the Threshold Volume today and will continue to be included with this amendment.

(''Fees for Responses to Crossing Orders.'') [38]

The Exchange also believes that it is reasonable to continue to assess a $0.07 per contract Initiating Order fee, unless the market participant has greater than 275,000 contracts per day in a month of Threshold Volume in the Customer Rebate Program, in which case a decreased $0.05 per contract fee would be assessed for the Initiating Order, because this incentivizes market participants to send additional Customer PIXL Order flow to the Exchange which reduces the market participant's fees once a certain volume (275,000 contracts per day in a month) is obtained and the Customer liquidity benefits all market participants.

The Exchange believes that the amendments to PIXL pricing in Select Symbols (Section I) are equitable and not unfairly discriminatory because the fees will be lower for all market participants that today pay $0.32 per contract and Customer PIXL Orders will remain free. Responder fees will also be reduced from $0.32 to $0.30 per contract. The Exchange believes that the amendments to the PIXL pricing in Section II symbols are equitable and not unfairly discriminatory because Customer PIXL Orders will remain free in all instances and all non-Customer market participant PIXL Orders will be assessed a fee of $0.30 per contract fee uniformly. The Exchange also believes that it is equitable and not unfairly discriminatory to continue to assess a $0.07 per contract Initiating Order fee, unless the market participant has greater than 275,000 contracts per day in a month of Threshold Volume in the Customer Rebate Program, in which case a $0.05 per contract Initiating Order fee would be assessed, because these fees would be assessed uniformly on all market participants and would further incentivize market participants to transact PIXL Orders. In addition, the differential between the Initiating Order and the Responders to a PIXL Order is $0.23 or $0.25 per contract as proposed, which is less than or equal to the current differential.

The Exchange operates in a highly competitive market, comprised of ten exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or rebates to be inadequate. Accordingly, the fees that are assessed and the rebates paid by the Exchange must remain competitive with fees charged and rebates paid by other venues and therefore must continue to be reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than competing venues.

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. The Exchange believes that the new Customer Rebate Program will attract additional Customer order flow to the benefit of all market participants.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[39] At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2012–121 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–2012–121. 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–2012–121 and should be submitted on or before November 8, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[40]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25651 Filed 10–17–12; 8:45 am]

BILLING CODE 8011–01–P

[38] ISE assesses a range of Fees for Responses to Crossing Orders from $0.18 to $0.40 per contract depending on the symbol.

[39] 15 U.S.C. 78s(b)(3)(A)(ii).

[40] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68045; File No. SR–NASDAQ–2012–115]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NASDAQ's Schedule of Execution Fees for Order Routing Under Rule 7018

October 12, 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 1, 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 the Substance of the Proposed Rule Change

NASDAQ proposes to amend NASDAQ's fee schedule governing order routing under Rule 7018. NASDAQ will implement the proposed change on October 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.

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

NASDAQ is amending its fee schedule governing order routing to modify fees for routing orders to the New York Stock Exchange (''NYSE'') and NASDAQ OMX PSX (''PSX'') to reflect announced price changes by those venues.[3] All of the changes pertain to securities priced at $1 or more per share.

With respect to orders that route to PSX using the TFTY, SOLV, or SAVE routing strategies, the fee will be fixed at $0.0028 per share executed. The change reflects the fact that PSX has replaced provisions under which the fee charged to access liquidity vary [sic] considerably based on the listing venue of the security being traded, with a simpler fee schedule under which NASDAQ would be charged either $0.0028 or $0.0030 per share executed with respect to the orders it routes to PSX. Accordingly, NASDAQ is opting to replace the current pass-through fee for orders routed to PSX using the TFTY, SOLV, or SAVE routing strategies with a flat rate of $0.0028 that will either recoup the applicable routing charge or provide routing at a slight discount.

Second, with respect to orders routed to NYSE, NASDAQ is making the following changes:

- The fee for DOTI, STGY, SCAN, SKNY or SKIP orders that execute at NYSE will increase from $0.0023 per share executed to $0.0025 per share executed.
- The fee for directed intermarket sweep orders that execute at NYSE will increase from $0.0025 per share executed to $0.0027 per share executed.
- The fee for other directed orders that execute at NYSE will increase from $0.0024 per share executed to $0.0026 per share executed for members with an average daily volume through the Nasdaq Market Center in all securities during the month of more than 35 million shares of liquidity provided through one or more MPIDs; and will increase from $0.0025 per share executed to $0.0027 per share executed for other members.
- The fee for MOPP orders that execute at NYSE will increase from $0.0025 per share executed to $0.0027 per share executed.
- The fee for TFTY orders that execute at NYSE will increase from $0.0023 per share executed to $0.0024 per share executed.
- The fee for SAVE and SOLV orders that execute at NYSE will increase from $0.0023 per share executed to $0.0025 per share executed.

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 with Sections 6(b)(4) and 6(b)(5) of the Act,[5] 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 NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The changes to routing fees are reasonable because the proposed fees for routing orders to NYSE and PSX reflect changes in the fees that will be charged by NYSE or PSX to NASDAQ with respect to such orders. The changes are consistent with an equitable allocation of fees because they will bring the economic attributes of routing orders to NYSE and PSX in line with the cost of executing orders there. Finally, the changes are not unfairly discriminatory because they solely apply to members that opt to route orders to NYSE or PSX.

Finally, NASDAQ notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, NASDAQ must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. NASDAQ believes that the proposed rule change reflects this competitive environment because it is designed to ensure that the charges for use of the NASDAQ routing facility to route to NYSE or PSX reflect changes in the cost of such routing.

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. Because the market for order routing is extremely competitive, members may readily opt to disfavor NASDAQ's routing services if they believe that alternatives offer them better value. For

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* SR–NYSE–2012–50 (September 26, 2012); SR–Phlx–2012–119 (October 1, 2012).

[4] 15 U.S.C. 78f.

[5] 15 U.S.C. 78f(b)(4) and (5).

this reason and the reasons discussed in connection with the statutory basis for the proposed rule change, NASDAQ does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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)(ii) of the Act.[6] 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.g gov.* Please include File Number SR–NASDAQ–2012–115 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–2012–115. 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–2012–115, and should be submitted on or before November 8, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

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[6] 15 U.S.C. 78s(b)(3)(a)(ii).

[7] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68049; File No. SR–BYX–2012–019]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Adopt a Retail Price Improvement Program

October 12, 2012.

On August 14, 2012, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to establish a Retail Price Improvement (''RPI'') Program (''proposed rule change'') to attract additional retail order flow to the Exchange while also providing the potential for price improvement to such order flow. The proposed rule change was published for comment in the **Federal Register** on August 31, 2012.[3] The Commission received one comment on the proposal.[4]

Section 19(b)(2) of the Act[5] provides that within 45 days of the publication of notice of filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is October 15, 2012.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period to take action on the proposed rule change so that it has sufficient time to consider the Exchange's proposal, which would allow the Exchange to utilize non-displayed orders that offer price improvement to retail order flow potentially in sub-penny increments, and the comment letter that has been submitted in connection with it.

Accordingly, pursuant to Section 19(b)(2) of the Act,[6] the Commission designates November 29, 2012 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–25652 Filed 10–17–12; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 67734 (August 27, 2012), 77 FR 53242 (SR–BYX–2012–019).

[4] *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, Commission, dated September 26, 2012 (''SIFMA Letter'').

[5] 15 U.S.C. 78s(b)(2).

[6] 15 U.S.C. 78s(b)(2).

[7] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2012–0283]

Qualification of Drivers; Exemption Applications; Diabetes Mellitus

AGENCY: Federal Motor Carrier Safety Administration (FMCSA).

ACTION: Notice of applications for exemption from the diabetes mellitus requirement; request for comments.

SUMMARY: FMCSA announces receipt of applications from 16 individuals for exemption from the prohibition against persons with insulin-treated diabetes mellitus (ITDM) operating commercial motor vehicles (CMVs) in interstate commerce. If granted, the exemptions would enable these individuals with ITDM to operate CMVs in interstate commerce.

DATES: Comments must be received on or before November 19, 2012.

ADDRESSES: You may submit comments bearing the Federal Docket Management System (FDMS) Docket No. FMCSA–2012–0283 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *Mail:* Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- *Fax:* 1–202–493–2251.

Instructions: Each submission must include the Agency name and the docket numbers for this notice. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below for further information.

Docket: For access to the docket to read background documents or comments, go to *http://www.regulations.gov* at any time or Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Federal Docket Management System (FDMS) is available 24 hours each day, 365 days each year. If you want acknowledgment that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments on-line.

Privacy Act: Anyone may search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's Privacy Act Statement for the FDMS published in the **Federal Register** on January 17, 2008 (73 FR 3316), or you may visit *http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf.*

FOR FURTHER INFORMATION CONTACT: Elaine M. Papp, Chief, Medical Programs Division, (202) 366–4001, *fmcsamedical@dot.gov,* FMCSA, Department of Transportation, 1200 New Jersey Avenue SE., Room W64–224, Washington, DC 20590–0001. Office hours are from 8:30 a.m. to 5 p.m., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Background

Under 49 U.S.C. 31136(e) and 31315, FMCSA may grant an exemption from the Federal Motor Carrier Safety Regulations for a 2-year period if it finds ''such exemption would likely achieve a level of safety that is equivalent to or greater than the level that would be achieved absent such exemption.'' The statute also allows the Agency to renew exemptions at the end of the 2-year period. The 16 individuals listed in this notice have recently requested such an exemption from the diabetes prohibition in 49 CFR 391.41(b)(3), which applies to drivers of CMVs in interstate commerce. Accordingly, the Agency will evaluate the qualifications of each applicant to determine whether granting the exemption will achieve the required level of safety mandated by the statutes.

Qualifications of Applicants

James D. Astle

Mr. Astle, age 52, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Astle understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. Astle meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A Commercial Driver's License from Ohio.

Gregory L. Faison

Mr. Faison, 39, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Faison understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Faison meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Maryland.

Theodore A. Garsombke

Mr. Garsombke, 70, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Garsombke understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Garsombke meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Wisconsin.

Thomas A. Goodman

Mr. Goodman, 39, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the

last 5 years. His endocrinologist certifies that Mr. Goodman understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Goodman meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Pennsylvania.

Kenneth M. Hansen

Mr. Hansen, 57, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Hansen understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Hansen meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Iowa.

Ronald D. Johnston

Mr. Johnston, 38, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Johnston understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Johnston meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Virginia.

Carl E. McCartney

Mr. McCartney, 73, has had ITDM since 1999. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McCartney understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. McCartney meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's License from Pennsylvania.

Jerry W. McFarland

Mr. McFarland, 69, has had ITDM since 2009. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. McFarland understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely.

Mr. McFarland meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Oregon.

Fred Nelson, Jr.

Mr. Nelson, 67, has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Nelson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Nelson meets the vision requirements of 49 CFR 391.41(b)(10). His ophthalmologist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class C operator's license from Pennsylvania.

Ricky L. Osterback

Mr. Osterback, 55, has had ITDM since 2008. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Osterback understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Osterback meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class B CDL from Washington.

Francis J. Pollock

Mr. Pollock, 58, has had ITDM since 2007. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Pollock understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Pollock meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Massachusetts.

Dwaine H. Sandlin

Mr. Sandlin, 58, has had ITDM since 2009. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Sandlin understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Sandlin meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Michigan.

Dan R. Stark

Mr. Stark, 62, has had ITDM since 2011. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the

assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Stark understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Stark meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class D operator's license from Minnesota.

Chad E. Vanscoy

Mr. Vanscoy, 41, has had ITDM since 2000. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Vanscoy understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Vanscoy meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from Ohio.

Gregory C. Watson

Mr. Watson, 52, has had ITDM since 2008. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Watson understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Watson meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from North Carolina.

Bailey G. Zickefoose, Jr.

Mr. Zickefoose, 59 has had ITDM since 2012. His endocrinologist examined him in 2012 and certified that he has had no severe hypoglycemic reactions resulting in loss of consciousness, requiring the assistance of another person, or resulting in impaired cognitive function that occurred without warning in the past 12 months and no recurrent (2 or more) severe hypoglycemic episodes in the last 5 years. His endocrinologist certifies that Mr. Zickefoose understands diabetes management and monitoring, has stable control of his diabetes using insulin, and is able to drive a CMV safely. Mr. Zickefoose meets the vision requirements of 49 CFR 391.41(b)(10). His optometrist examined him in 2012 and certified that he does not have diabetic retinopathy. He holds a Class A CDL from West Virginia.

Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. We will consider all comments received before the close of business on the closing date indicated in the date section of the notice.

FMCSA notes that section 4129 of the Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users requires the Secretary to revise its diabetes exemption program established on September 3, 2003 (68 FR 52441) [1]. The revision must provide for individual assessment of drivers with diabetes mellitus, and be consistent with the criteria described in section 4018 of the Transportation Equity Act for the 21st Century (49 U.S.C. 31305).

Section 4129 requires: (1) Elimination of the requirement for 3 years of experience operating CMVs while being treated with insulin; and (2) establishment of a specified minimum period of insulin use to demonstrate stable control of diabetes before being allowed to operate a CMV.

In response to section 4129, FMCSA made immediate revisions to the diabetes exemption program established by the September 3, 2003 notice. FMCSA discontinued use of the 3-year driving experience and fulfilled the requirements of section 4129 while continuing to ensure that operation of CMVs by drivers with ITDM will achieve the requisite level of safety required of all exemptions granted under 49 USC. 31136 (e).

Section 4129(d) also directed FMCSA to ensure that drivers of CMVs with ITDM are not held to a higher standard than other drivers, with the exception of limited operating, monitoring and medical requirements that are deemed medically necessary.

The FMCSA concluded that all of the operating, monitoring and medical requirements set out in the September 3, 2003 notice, except as modified, were in compliance with section 4129(d). Therefore, all of the requirements set out in the September 3, 2003 notice, except as modified by the notice in the **Federal Register** on November 8, 2005 (70 FR 67777), remain in effect.

Issued on: October 9, 2012.

Larry W. Minor,

Associate Administrator for Policy.

[FR Doc. 2012–25681 Filed 10–17–12; 8:45 am]

BILLING CODE P

[1] Section 4129(a) refers to the 2003 notice as a ''final rule.'' However, the 2003 notice did not issue a ''final rule'' but did establish the procedures and standards for issuing exemptions for drivers with ITDM.

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Availability of a Final General Conformity Determination for the California High-Speed Train System Merced to Fresno Section

AGENCY: Federal Railroad Administration (FRA), United States Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: FRA is issuing this notice to advise the public that it issued a Final General Conformity Determination for the Merced to Fresno Section of the California High-Speed Train (HST) System on September 18, 2012. FRA is the lead Federal agency for compliance with federal environmental review requirements including the National Environmental Policy Act (NEPA) and is also the Federal agency with responsibility for complying with the Clean Air Act General Conformity requirements. The California High Speed Rail Authority (Authority), as the Project-proponent, is the lead state agency for the environmental review process for the Project. This environmental review includes completing an Environmental Impact Statement (EIS) required under NEPA and an Environmental Impact Report (EIR) in compliance with the California Environmental Quality Act (CEQA) and CEQA Guidelines.

FOR FURTHER INFORMATION CONTACT: Mr. David Valenstein, Chief, Environment and Systems Planning Division, Office of Railroad Policy and Development, Federal Railroad Administration, U.S., Department of Transportation, 1200 New Jersey Avenue SE., MS–20, Washington, DC 20590 (telephone: 202–493–6368).

SUPPLEMENTARY INFORMATION: FRA prepared a Draft General Conformity

Determination pursuant to 40 CFR part 93, subpart B, which establishes the process for complying with the general conformity requirements of the Clean Air Act. Consistent with those regulations, FRA published a notice in the **Federal Register** on April 20, 2012 advising the public of the availability of the Draft Conformity Determination for a 30-day review and comment period. Copies of the Draft Conformity Determination were made available with the Final EIR/EIS at various locations in the Project area and were also posted to the Authority and FRA's Web sites. The comment period on the Draft Conformity Determination closed on May 29, 2012. FRA received one comment from the U.S. Environmental Protection Agency (USEPA), a response to which was included in the Final General Conformity Determination published on September 18, 2012.

The Final General Conformity Determination was developed after extensive consultation with the San Joaquin Valley Air Pollution Control District (SJVAPCD), the Authority, and the U.S. Environmental Protection Agency. The analysis found that the Project's potential emissions during the Project construction period would exceed the General Conformity *de minimis* threshold for two precursor criteria pollutants, nitrogen oxides (NOx) and volatile organic compounds (VOC), a precursor for ozone. However, operation of the Project (*i.e.,* operation of the high-speed train, once the infrastructure was constructed) would result in an overall reduction of regional emissions of all applicable air pollutants and would not cause a localized exceedence of an air quality standard. Since the Project will result in the exceedence of the *de minimus* thresholds for the precursor criteria pollutants listed above during the construction phase, Project conformity with the applicable emission standards will be accomplished through a combination of efforts to use cleaner-than-average construction equipment and a Voluntary Emissions Reduction Agreement (VERA) between the Authority and the SJVAPCD. The VERA will offset the NOx and VOC emissions, consistent with applicable regulatory requirements, by funding (by the Project) local emissions reductions projects such as replacement and/or retrofit of existing diesel agricultural pumps, farm tractors, heavy trucks, etc. The Final General Conformity Determination is available for public review on FRA's Web site at *http://www.fra.dot.gov/rpd/freight/fp_California_HST_%20Merced_to_Fresno.shtml.*

Issued in Washington, DC, on October 15, 2012.

Karen J. Hedlund,

Deputy Administrator.

[FR Doc. 2012–25763 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2012 0096]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel FINALLY ENOUGH; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 19, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2012 0096. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel FINALLY ENOUGH is:

Intended Commercial Use of Vessel: Charter operations for sightseeing, wildlife viewing, entertainment and sport fishing.

Geographic Region: ''California, Oregon and Washington.'' The complete application is given in DOT docket MARAD–2012–0096 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 9, 2012.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–25626 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD 2012 0097]

Requested Administrative Waiver of the Coastwise Trade Laws: Vessel FIRE BELLE; Invitation for Public Comments

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice.

SUMMARY: As authorized by 46 U.S.C. 12121, the Secretary of Transportation, as represented by the Maritime

Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a brief description of the proposed service, is listed below.

DATES: Submit comments on or before November 19, 2012.

ADDRESSES: Comments should refer to docket number MARAD–2012–0097. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590. You may also send comments electronically via the Internet at *http://www.regulations.gov.* All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Linda Williams, U.S. Department of Transportation, Maritime Administration, 1200 New Jersey Avenue SE., Room W23–453, Washington, DC 20590. Telephone 202–366–0903, Email *Linda.Williams@dot.gov.*

SUPPLEMENTARY INFORMATION: As described by the applicant the intended service of the vessel FIRE BELLE is: 6 pack sightseeing charters.

Intended Commercial Use of Vessel: Geographic Region: Washington; Alaska (excluding waters in Southeastern Alaska and waters north of a line between Gore Point to Cape Suckling [including the North Gulf Coast and Prince William Sound]).

The complete application is given in DOT docket MARAD–2012–0097 at *http://www.regulations.gov.* Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines, in accordance with 46 U.S.C. 12121 and MARAD's regulations at 46 CFR part 388, that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels in that business, a waiver will not be granted. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR part 388.

Privacy Act

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78).

By Order of the Maritime Administrator.

Dated: October 11, 2012.

Julie P. Agarwal,

Secretary, Maritime Administration.

[FR Doc. 2012–25625 Filed 10–17–12; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. FD 35644]

BNSF Railway Company—Acquisition and Operation Exemption—Nebraska Northeastern Railway Company

AGENCY: Surface Transportation Board.

ACTION: Notice of exemption.

SUMMARY: The Board is granting an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 11323–25 for BNSF Railway Company (BNSF), a Class I rail carrier, to acquire and operate a 120.4-mile rail line owned by Nebraska Northeastern Railway Company (NENE), a Class III rail carrier, between milepost 4.0, near Ferry Station, Neb., and milepost 124.4, at O'Neill, Neb. Upon consummation of the authorized transaction, BNSF would replace NENE as the only rail carrier providing freight service on the line. The acquisition and operation exemption is subject to standard labor protective conditions.

DATES: This exemption will be effective on November 17, 2012. Petitions to stay must be filed by November 2, 2012. Petitions to reopen must be filed by November 13, 2012.

ADDRESSES: Send an original and 10 copies of all pleadings referring to Docket No. FD 35644 to: Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001. In addition, send one copy of pleadings to: Karl Morell, Ball Janik LLP, Suite 225, 655 Fifteenth Street NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman, (202) 245–0386. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's decision served October 18, 2012, which is available on our Web site at *www.stb.dot.gov.*

Decided: October 9, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2012–25650 Filed 10–17–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 552 (Sub-No. 16)]

Railroad Revenue Adequacy—2011 Determination

AGENCY: Surface Transportation Board.

ACTION: Notice of decision.

SUMMARY: On October 16, 2012, the Board served a decision announcing the 2011 revenue adequacy determinations for the Nation's Class I railroads. Two carriers, Norfolk Southern Combined Railroad Subsidiaries and Union Pacific Railroad Company, were found to be revenue adequate.

DATES: *Effective Date:* This decision is effective on October 16, 2012.

FOR FURTHER INFORMATION CONTACT: Paul Aguiar, (202) 245–0323. Assistance for the hearing impaired is available through Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board is required to make an annual determination of railroad revenue adequacy. A railroad is considered revenue adequate under 49 U.S.C. 10704(a) if it achieves a rate of return on net investment equal to at least the current cost of capital for the railroad industry for 2011, determined to be 11.57% in *Railroad Cost of Capital—2011,* Docket No. EP 558 (Sub-No. 15) (STB served Sept. 13, 2012). This revenue adequacy standard was applied to each Class I railroad. Two carriers, Norfolk Southern Combined Railroad Subsidiaries and Union Pacific Railroad Company, were found to be revenue adequate for 2011.

The decision in this proceeding is posted on the Board's Web site at *www.stb.dot.gov.* Copies of the decision may be purchased by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: October 15, 2012.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2012–25665 Filed 10–17–12; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Appointment of Members of the Legal Division to the Performance Review Board, Internal Revenue Service

Under the authority granted to me as Chief Counsel of the Internal Revenue Service by the General Counsel of the Department of the Treasury by General Counsel Directive 15, pursuant to the Civil Service Reform Act, I have appointed the following persons to the Legal Division Performance Review Board, Internal Revenue Service Panel:

1. Christian Weidman, Deputy General Counsel
2. Ruth Perez, IRS, Deputy Commissioner (Small Business/Self Employed)
3. Paul DeNard, IRS, Deputy Commissioner (Domestic), LBI

This publication is required by 5 U.S.C. 4314(c)(4).

Dated: October 9, 2012.

William J. Wilkins,

Chief Counsel, Internal Revenue Service.

[FR Doc. 2012–25617 Filed 10–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Appointment of Members of the Legal Division to the Performance Review Board, Internal Revenue Service

Under the authority granted to me as Chief Counsel of the Internal Revenue Service by the General Counsel of the Department of the Treasury by General Counsel Directive 15, pursuant to the Civil Service Reform Act, I have appointed the following persons to the Legal Division Performance Review Board, Internal Revenue Service Panel:

1. Chairperson, Erik Corwin, Deputy Chief Counsel (Technical)
2. Frances F. Regan, Area Counsel (Small Business/Self Employed)
3. Janine Cook, Deputy Division Counsel/Deputy Associate Chief Counsel (TEGE)
4. Ronald Dabrowski, Deputy Associate Chief Counsel (International)
5. Michael P. Corrado, Area Counsel (Large Business and International)

This publication is required by 5 U.S.C. 4314(c)(4).

Dated: October 9, 2012.

William J. Wilkins,

Chief Counsel, Internal Revenue Service.

[FR Doc. 2012–25613 Filed 10–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 13614

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 13614, Interview and Intake Sheet.

DATES: Written comments should be received on or before December 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Interview and Intake Sheet.

OMB Number: 1545–1964.

Form Number: Form 13614–C and 13614–C (SP).

Abstract: Forms 13614–C and 13614–C (SP) contain a standardized list of required intake questions to guide volunteers in asking taxpayers basic questions about themselves. The intake sheet is an effective tool ensuring that critical taxpayer information is obtained and applied during the interview process.

Current Actions: There are no changes being made to these forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, Business or other for-profit organizations, and not-for-profit institutions, and Federal Government.

Estimated Number of Responses: 3,375,000.

Estimated Time per Response: 10 min.

Estimated Total Annual Burden Hours: 562,583.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 12, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–25588 Filed 10–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 637 Questionnaires

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Questionnaires A, B, C, D, E, F, H, I, J, K, M, Q, R, S, T, UP, UV, V, W, X, and Y, Form 637 Questionnaires.

DATES: Written comments should be received on or before December 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of Form 637 Questionnaires should be directed to Allan Hopkins, (202)–622–6665, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Form 637 Questionnaires.

OMB Number: 1545–1835.

Form Number: Questionnaires A, B, C, D, E, F, H, I, J, K, M, Q, R, S, T, UP, UV, V, W, X, and Y.

Abstract: Form 637 Questionnaires will be used to collect information about persons who are registered with the Internal Revenue Service (IRS) in accordance with Internal Revenue Code (IRC) § 4104 or 4222. The information will be used to make an informed decision on whether the applicant/registrant qualifies for registration.

Current Actions: There are no changes being made to the schedules at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 2,840.

Estimated Average Time per Respondent: 1 hours, 14 minutes.

Estimated Total Annual Burden Hours: 3,479.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 12, 2012.

Allan Hopkins,

Tax Analyst.

[FR Doc. 2012–25615 Filed 10–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 990–W

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 990–W, Estimated Tax on Unrelated Business Taxable Income for Tax-Exempt Organizations.

DATES: Written comments should be received on or before December 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or at (202) 622–6665, or through the internet at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Estimated Tax on Unrelated Business Taxable Income for Tax-Exempt Organizations.

OMB Number: 1545–0976.

Form Number: 990–W.

Abstract: Form 990–W is used by tax-exempt trusts and tax-exempt *corporations* to figure estimated tax liability on unrelated business income and on investment income for private foundations and the amount of each installment payment. Form 990–W is a worksheet only. It is not required to be filed.

Current Actions: There are no changes being made to this form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Not-for-profit institutions and business or other for-profit organizations.

Estimated Number of Respondents: 19,151.

Estimated Number of Response: 11 hours, 30 minutes.

Estimated Total Annual Burden Hours: 220,310.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will

be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 27, 2012.

Yvette Lawrence,

IRS Reports Clearance Office.

[FR Doc. 2012–25614 Filed 10–17–12; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 8288 and 8288–A

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests, and Form 8288–A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests.

DATES: Written comments should be received on or before December 17, 2012 to be assured of consideration.

ADDRESSES: Direct all written comments to Yvette Lawrence, Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Allan Hopkins, at (202) 622–6665, or at Internal Revenue Service, Room 6129, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet, at *Allan.M.Hopkins@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests (Form 8288) and Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests (Form 8288–A).

OMB Number: 1545–0902.

Form Number: 8288 and 8288–A.

Abstract: Internal Revenue Code section 1445 requires transferees to withhold tax on the amount realized from sales or other dispositions by foreign persons of U.S. real property interests. Form 8288 is used to report and transmit the amount withheld to the IRS. Form 8288–A is used by the IRS to validate the withholding, and a copy is returned to the transferor for his or her use in filing a tax return.

Current Actions: There are no changes being made to these forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations and individuals or households.

Estimated Number of Respondents: 27,500.

Estimated Time per Respondent: 8 hr., 52 min.

Estimated Total Annual Burden Hours: 243,675.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: September 27, 2012.

Yvette Lawrence,

IRS Reports Clearance Officer.

[FR Doc. 2012–25616 Filed 10–17–12; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

Vol. 77 Thursday,

No. 202 October 18, 2012

Part II

Department of Commerce

Patent and Trademark Office

37 CFR Part 1, 2, 7, 10, et al.

Changes to Representation of Others Before the United States Patent and Trademark Office; Proposed Rule

DEPARTMENT OF COMMERCE

United States Patent and Trademark Office

37 CFR Parts 1, 2, 7, 10, 11 and 41

[Docket No. PTO–C–2012–0034]

RIN 0651–AC81

Changes to Representation of Others Before the United States Patent and Trademark Office

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Patent and Trademark Office (Office or USPTO) proposes to align the USPTO's professional responsibility rules with those of most other U.S. jurisdictions by replacing the current Patent and Trademark Office Code of Professional Responsibility, adopted in 1985, based on the 1980 version of the Model Code of Professional Responsibility of the American Bar Association (''ABA''), with new USPTO Rules of Professional Conduct, which are based on the Model Rules of Professional Conduct of the ABA, which were published in 1983, substantially revised in 2003 and updated through 2011. Changes approved by the ABA House of Delegates in August 2012 have not been incorporated in these proposed rules. The Office also proposes to revise the existing procedural rules governing disciplinary investigations and proceedings.

DATES: To be ensured of consideration, written comments must be received on or before December 17, 2012.

ADDRESSES: Comments should be sent by electronic mail message over the Internet addressed to: *ethicsrules.comments@uspto.gov*. Comments may also be submitted by mail addressed to: Mail Stop OED-Ethics Rules, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450, marked to the attention of William R. Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline.

Comments may also be sent by electronic mail message over the Internet via the Federal eRulemaking Portal. See the Federal eRulemaking Portal Web site (*http://www.regulations.gov*) for additional instructions on providing comments via the Federal eRulemaking Portal.

Although comments may be submitted by postal mail, the Office prefers to receive comments by electronic mail message over the Internet because sharing comments with the public is more easily accomplished. Electronic comments are preferred to be submitted in plain text, but also may be submitted in ADOBE® portable document format or MICROSOFT WORD® format. Comments not submitted electronically should be submitted on paper in a format that facilitates convenient digital scanning into ADOBE® portable document format.

Comments will be made available for public inspection at the Office of Enrollment and Discipline, located on the 8th Floor of the Madison West Building, 600 Dulany Street, Alexandria, Virginia. Comments also will be available for viewing via the Office's Internet Web site (*http://www.uspto.gov*). Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

FOR FURTHER INFORMATION CONTACT: William R. Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, by telephone at 571–272–4097.

SUPPLEMENTARY INFORMATION:

Executive Summary

Pursuant to 35 U.S.C. 2(b)(2)(D), the Office governs ''the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Office.'' The Office also has the authority to suspend or exclude from practice before the Office any practitioner who ''is shown to be incompetent or disreputable, or guilty of gross misconduct, or who does not comply with the regulations established under section 2(b)(2)(D) of this title.'' 35 U.S.C. 32. Pursuant to the authority provided in sections 2(b)(2)(D) and 32 of Title 35, practitioners representing parties in patent, trademark and other non-patent matters presently are required to conform to the Patent and Trademark Office Code of Professional Responsibility set forth in 37 CFR 10.20 through 10.112. These rules have been in place since 1985 and are based on the ABA Model Code of Professional Responsibility. *See* 50 FR 5158 (February 6, 1985). Since that time, the vast majority of State bars in the United States have adopted substantive disciplinary rules based on the newer ABA Model Rules of Professional Conduct. As noted below, the Office believes individuals representing others before the Office will benefit from modernization of the regulations governing professional conduct before the Office and harmonization of these regulations with corresponding rules adopted by bars in the States and the District of Columbia.

The bars of 50 U.S. jurisdictions including the District of Columbia have adopted the ABA Model Rules of Professional Conduct or a modification thereof. This notice of proposed rulemaking sets out proposed USPTO Rules of Professional Conduct. The changes from the existing USPTO Code of Professional Responsibility are intended to bring standards of ethical practice before the Office into closer conformity with the Rules of Professional Conduct adopted by nearly all States and the District of Columbia, while addressing circumstances particular to practice before the Office. By adopting professional conduct rules consistent with the ABA Model Rules and the professional responsibility rules of 50 U.S. jurisdictions, the USPTO both would provide attorneys with consistent professional conduct standards, and would provide practitioners with large bodies of both case law and opinions written by disciplinary authorities that have adopted the ABA Model Rules of Professional Conduct. At this time, nearly 42,000 individuals are registered practitioners, of whom at least 75% are attorneys. The registered patent attorneys have offices located in all fifty States, the District of Columbia, and more than forty foreign countries. In addition to registered patent attorneys, any attorney who is a member in good standing of the bar of the highest court of a State, territory or possession of the United States is eligible to practice before the Office in trademark and other non-patent matters, without becoming a registered practitioner. 5 U.S.C. 500(b); 37 CFR 11.14. The attorneys who appear before the Office are subject to these rules as well. 37 CFR 11.19.

A body of precedent specific to practice before the USPTO will develop as disciplinary matters brought under the USPTO Rules of Professional Conduct progress through the USPTO and the Federal Courts. In the absence of binding USPTO-specific precedent, practitioners may refer to various sources for guidance. For example, it is expected that precedent based on the current Patent and Trademark Office Code of Professional Responsibility will assist interpretation of professional conduct standards under the proposed USPTO Rules of Professional Conduct. A practitioner also may refer to the Comments and Annotations to the ABA Model Rules of Professional Conduct for

guidance as to how to interpret the equivalent USPTO Rules of Professional Conduct. Additionally, relevant guidance may be provided by opinions issued by State bars and disciplinary decisions based on similar professional conduct rules in the States. Such guidance is not binding precedent relative to USPTO Rules of Professional Conduct, but it may provide a useful tool in interpreting the rules while a larger body of USPTO-specific precedent is established.

This rulemaking benefits and reduces costs for most practitioners by clarifying and streamlining their professional responsibility obligations. With this rulemaking, the USPTO would be adopting professional conduct rules consistent with the ABA Model Rules and the professional responsibility rules already followed by 50 U.S. jurisdictions, *i.e.,* the District of Columbia and 49 States, excluding California. Further, any change is not a significant deviation from rules of professional conduct for practitioners that are already required by the Office.

Table 1 shows the principal sources of the rules proposed for the USPTO Rules of Professional Conduct. In general, numbering of the USPTO Rules of Professional Conduct largely track numbering of the ABA Model Rules of Professional Conduct. For example, USPTO Rule of Professional Conduct 11.101 parallels ABA Model Rule of Professional Conduct 1.1; USPTO Rule of Professional Conduct 11.102 parallels ABA Model Rule of Professional Conduct 1.2; USPTO Rule of Professional Conduct 11.201 parallels ABA Model Rule of Professional Conduct 2.1; et cetera. The discussion below highlights instances where the USPTO Rules of Professional Conduct diverge from the ABA Model Rules of Professional Conduct.

The proposed USPTO Rules of Professional Conduct reserve or decline to implement certain provisions set forth in the ABA Model Rules of Professional Conduct. For example, the ABA Model Rules set forth specific provisions concerning domestic relations or criminal practice that do not appear in the proposed USPTO Rules of Professional Responsibility. *See, e.g.,* sections 11.102, 11.105(d), 11.108(g), 11.108(j), 11.301, 11.303(a)(3), 11.306, 11.308 and 11.704(c). Conduct that would violate an unadopted provision might nevertheless also violate an adopted provision (*e.g.,* the conduct might also violate the broader obligations under section 11.804 of the proposed USPTO Rules of Professional Conduct). In addition, a licensed attorney is subject to the professional conduct rules of appropriate State licensing authorities, as well as of any courts before which the attorney practices. Failure to comply with those rules may lead to disciplinary action against the practitioner by the appropriate State bar or court and, in turn, possible reciprocal action against the practitioner by the USPTO. *See* 37 CFR 11.24 and 11.804(h).

In August 2012, the ABA House of Delegates approved revisions to the ABA Model Rules of Professional Conduct recommended by the ABA Commission on Ethics 20/20. *See http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.authcheckdam.pdf.* These revisions have not been incorporated into these proposed rules since the states have not adopted those changes at this time. However, comments are solicited as to whether those changes should be incorporated into the USPTO Rules of Professional Conduct.

The Office does not propose any change to the preamble to section 11.1. This preamble provides in part: ''This part governs solely the practice of patent, trademark, and other law before the United States Patent and Trademark Office. Nothing in this part shall be construed to preempt the authority of each State to regulate the practice of law, except to the extent necessary for the United States Patent and Trademark Office to accomplish its Federal objectives.'' Attorneys who practice before the Office are subject to professional conduct rules established by the Office as well as the appropriate State bars.

The Office adopted rules governing the conduct of disciplinary investigations in 2008. *See* 73 FR 47650 (August 14, 2008). Experience under these rules has demonstrated areas in which the rules could be clarified. Accordingly, the Office also proposes revisions to existing rules set forth at 37 CFR 11.19, 11.20, 11.22, 11.32, 11.34, 11.35 and 11.54. Finally, the Office proposes incorporating the survey rule, currently set forth at 37 CFR 10.11, as section 11.11(a)(2).

Discussion of Specific Rules

Section 1.4(d)(4) would be corrected by deleting the reference to section 11.804(b)(9), which does not exist.

Sections 1.21(a)(7) and (a)(8) would be deleted since the annual practitioner maintenance fee is proposed to be removed by this rule package. The Office has published a Notice of Proposed Rulemaking, Setting and Adjusting Patent Fees, 77 FR 55028, 55082, proposing to adjust the practitioner maintenance fee to $120, and noting elsewhere in the rulemaking materials that the Office has suspended collection of those fees, making total collections $0. The Office now proposes to remove this practitioner maintenance fee which is set forth in 11.8(d).

Section 2.2(c) would be revised to delete the reference to part 10 of this chapter, which would be removed and reserved.

Section 7.25(a) would be revised to delete the reference to part 10 of this chapter, which would be removed and reserved.

Section 11.1 would set out definitions of terms used in the USPTO Rules of Professional Conduct. The definitions of *mandatory disciplinary rule* and *matter* have been deleted; the definitions of *fraud* or *fraudulent* and *practitioner* have been revised; and the terms *confirmed in writing, firm* or *law firm, informed consent, law-related services, partner, person, reasonable belief* or *reasonably believes, reasonably should know, screened, tribunal,* and *writing* or *written* would be newly defined. The definition of *practitioner* would be updated to refer to section 11.14 rather than section 10.14, and to refer to sections 11.14(a), (b) and (c) rather than sections 11.14(b), (c) and (e). The new definitions generally comport to definitions set forth in the ABA Model Rules of Professional Conduct. However, the definition of *fraud* or *fraudulent* used in the ABA Model Rules has not been adopted. Instead, the Office believes a uniform definition based on common law should apply to all individuals subject to the USPTO Rules of Professional Conduct. Accordingly, the definition of common law fraud is based on the definition discussed by the United States Court of Appeals for the Federal Circuit. *See Unitherm Food Systems, Inc.* v. *Swift-Ekrich, Inc.,* 375 F.3d 1341, 1358 (Fed. Cir. 2004); *In re Spalding Sports Worldwide, Inc.,* 203 F.3d 800, 807 (Fed. Cir. 2000). Further, in the definition of *tribunal,* the reference to ''the Office'' includes those persons or entities acting in an adjudicative capacity.

Section 11.2(c) would be revised to delete redundant language.

Section 11.2(d) would be revised to clarify that a party dissatisfied with a final decision of the OED Director regarding enrollment or recognition must exhaust administrative remedies before seeking relief under the Administrative Procedure Act, 5 U.S.C. 551 et seq.

Section 11.2(e) would be revised to clarify that a party dissatisfied with an action or notice of the OED Director

during or at the conclusion of a disciplinary investigation must exhaust administrative remedies before seeking relief under the Administrative Procedure Act, 5 U.S.C. 551 et seq.

Section 11.8(d) would be reserved. The USPTO is deleting reference to an annual practitioner maintenance fee.

Section 11.11 would be revised to change the language ''registered attorney or agent'' to ''registered practitioner'' and add the term ''registered'' as appropriate.

Section 11.11(a) and (b) would be revised to substantially incorporate the provisions currently set forth in 37 CFR 10.11. Specifically, the current provisions of section 11.11(a) would appear as section 11.11(a)(1) and the current provisions of section 10.11 would appear as section 11.11(a)(2). Additionally, section 11.11(b) would be revised to provide that a practitioner failing to comply with section 11.11(a)(2) would be placed on administrative suspension, rather than removed from the register as set forth in section 10.11. Additionally, section 11.11(b)(1) would be revised to delete reference to section 11.8(d). Also, section 11.11(b)(4) would be deleted and reserved since an annual practitioner maintenance fee would be deleted by this rules package.

Section 11.11(c) would be revised to change the reference to the ''Mandatory Disciplinary Rules'' to the ''USPTO Rules of Professional Conduct.'' Section 11.11(c) would also be revised to delete reference to an annual practitioner maintenance fee.

Section 11.11(d) would be revised by updating the previous reference to section 10.40 to refer to section 11.116, which, with this rulemaking, would include provisions related to withdrawal from representation. Section 11.11(d) would also be revised to delete reference to an annual practitioner maintenance fee. Sections 11.11(d)(2) and (d)(4) are deleted and reserved since they are directed to an annual practitioner maintenance fee.

Section 11.11(e) would be revised to update the reference to the ''Mandatory Disciplinary Rules'' to read ''USPTO Rules of Professional Conduct.''

Section 11.11(f) would be revised to remove reference to sections 1.21(a)(7)(i) and (a)(8)(i) which provide for annual practitioner maintenance fees.

Section 11.19(a) would be revised to expressly provide jurisdiction over a person not registered or recognized to practice before the Office if the person provides or offers to provide any legal services before the Office. This change is consistent with the USPTO's statutory and inherent authority to regulate practice before the Office, and it is consistent with the second sentence of ABA Model Rule of Professional Conduct 8.5(a).

Section 11.20(a)(4) would be revised to clarify that disciplinary sanctions that may be imposed upon revocation of probation are not necessarily limited to the remainder of the probation period.

Section 11.20(b) would be revised to more clearly set forth conditions that may be imposed with discipline.

Section 11.21 would be revised to update the reference to the ''Mandatory Disciplinary Rules'' to read ''USPTO Rules of Professional Conduct.''

Section 11.22 would be revised to change the title to ''Disciplinary Investigations'' for clarification.

Section 11.22(f)(2) would be revised to update the reference to the ''Mandatory Disciplinary Rules'' to read ''USPTO Rules of Professional Conduct.''

Section 11.22(i) would be revised to correct a technical error in the heading. Specifically, the reference to a warning letter in the heading could mistakenly be viewed as indicating that issuance of a warning means at least one of the conditions set forth in that section apply. Indeed, a warning may be issued in situations where, for example, there is sufficient evidence to conclude that there is probable cause to believe that grounds exist for discipline. However, in a situation where a potential violation of the disciplinary rules is minor in nature or was not willful, it often is in the interest of the Office, practitioners, and the public to resolve the matter with a warning rather than a formal disciplinary action.

Section 11.24(e) would be revised to make a technical correction. Specifically, the previous reference to 37 CFR 10.23 would be updated to refer to new section 11.804.

Section 11.25(a) would be revised to update the reference to the ''Mandatory Disciplinary Rules'' to read ''USPTO Rules of Professional Conduct.''

Section 11.32 would be revised to clarify that the Director of the Office of Enrollment and Discipline has the authority to exercise discretion in referring matters to the Committee on Discipline and in recommending settlement or issuing a warning in matters wherein the Committee on Discipline has made a probable cause determination. The section also would be revised to make a technical correction by deleting the reference to sections 11.19(b)(3) through (5), which do not exist.

Section 11.34 would be revised to incorporate several technical corrections. Specifically, section 11.34(a) would be revised to eliminate an erroneous reference to section 11.25(b)(4). The requirements set forth in section 11.34 apply to complaints filed in disciplinary proceedings filed under sections 11.24, 11.25 and 11.32. The revision to section 11.34(a)(1) clarifies that an individual other than a ''practitioner'' may be a respondent. The revision to section 11.34(b) updates the reference to the ''Mandatory Disciplinary Rules'' to read ''USPTO Rules of Professional Conduct.''

Section 11.35(a)(2)(ii) and (a)(4)(ii) would be revised by changing the term ''a nonregistered practitioner'' to ''not registered.'' The section would now specify the service address for an individual subject to the Office's disciplinary jurisdiction who does not meet the definition of ''practitioner'' set forth in section 11.1.

Section 11.54(a)(2) and (b) would be revised to clarify that an initial decision of the hearing officer may impose conditions deemed appropriate under the circumstances, and should explain the reason for probation and any conditions imposed with discipline.

Section 11.58(b)(2) would be revised to update the reference to section 10.40 to refer to section 11.116.

Section 11.58(f)(1)(ii) would be revised to update the reference to the ''Mandatory Disciplinary Rules'' to read ''USPTO Rules of Professional Conduct'' and to delete reference to section 10.20(b).

Section 11.61 would be deleted and reserved. A savings clause would be added at the end of Part 11.

USPTO Rules of Professional Conduct

Section 11.101 would address the requirement that practitioners provide competent representation to a client. Consistent with the provisions of 37 CFR 11.7, this rule acknowledges that competent representation in patent matters requires scientific and technical knowledge, skill, thoroughness and preparation as well as legal knowledge, skill, thoroughness and preparation, and otherwise corresponds to the ABA Model Rule of Professional Conduct 1.1.

Section 11.102 would provide for the scope of representation of a client by a practitioner and the allocation of authority between the client and the practitioner. This section corresponds to the ABA Model Rule of Professional Conduct 1.2. However, the USPTO is declining to enact the substance of the last sentence of ABA Model Rule of Professional Conduct 1.2(a) as the USPTO does not regulate criminal law practice. Nonetheless, a patent attorney who engages in the practice of criminal law is subject to the disciplinary rules

of the appropriate State and Court authorities. Failure to comply with those rules may lead to disciplinary action against the practitioner and, in turn, possible reciprocal action against the practitioner by the USPTO. *See* 37 CFR 11.24 and 11.804(h). Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one of the USPTO Rules of Professional Conduct.

Section 11.102(b) is reserved as the USPTO is declining to enact a specific rule regarding a practitioner's endorsement of a client's view or activities. However, the USPTO is not implying that a practitioner's representation of a client constitutes an endorsement of the client's political, economic, social, or moral views or activities.

Section 11.103 would address a practitioner's duty to act with reasonable diligence and promptness in representing a client. This rule corresponds to the ABA Model Rule of Professional Conduct 1.3.

Section 11.104 would address the practitioner's duty to communicate with the client. This rule corresponds to the ABA Model Rule of Professional Conduct 1.4. As in prior § 10.23(c)(8), under this rule a practitioner should not fail to timely and adequately inform a client or former client of correspondence received from the Office in a proceeding before the Office or from the client's or former client's opponent in an *inter partes* proceeding before the Office when the correspondence (i) could have a significant effect on a matter pending before the Office; (ii) is received by the practitioner on behalf of a client or former client; and (iii) is correspondence of which a reasonable practitioner would believe under the circumstances the client or former client should be notified.

Section 11.105 would address the practitioner's responsibilities regarding fees. This rule corresponds to the ABA Model Rule of Professional Conduct 1.5. Nothing in paragraph (c) should be construed to prohibit practitioners gaining proprietary interests in patents under section 11.108(i)(3).

Section 11.105(d) is reserved as the USPTO is declining to enact a specific rule regarding contingent fee arrangements for domestic relations and criminal matters.

Section 11.106 would address the practitioner's responsibilities regarding maintaining confidentiality of information. This section generally corresponds to the ABA Model Rule of Professional Conduct 1.6, but it includes exceptions in the case of inequitable conduct before the Office in addition to crimes and fraud.

Section 11.106(b)(3) would state that a practitioner may reveal information relating to the representation of a client to the extent the practitioner reasonably believes necessary to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from inequitable conduct before the Office.

Section 11.106(c) would additionally provide that regardless of the confidentiality requirements of Section 11.106(a), a practitioner is required to disclose to the Office all information necessary to comply with the duty of disclosure rules of this subchapter in practice before the Office.

Section 11.107 would prohibit a practitioner from representing a client if the representation involves a concurrent conflict of interest. This rule corresponds to the ABA Model Rule of Professional Conduct 1.7. *See also,* 37 CFR 10.66.

Section 11.108 would address conflicts of interest for current clients and specific rules, including rules regarding practitioners entering into business transactions with clients, the use of information by a practitioner relating to representation of a client, gifts between the practitioner and a client, literary rights based on information relating to representation of a client, a practitioner's provision of financial assistance to the client, compensation for services by a third party, aggregate settlement of claims where the practitioner represents two or more clients in a similar matter, agreements between the client and practitioner limiting liability of the practitioner, and the practitioner's acquiring a proprietary interest in the matter. This rule corresponds to the ABA Model Rule of Professional Conduct 1.8.

Section 11.108(e) would provide that a practitioner shall not provide financial assistance to a client in connection with pending or contemplated litigation or proceeding before the Office, except that a practitioner may advance court or tribunal costs and expenses of either litigation or a proceeding before the Office and a practitioner representing an indigent client may pay court or tribunal costs and expenses of litigation or a proceeding before the Office.

Section 11.108(g) differs from ABA Model Rule of Professional Conduct 1.8(g) in that the USPTO is declining to enact the portion of the rule relating to representation of clients in criminal matters and the corresponding regulation of multiple clients agreeing to an aggregated agreement as to guilty or nolo contendere pleas.

Section 11.108(i) differs from ABA Model Rule of Professional Conduct 1.8(i) in that the USPTO would provide that a practitioner may, in a patent case, take an interest in the patent as part or all of his or her fee. *See* 37 CFR 10.64(a)(3).

Section 11.108(j) is reserved. The USPTO is declining to enact a rule that would specifically address sexual relations between practitioners and clients. Because of the fiduciary duty to clients, combining a professional relationship with any intimate personal relationship may raise concerns about conflict of interest and impairment of the judgment of both practitioner and client. To the extent warranted, such conduct may be investigated under more general provisions (*e.g.,* 37 CFR 11.804).

Section 11.109 would address conflicts of interest and duties to former clients. This rule corresponds to the ABA Model Rule of Professional Conduct 1.9.

Section 11.110 would address the imputation of conflicts of interest for practitioners in the same firm. This rule corresponds to the ABA Model Rule of Professional Conduct 1.10.

Section 11.111 would address former or current Federal Government employees. This rule deals with practitioners who leave public office and enter other employment. It applies to judges and their law clerks as well as to practitioners who act in other capacities. The USPTO is declining to enact ABA Model Rule of Professional Conduct 1.11 and is instead enacting its own rule regarding successive government and private employment, namely, that a practitioner who is a former or current Federal Government employee shall not engage in any conduct which is contrary to applicable Federal ethics laws, including conflict of interest statutes and regulations of the department, agency or commission formerly or currently employing said practitioner. *See, e.g.,* 18 U.S.C. 207.

A practitioner representing a government agency, whether employed or specially retained by the government, is subject to the USPTO Rules of Professional Conduct, including the prohibition against representing adverse interests stated in section 11.107 and the protections afforded former clients in section 11.109. In addition, such a practitioner is subject to this section and to statutes and regulations, as well as government policies, concerning conflicts of interest and other Federal ethics requirements.

Section 11.112 would provide specific rules regarding the imputation of conflicts of interest for practitioners who were former judges, arbitrators, mediators or third-party neutrals. This rule corresponds to the ABA Model Rule of Professional Conduct 1.12.

Section 11.113 would provide specific rules regarding a practitioner's responsibilities when representing an organization as a client. This rule corresponds to the ABA Model Rule of Professional Conduct 1.13.

Section 11.114 would provide specific rules regarding a practitioner's responsibilities when representing a client with diminished capacity. This rule corresponds to the ABA Model Rule of Professional Conduct 1.14.

Section 11.115 would provide specific rules regarding a practitioner's responsibilities regarding safekeeping of client property and maintenance of financial records. This rule corresponds to the ABA Model Rule of Professional Conduct 1.15.

Section 11.115(a) would require that funds be kept in a separate client or third person account maintained in the state where the practitioner's office is situated, or elsewhere with the consent of the client or third person. The USPTO bar includes practitioners who are located outside the United States. The USPTO rules would propose that where the practitioner's office is situated in a foreign country, funds shall be kept in a separate account maintained in that foreign country or elsewhere with the consent of the client or third person. *See also,* 37 CFR 10.112.

Sections 11.115(b)–(e) correspond to the ABA Model Rules of Professional Conduct 1.15(b)–(e).

Section 11.115(f) would require that the type of records specified by section 11.115(a) would include those records consistent with (i) the ABA Model Rules for Client Trust Account Records; (ii) for lawyer practitioners, the types of records that are maintained meet the recordkeeping requirements of a state in which the lawyer is licensed and in good standing, the recordkeeping requirements of the state where the lawyer's principal place of business is located, or the recordkeeping requirements of this section; and/or (iii) for patent agents and persons granted limited recognition who are employed in the United States by a law firm, the types of records that are maintained meet the recordkeeping requirements of the state where at least one lawyer of the law firm is licensed and in good standing, the recordkeeping requirements of the state where the law firm's principal place of business is located, or the recordkeeping requirements of this section. According to the ABA Standing Committee on Client Protection, the ABA Model Rules for Client Trust Account Records responds to a number of changes in banking and business practices that may have left lawyers ''inadvertently running afoul of their jurisdiction's rules of professional conduct.'' The new rule addresses recordkeeping requirements after electronic transfers and clarifies who can authorize such transfers. The proposed rule also accounts for the Check Clearing for the 21st Century Act, which allows banks to substitute electronic images of checks for canceled checks. The rule also addresses the increasing prevalence of electronic banking and wire transfers or electronic transfers of funds, for which banks do not routinely provide specific confirmation. The proposed rule acknowledges those issues, addressing recordkeeping requirements after electronic transfers and clarifying who can authorize such transfers, record maintenance and safeguards required for electronic record storage systems. The rule also details minimum safeguards practitioners must implement when they allow non-practitioner employees to access client trust accounts; addresses partner responsibilities for storage of and access to client trust account records when partnerships are dissolved or when a practice is sold; and allows practitioners to maintain client trust account records in electronic, photographic, computer or other media or paper format, either at the practitioner's office or at an off-site storage facility, but it requires that records stored off-site be readily accessible to the practitioner and that the practitioner be able to produce and print them upon request.

Section 11.115(f) would require a practitioner to keep the same records as the practitioner must currently maintain to comply with 37 CFR 10.112(c)(3). Section 10.112(c)(3) requires a practitioner to ''maintain complete records of all funds, securities and other properties of a client coming into the possession of the practitioner.'' Section 10.112(c)(3) is substantially the same as DR 9–102(b)(3) of the Model Code of Professional Responsibility of the American Bar Association, which was adopted by numerous states. It has been long recognized that compliance with the Code's rule requires maintenance of, *inter alia,* a cash receipts journal, a cash disbursements journal, and a subsidiary ledger, as well as periodic trial balances, and insufficient fund check reporting. *See Wright* v. *Virginia State Bar,* 357 SE.2d 518, 519 (Va. 1987); *In re Librizzi,* 569 A.2d 257, 258–259 (N.J. 1990); *In re Heffernan,* 351 NW.2d 13, 14 (Minn. 1984); *In re Austin,* 333 NW.2d 633, 634 (Minn. 1983); and *In re Kennedy,* 442 A.2d 79, 84–85 (Del. 1982). Thus, § 11.115(f) clarifies recordkeeping requirements that currently apply to all practitioners through section 10.112(c)(3).

Section 11.116 would provide rules regarding a practitioner's responsibilities in declining or terminating representation of a client. This rule corresponds to the ABA Model Rule of Professional Conduct 1.16.

Section 11.117 would provide rules regarding a practitioner's responsibilities when buying or selling a law practice or an area of law practice, including good will. This rule corresponds to the ABA Model Rule of Professional Conduct 1.17.

Section 11.117(b) differs from ABA Model Rule of Professional Conduct 1.17(b) in that the USPTO is proposing that to the extent the practice or the area of practice to be sold involves patent proceedings before the Office, that practice or area of practice may be sold only to one or more registered practitioners or law firms that includes at least one registered practitioner.

Section 11.118 would provide rules regarding a practitioner's responsibilities to prospective clients. This rule corresponds to the ABA Model Rule of Professional Conduct 1.18.

Sections 11.119–11.200 are reserved.

Section 11.201 would provide a rule addressing the practitioner's role in providing advice to a client and corresponds to the ABA Model Rule of Professional Conduct 2.1. However, the USPTO is declining to enact the substance of the last sentence of ABA Model Rule of Professional Conduct 2.1, which provides that in representing a client, a practitioner may refer to not only legal considerations, but also other factors. However, by not enacting the last sentence of Rule 2.1, the USPTO is not implying that a practitioner may not refer to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Section 11.202 is reserved. ABA Model Rule of Professional Conduct 2.2 was deleted in 2002 as the ABA no longer treats intermediation and the conflict-of-interest issues it raises separately from any other multi-representation conflicts. Issues relating to practitioners acting as intermediaries are dealt with under § 11.107.

Section 11.203 would articulate the ethical standards for circumstances where a practitioner provides an

evaluation of a matter affecting a client for the use by a third party. This rule corresponds to the ABA Model Rule of Professional Conduct 2.3. It should be noted that with respect to evaluation information under § 11.203 a practitioner is required to disclose information in compliance with the duty of disclosures provisions of this subchapter subject to disclosure to the USPTO pursuant to § 11.106(c).

Section 11.204 would provide a rule addressing the practitioner's role in serving as a third-party neutral, whether as an arbitrator, a mediator or in such other capacity, and corresponds to the ABA Model Rule of Professional Conduct 2.4.

Sections 11.205–11.300 are reserved.

Section 11.301 would require that a practitioner present well-grounded positions. The advocate has a duty to use legal procedure for the fullest benefit of the client's cause. The advocate also has a duty not to abuse the legal procedure. This rule corresponds to the ABA Model Rule of Professional Conduct 3.1; however, the USPTO is declining to enact the ABA Model Rule requirement that a lawyer for the defendant in a criminal proceeding may defend the proceeding by requiring that every element of the case be established. The USPTO proposes deleting the specific reference because it is a professional conduct rule limited to the practice of criminal law.

Section 11.302 would require that practitioners diligently pursue litigation and Office proceedings. This rule corresponds to the ABA Model Rule of Professional Conduct 3.2, adding that a practitioner shall make reasonable efforts to expedite proceedings before the Office as well as in litigated matters.

Section 11.303 would continue the duty of candor to a tribunal while specifying its application under different situations, and corresponds to the ABA Model Rule of Professional Conduct 3.3. Section 11.303(a)(2) sets forth the duty to disclose to the tribunal legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel in an *inter partes* proceeding. It also sets forth this duty for an *ex parte* proceeding before the Office where the legal authority is not otherwise disclosed. All decisions made by the Office in patent and trademark matters affect the public interest. *See Lear* v. *Adkins,* 395 U.S. 653 (1969). Many of the decisions made by the Office are made *ex parte.* Accordingly, practitioners must cite to the Office known authority that is contrary, *i.e.,* directly adverse, to the position being taken by the practitioner in good faith. Section 11.303(a)(3) does not include a reference to testimony of a defendant in a criminal matter, as set forth in ABA Model Rule 3.3(a)(3).

Section 11.303(e) would specify that in a proceeding before the Office, a practitioner must disclose information necessary to comply with the duty of disclosure provisions of this subchapter in practice before the Office. The practitioner's responsibility to present the client's case with persuasive force is qualified by the practitioner's duty of candor to the tribunal. *See Lipman v. Dickinson,* 174 F.3d 1363, 50 USPQ2d 1490 (Fed. Cir. 1999).

Section 11.304 would contemplate that evidence be marshaled fairly in a case before a tribunal, including in *ex parte* and *inter partes* proceedings before the Office. This rule corresponds to the ABA Model Rule of Professional Conduct 3.4, but it clarifies that the duties of the practitioner are not limited to trial matters but also to any proceeding before a tribunal.

Section 11.305 would contemplate that practitioners act with impartiality and decorum in *ex parte* and *inter partes* proceedings. This rule corresponds to the ABA Model Rule of Professional Conduct 3.5, but it clarifies that it is improper to seek to improperly influence a hearing officer, administrative law judge, administrative patent judge, administrative trademark judge, employee or officer of the Office.

Section 11.305(c) is reserved as the USPTO is declining to enact a specific rule regarding a practitioner's communication with a juror or prospective juror. Nonetheless, a practitioner who engages in the practice of improper communication with a juror or prospective juror is subject to criminal laws and the disciplinary rules of the appropriate State and Court authorities. Failure to comply with those laws and rules may lead to disciplinary action against the practitioner and, in turn, possible reciprocal action against the practitioner by the USPTO. *See* 37 CFR 11.24 and 11.804(h). Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one or more of the USPTO Rules of Professional Conduct (*e.g.,* § 11.804).

Section 11.306 is reserved as the USPTO is declining to enact a specific rule regarding trial publicity. Nonetheless, a practitioner who engages in improper conduct relating to trial publicity is subject to the disciplinary rules of the appropriate State and Court authorities. Failure to comply with those rules may lead to disciplinary action against the practitioner and, in turn, possible reciprocal action against the practitioner by the USPTO. *See* 37 CFR 11.24 and 11.804(h). Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one or more of the USPTO Rules of Professional Conduct (*e.g.,* § 11.804).

Section 11.307 would generally proscribe a practitioner from acting as an advocate in a proceeding before the Office in which the practitioner is likely to be a necessary witness. Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the practitioner and client. This rule corresponds to the ABA Model Rule of Professional Conduct 3.7.

Section 11.308 is reserved. ABA Model Rule of Professional Conduct 3.8 addresses the ''Special Responsibilities of a Prosecutor'' in the context of criminal proceedings. Because practice before the Office does not involve criminal proceedings, the content of ABA Model Rule of Professional Conduct 3.8 is not being proposed. Nevertheless, an attorney who is both a practitioner before the Office and a criminal prosecutor may be subject to both the Office and other professional conduct rules. Discipline by a duly constituted authority of a State, the United States, or the country in which a practitioner resides may lead to reciprocal disciplinary action by the Office. *See* 37 CFR 11.24. Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one or more of the USPTO Rules of Professional Conduct (*e.g.,* § 11.804).

Section 11.309 would regulate a practitioner's conduct when he or she is representing a client in a non-adjudicative proceeding before an administrative agency, such as the Office. This rule corresponds to the ABA Model Rule of Professional Conduct 3.9.

Sections 11.310–11.400 are reserved.

Section 11.401 would require a practitioner to be truthful when dealing with others on a client's behalf. This rule corresponds to the ABA Model Rule of Professional Conduct 4.1.

Section 11.402 would provide a standard for communicating with a represented party. Section 11.402(a) corresponds to the ABA Model Rule of Professional Conduct 4.2. Section 11.402(a) differs from ABA Model Rule of Professional Conduct 4.2 in that the proposed rule adds that in addition to

a practitioner being authorized to communicate with a represented party when the practitioner is authorized by law or a court order, a practitioner may communicate with a represented party when the practitioner is authorized by rule to do so.

Section 11.402(b) is based on District of Columbia Rule of Professional Conduct 4.2(b) and would recognize that special considerations come into play when the Federal Government, including the Office, is involved in a lawsuit. It would permit communications with those in Government having the authority to redress such grievances (but not with other Government personnel) without the prior consent of the practitioner representing the Government in such cases. However, a practitioner making such a communication without the prior consent of the practitioner representing the Government must make the kinds of disclosures that are required by § 11.402(b) in the case of communications with non-party employees.

Section 11.402(b) does not permit a practitioner to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide practitioners access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

Section 11.403 would provide a standard for communicating with an unrepresented person, particularly one not experienced in dealing with legal matters. This rule corresponds to the ABA Model Rule of Professional Conduct 4.3.

Section 11.404 would require a practitioner to respect the rights of third parties. Responsibility to a client requires a practitioner to subordinate the interests of others to those of the client, but that responsibility does not imply that a practitioner may disregard the rights of third persons. The rule also provides guidance to practitioners regarding the receipt of inadvertently sent documents. This rule corresponds to the ABA Model Rule of Professional Conduct 4.4.

Sections 11.405–11.500 are reserved.

Section 11.501 would set forth the responsibilities of a partner or supervisory practitioner. This rule corresponds to the ABA Model Rule of Professional Conduct 5.1.

Section 11.502 would set forth the ethical and professional conduct responsibilities of a subordinate practitioner. This rule corresponds to the ABA Model Rule of Professional Conduct 5.2.

Section 11.503 would set forth a practitioner's responsibilities regarding non-practitioner assistants. Practitioners generally employ assistants in their practice, including secretaries, technical advisors, student associates, draftspersons, investigators, law student interns, and paraprofessionals. This rule specifies the practitioner's responsibilities in supervising non-practitioner assistants and corresponds to the ABA Model Rule of Professional Conduct 5.3.

Section 11.504 would protect the professional independence of a practitioner by providing traditional limitations on sharing fees with non-practitioners. This rule corresponds to the ABA Model Rule of Professional Conduct 5.4. (*See also,* 37 CFR 10.48, 10.49, 10.68)

Section 11.504(a)(4) would differ from the ABA Model Rule in favor of District of Columbia Rule of Professional Conduct 5.4(a)(5). Section 11.504(a)(4) permits a practitioner to share legal fees with a nonprofit organization that employed, retained, or recommended employment of the practitioner in the matter. A practitioner may decide to contribute all or part of legal fees recovered from the opposing party to the nonprofit organization. Such a contribution may or may not involve fee-splitting, but when it does, the prospect that the organization will obtain all or part of the practitioner's fees does not inherently compromise the practitioner's professional independence, whether the practitioner is employed by the organization or was only retained or recommended by it. A practitioner who has agreed to share legal fees with such an organization remains obligated to exercise professional judgment solely in the client's best interests. Moreover, fee-splitting in these circumstances may promote the financial viability of such nonprofit organizations and facilitate their public interest mission. Unlike the corresponding provision of the ABA Model Rules, this provision is not limited to sharing of fees awarded by a court because that restriction would significantly interfere with settlement of cases outside of court, without significantly advancing the purpose of the exception. To prevent abuse, it applies only if the nonprofit organization has been recognized by the Internal Revenue Service as an organization described in Section 501(c)(3) of the Internal Revenue Code.

Section 11.505 would proscribe practitioners from engaging in or aiding the unauthorized practice of law. This rule corresponds to the ABA Model Rule of Professional Conduct 5.5(a). The USPTO is declining to adopt the ABA Model Rules regarding multijurisdictional practice of law.

Limiting the practice of patent law before the Office to those recognized to practice protects the public against rendition of legal services by unqualified persons or organizations. A patent application is recognized as being a legal document and registration to practice before the USPTO sanctions ''the performance of those services which are reasonably necessary and incident to the preparation and prosecution of patent applications.'' *Sperry* v. *Florida,* 373 U.S. 379, 386, 137 USPQ 578, 581 (1963). Thus, a registered practitioner may practice in patent matters before the Office regardless of where they reside within the United States.

It is noted that the USPTO registers individuals, not law firms or corporations, to practice in patent matters before the Office. Thus, a corporation is not authorized to practice law and render legal services. Instead, upon request and for a fee, the corporation could cause a patent application to be prepared by a registered practitioner. *See Lefkowitz* v. *Napatco,* 415 NE.2d 916, 212 USPQ 617 (NY 1980). There are numerous cases and ethics opinions wherein attorneys have been found to have aided lay organizations in the unauthorized practice of law by agreeing to accept referrals from a non-lawyer engaged in unauthorized practice of law. For example, an attorney was found to have aided the unauthorized practice of law by permitting a non-attorney operating as a business to gather data from estate planning clients for preparation of legal documents and forward the data to the attorney who thereafter prepared the documents (including a will, living trust, living will, and powers of attorney). The attorney, without having personally met or corresponded with the client, forwarded the documents to the non-attorney for the client to execute. *See Wayne County Bar Ass'n.* v. *Naumoff,* 660 NE.2d 1177 (Ohio 1996). *See Comm. on Professional Ethics & Conduct* v. *Baker,* 492 NW.2d 695,597 (Iowa 1992); *see also People* v. *Laden,* 893 P.2d 771 (Colo. 1995);

People v. *Macy,* 789 P.2d 188 (Colo. 1990); *People* v. *Boyles,* 591 P.2d 1315 (Colo. 1979); *In re Discipio,* 645 NE.2d 906 (Ill. 1994); *In re Komar,* 532 NE.2d 801 (Ill.1988); Formal Opinion 705, Committee on Professional Ethics of the Illinois State Bar Association (1982); Formal Opinion 1977–148, Standing Committee on Professional Responsibility and Conduct; Formal Opinion 87, Ethics Committee of the Colorado State Bar (1991).

Section 11.505(b) would specifically proscribe practice before the Office in patent, trademark, or other non-patent law if a practitioner is suspended, excluded, or excluded on consent before the Office. The rule would also proscribe practice before the Office in patent, trademark, or other non-patent law if a practitioner has been transferred to disability inactive status before the Office, has been administratively suspended before the Office, or is administratively inactive before the Office.

Section 11.505(c) would clarify that a practitioner is prohibited from assisting a person who is not a member of the bar of a jurisdiction in the performance of an activity that constitutes the unauthorized practice of law, and from assisting a person who is not registered to practice before the Office in patent matters in the unauthorized practice of law before the Office.

Sections 11.505(d), like current § 10.47(b), would clarify that a practitioner is prohibited from aiding a suspended or excluded practitioner in the practice of law before the Office.

Sections 11.505(e) would provide that a practitioner is prohibited from aiding a suspended or excluded practitioner in the practice of law in any other jurisdiction.

Section 11.505(f), consistent with § 11.14(b), would recognize that individuals who are not attorneys but who were recognized to practice before the Office in trademark matters prior to January 1, 1957, will continue to be recognized as agents to continue practice before the Office in trademark matters and such practice by those individuals is not the unauthorized practice of trademark law before the Office.

Section 11.506 would prohibit agreements restricting rights to practice. This rule corresponds to the ABA Model Rule of Professional Conduct 5.6.

Section 11.507 would provide for a practitioner being subject to the USPTO Rules of Professional Conduct if the practitioner provides law-related services. This rule corresponds to the ABA Model Rule of Professional Conduct 5.7. The definition of ''law-related service'' is set forth in § 11.1.

Sections 11.508–11.600 are reserved.

Section 11.601–11.700 are reserved. The USPTO is declining to adopt the ABA Model Rules regarding public service. The USPTO recognizes that every practitioner, regardless of professional prominence or professional workload, has a responsibility to provide legal services to those unable to pay and that every practitioner should support all proper efforts to meet this need for legal services. However, attorney practitioners' individual state ethical rules should provide guidance and regulations regarding their respective duties to provide voluntary *pro bono* service, accept court appointed representation, and serve as members of legal service and legal reform organizations. The USPTO is declining to add an increased regulatory requirement on attorney practitioners.

Section 11.701 would govern all communications about a practitioner's services, including advertising, and corresponds to the ABA Model Rule of Professional Conduct 7.1.

Section 11.702 would provide for advertising by practitioners. This section corresponds to the ABA Model Rule of Professional Conduct 7.2. However, the USPTO is declining to enact the substance of ABA Model Rule of Professional Conduct 7.2(b)(2) as the USPTO does not currently regulate and does not anticipate regulating lawyer referral services.

Section 11.703 would address the direct contact by a practitioner with a prospective client known to need legal services. This section corresponds to the ABA Model Rule of Professional Conduct 7.3.

Section 11.704 would permit a practitioner to indicate areas of practice in communications about the practitioner's services. Section 11.704(a) corresponds to the ABA Model Rule of Professional Conduct 7.4(a).

Section 11.704(b), as with current § 10.34, would continue the long-established policy of the USPTO for the designation of practitioners practicing before the Office.

Section 11.704(c) is reserved as the USPTO is declining to regulate the communication of specialization in Admiralty practice.

Section 11.704(d) corresponds to the ABA Model Rule of Professional Conduct 7.4(d).

Section 11.704(e) would provide guidance to, and permit, an individual granted limited recognition under § 11.9 to use the designation ''Limited Recognition'' to indicate in communications about the individual's services that the individual, while not a ''registered practitioner,'' is authorized to practice before the USPTO in patent matters subject to the limitations in the individual's grant of limited recognition under § 11.9.

Section 11.705 would regulate firm names and letterheads. This section corresponds to the ABA Model Rule of Professional Conduct 7.5.

Section 11.705(b) is reserved as the USPTO is declining to enact a specific rule regarding law firms with offices in more than one jurisdiction since the USPTO encompasses one Federal jurisdiction. However, the USPTO is not implying that a law firm with offices in more than one jurisdiction may violate a State authority regulating this conduct. Nonetheless, a practitioner who engages in the improper use of firm names and letterhead is subject to the disciplinary rules of the appropriate State and Court authorities. Failure to comply with those rules may lead to disciplinary action against the practitioner and, in turn, possible reciprocal action against the practitioner by the USPTO. *See* 37 CFR 11.24 and 11.804(h). Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one or more of the USPTO Rules of Professional Conduct (*e.g.,* § 11.804).

Section 11.705(d) is reserved. The USPTO declines to adopt ABA Model Rule of Professional Conduct 7.5(d) providing that practitioners may state or imply that they practice in a partnership or other organization only when that is the fact. However, the USPTO is not implying that practitioners may state or imply that they practice in a partnership or other organization if that is not the fact. Nonetheless, a practitioner who engages in the improper use of firm names and letterhead is subject to the disciplinary rules of the appropriate State and Court authorities. Failure to comply with those rules may lead to disciplinary action against the practitioner and, in turn, possible reciprocal action against the practitioner by the USPTO. *See* 37 CFR 11.24 and 11.804(h). Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one or more of the USPTO Rules of Professional Conduct (*e.g.,* § 11.804).

Section 11.706 is reserved as the USPTO is declining to enact a specific rule regarding political contributions to obtain legal engagements or appointments by judges. However, the USPTO is not implying that a

practitioner or law firm may accept a government legal engagement or an appointment by a judge if the practitioner or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment. Nonetheless, a practitioner who engages in this type of practice is subject to the disciplinary rules of the appropriate State and Court authorities. Failure to comply with those rules may lead to disciplinary action against the practitioner and, in turn, possible reciprocal action against the practitioner by the USPTO. *See* 37 CFR 11.24 and 11.804(h). Moreover, the lack of a specific disciplinary rule concerning particular conduct should not be viewed as suggesting that the conduct would not violate one or more of the USPTO Rules of Professional Conduct.

Sections 11.707–11.800 are reserved.

Section 11.801 would impose the same duty to persons seeking admission to a bar as well as to practitioners seeking registration or limited recognition. This section corresponds to the ABA Model Rule of Professional Conduct 8.1. This section would clarify that the section pertains to applicants for registration or an applicant for recognition to practice before the Office and would conform to current USPTO practice in §§ 11.6, 11.7, 11.9, 11.14 and 11.58.

If a person makes a material false statement in connection with an application for registration or recognition, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event it may be relevant in a subsequent application. The duty imposed by § 11.801 applies to a practitioner's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a practitioner to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the practitioner's own conduct. Section 11.801 also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware. Moreover, Section 11.801(d) requires practitioners to cooperate with the Office of Enrollment and Discipline in an investigation of any matter before it and would continue the practice set forth under former § 10.131(b).

Section 11.802 would require that a practitioner not make a statement that the practitioner knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. This section corresponds to the ABA Model Rule of Professional Conduct 8.2. Government employees and officers such as administrative patent judges, administrative trademark judges, patent examiners, trademark examining attorneys, and petitions examiners, perform judicial and quasi-judicial functions. *See, e.g., United States* v. *Morgan,* 313 U.S. 409 (1941); *Western Electric Co.* v. *Piezo Technology, Inc.,* 860 F.2d 428 (Fed. Cir. 1988) (''Patent examiners are quasi-judicial officials.''); *see also, Butterworth* v. *United States ex rel. Hoe,* 112 U.S. 50, 67 (1884) (''That it was intended that the Commissioner of Patents, in issuing or withholding patents * * * should exercise quasi-judicial functions, is apparent from the nature of the examinations and decision he is required to make.''); *Chamberlin* v. *Isen,* 779 F.2d 522, 524 (9th Cir. 1985) (''[I]t has long been recognized that PTO employees perform a 'quasi-judicial' function in examining patent applications.'') Such employees and officers are considered adjudicatory officers.

Section 11.803 would require reporting a violation of the Rules of Professional Conduct. This section corresponds to the ABA Model Rule of Professional Conduct 8.3.

Self-regulation of the legal profession requires that members of the profession seek a disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Consistent with the current rule, § 10.24(a), a report about misconduct may not be required where it would involve violation of § 11.106(a). However, a practitioner should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests. Section 11.803(c) does not require disclosure of information otherwise protected by § 11.106, or information gained while participating in an approved lawyers assistance program. It should be noted that the USPTO does not sanction any lawyer's assistance programs and the reference thereto in § 11.803 is a reference to lawyer's assistance programs approved by a relevant state authority.

Section 11.804 would address the practice of providing for discipline involving a variety of acts constituting misconduct. Sections 11.804(a)–(f) correspond to the ABA Model Rules of Professional Conduct 8.4(a)–(f), respectively. It is noted that § 10.23(c) of the current Patent and Trademark Office Code of Professional Responsibility sets forth specific examples of misconduct that constitute a violation of the rules. Because it is not possible to provide an exhaustive list of actions that constitute misconduct, Section 11.804 does not carry forward these specific examples into the USPTO Rules of Professional Conduct. The decision not to set forth specific examples of misconduct in the rule, however, should not be construed as an indication that the examples set forth in § 10.23(c) represent acceptable conduct under the USPTO Rules of Professional Conduct.

Section 11.804(g) would specifically address knowing assistance to an officer or employee of the Office in conduct that is a violation of applicable rules of conduct or other law.

Section 11.804(h) would clearly set forth that it is misconduct for a practitioner to be publicly disciplined on ethical grounds by any duly constituted authority of (1) a State, (2) the United States, or (3) the country in which the practitioner resides. *See* 37 CFR 11.24.

Section 11.804(i) would clearly set forth that it continues to be misconduct for a practitioner to engage in conduct that adversely reflects on the practitioner's fitness to practice before the Office.

Section 11.805 is reserved. The USPTO is declining to adopt the ABA Model Rule regarding disciplinary authority and choice of law. The disciplinary jurisdiction of the Office is set forth in section 11.19. The USPTO Director has statutory, 35 U.S.C. 2(b)(2)(D) and 32, and inherent authority to adopt rules regulating the practice of attorneys and other persons before the USPTO in patent, trademark, and non-patent law. The USPTO, like other Government agencies, has inherent authority to regulate who may practice before it as practitioners, including the authority to discipline practitioners. *See Goldsmith* v. *U.S. Board of Tax Appeals,* 270 U.S. 117 (1926); *Herman* v. *Dulles,* 205 F.2d 715 (D.C. Cir. 1953); and *Koden* v. *U.S. Department of Justice,* 564 F.2d 228 (7th Cir. 1977). Courts have affirmed that Congress, through the Administrative Procedure Act, 5 U.S.C. 500, did not limit the inherent power of agencies to discipline professionals who appear or practice before them. *See Polydoroff* v. *ICC,* 773 F.2d 372 (D.C. Cir. 1985); *Touche Ross & Co.* v. *SEC,* 609 F.2d 570 (2d Cir. 1979).

Sections 11.806–11.900 are reserved.

Section 11.901 would contain the following savings clauses: (a) A disciplinary proceeding based on conduct engaged in prior to the effective

date of these regulations may be instituted subsequent to such effective date, if such conduct would continue to justify disciplinary sanctions under the provisions of this part; (b) No practitioner shall be subject to a disciplinary proceeding under this part based on conduct engaged in before the effective date hereof if such conduct would not have been subject to disciplinary action before such effective date.

Section 41.5 would be revised to make a technical correction. Specifically, the previous reference to section 10.40 has been updated to refer to section 11.116.

TABLE 1—PRINCIPAL SOURCE OF SECTIONS 11.101 THROUGH 11.804

Section	Principal source
§ 11.101	MRPC 1.1
§ 11.102	MRPC 1.2
§ 11.103	MRPC 1.3
§ 11.104	MRPC 1.4
§ 11.105	MRPC 1.5
§ 11.106(a)–(b)	MRPC 1.6(a)–(b)
§ 11.106(c)	USPTO
§ 11.107	MRPC 1.7
§ 11.108	MRPC 1.8
§ 11.109	MRPC 1.9
§ 11.110	MRPC 1.10
§ 11.111	USPTO
§ 11.112	MRPC 1.12
§ 11.113	MRPC 1.13
§ 11.114	MRPC 1.14
§ 11.115(a)–(e)	MRPC 1.15(a)–(e)
§ 11.115(f)(1)	MRCTAR Rule 1
§ 11.115(f)(2)	MRCTAR Rule 2
§ 11.115(f)(3)	MRCTAR Rule 3
§ 11.115(f)(4)–(5)	USPTO
§ 11.116	MRPC 1.16
§ 11.117	MRPC 1.17, USPTO
§ 11.118	MRPC 1.18
§ 11.201	MRPC 2.1
§ 11.203	MRPC 2.3
§ 11.204	MRPC 2.4
§ 11.301	MRPC 3.1
§ 11.302	MRPC 3.2
§ 11.303	MRPC 3.3, USPTO
§ 11.304	MRPC 3.4
§ 11.305	MRPC 3.5
§ 11.307	MRPC 3.7
§ 11.309	MRPC 3.9
§ 11.401	MRPC 4.1
§ 11.402(a)	MRPC 4.2(a)
§ 11.402(b)	DCRPR 4.2(b)
§ 11.403	MRPC 4.3
§ 11.404	MRPC 4.4
§ 11.501	MRPC 5.1
§ 11.502	MRPC 5.2
§ 11.503	MRPC 5.3
§ 11.504	MRPC 5.4; DCRPR 5.4(a)(5)
§ 11.505(a)	MRPC 5.5(a)
§ 11.505(b)	USPTO
§ 11.505(c)	USPTO
§ 11.505(d)	USPTO
§ 11.505(e)	USPTO
§ 11.505(f)	USPTO
§ 11.506	MRPC 5.6
§ 11.507	MRPC 5.7
§ 11.701	MRPC 7.1
§ 11.702	MRPC 7.2
§ 11.703	MRPC 7.3
§ 11.704(a)	MRPC 7.4(a)
§ 11.704(b)	37 CFR 10.34
§ 11.704(d)	MRPC 7.4(d)
§ 11.704(e)	USPTO
§ 11.705	MRPC 7.5
§ 11.801(a)–(c)	MRPC 8.1(a)–(b)
§ 11.801(d)	USPTO
§ 11.802	MRPC 8.2
§ 11.803	MRPC 8.3
§ 11.804(a)–(f)	MRPC 8.4(a)–(f)
§ 11.804(g)	37 CFR 10.23(c)(19), 10.23(c)(20), 11.10(d)
§ 11.804(h)	37 CFR 10.23(c)(5), 11.24
§ 11.901	USPTO

Abbreviations:

DCRPR means the District of Columbia Court of Appeals Rules of Professional Conduct (2007).

MRPC means the Model Rules of Professional Conduct of the American Bar Association (2011).

MRCTAR means the Model Rules for Client Trust Account Records of the American Bar Association (2010).

Rulemaking Considerations

Regulatory Flexibility Act: The Deputy General Counsel, United States Patent and Trademark Office, has certified to the Chief Counsel for Advocacy, Small Business Administration, that the changes in this notice of proposed rulemaking will not have a significant economic impact on a substantial number of small entities (Regulatory Flexibility Act, 5 U.S.C. 605(b)).

The primary effect of this rulemaking is not economic, but rather is to govern the conduct of practitioners in their interactions with their clients and with the Office.

The provisions of this rulemaking that may have a slight economic effect, such as record-keeping requirements, requirements to segregate client funds, and rules governing representation of multiple entities, are consistent with the USPTO's current rules, with which practitioners currently must comply. The existing USPTO Code applies to the approximately 41,000 registered patent practitioners currently appearing before the Office, as well as licensed attorneys practicing in trademark and other non-patent matters before the Office.

These proposed conduct rules continue the fundamental requirements of the Office's existing conduct rules. The existing rules have many broad canons and obligations that the proposed rules fundamentally continue, though with greater specificity and clarity, and with some reorganization. The proposed rules also have greater specificity and clarity as to allowed conduct. The proposed rules, like the existing rules, codify many obligations that already apply to the practice of law under professional and fiduciary duties owed to clients. Because the provisions most likely to have an economic effect are already in place, these provisions do not contribute to the economic impact of this rulemaking.

Furthermore, for most practitioners, this rulemaking will reduce the economic impact of complying with the Office's professional responsibility requirements. Approximately 75 percent of registered practitioners are attorneys. The state bars of 50 U.S. jurisdictions have adopted rules based on the same ABA Model Rules on which these proposed rules are based. Therefore, for most current and prospective practitioners, the proposed rules would provide practitioners greater uniformity and familiarity with their professional conduct obligations before the Office and would harmonize the requirements to practice law before the Office and other jurisdictions. Moreover, for some provisions of this rulemaking, such as the record-keeping requirements in § 11.115(f)(4) and (f)(5), the rules explicitly state that an attorney or agent (employed in the U.S. by a law firm) that complies with the state in which he or she practices will be deemed in compliance with the Office's requirements, as well. Accordingly, this rulemaking streamlines many practitioners' obligations and thus reduces the administrative burden of compliance.

Accordingly, this rulemaking does not have a significant economic effect on a substantial number of small entities.

Executive Order 12866: This notice of proposed rulemaking has been determined to be not significant for purposes of Executive Order 12866 (September 30, 1993).

Executive Order 13563 (Improving Regulation and Regulatory Review): The Office has complied with Executive Order 13563. Specifically, the Office has, to the extent feasible and applicable: (1) Made a reasoned determination that the benefits justify the costs of the rule; (2) tailored the rule to impose the least burden on society consistent with obtaining the regulatory objectives; (3) selected a regulatory approach that maximizes net benefits; (4) specified performance objectives; (5) identified and assessed available alternatives; (6) involved the public in an open exchange of information and perspectives among experts in relevant disciplines, affected stakeholders in the

private sector and the public as a whole, and provided on-line access to the rulemaking docket; (7) attempted to promote coordination, simplification and harmonization across government agencies and identified goals designed to promote innovation; (8) considered approaches that reduce burdens and maintain flexibility and freedom of choice for the public; and (9) ensured the objectivity of scientific and technological information and processes.

Executive Order 13132: This notice of proposed rulemaking does not contain policies with federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 13132 (August 4, 1999).

Executive Order 13175 (Tribal Consultation): This rulemaking will not: (1) Have substantial direct effects on one or more Indian tribes; (2) impose substantial direct compliance costs on Indian tribal governments; or (3) preempt tribal law. Therefore, a tribal summary impact statement is not required under Executive Order 13175 (Nov. 6, 2000).

Executive Order 13211 (Energy Effects): This rulemaking is not a significant energy action under Executive Order 13211 because this rulemaking is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required under Executive Order 13211 (May 18, 2001).

Executive Order 12988 (Civil Justice Reform): This rulemaking meets applicable standards to minimize litigation, eliminate ambiguity, and reduce burden as set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 (Feb. 5, 1996).

Executive Order 13045 (Protection of Children): This rulemaking does not concern an environmental risk to health or safety that may disproportionately affect children under Executive Order 13045 (Apr. 21, 1997).

Executive Order 12630 (Taking of Private Property): This rulemaking will not effect a taking of private property or otherwise have taking implications under Executive Order 12630 (Mar. 15, 1988).

Congressional Review Act: Under the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*), prior to issuing any final rule, the United States Patent and Trademark Office will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the Government Accountability Office. The changes in this notice are not expected to result in an annual effect on the economy of 100 million dollars or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this notice is not expected to result in a ''major rule'' as defined in 5 U.S.C. 804(2).

Unfunded Mandates Reform Act of 1995: The changes in this notice do not involve a Federal intergovernmental mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, of 100 million dollars (as adjusted) or more in any one year, or a Federal private sector mandate that will result in the expenditure by the private sector of 100 million dollars (as adjusted) or more in any one year, and will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995. *See* 2 U.S.C. 1501 *et seq.*

National Environmental Policy Act: This rulemaking will not have any effect on the quality of environment and is thus categorically excluded from review under the National Environmental Policy Act of 1969. *See* 42 U.S.C. 4321 *et seq.*

National Technology Transfer and Advancement Act: The requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) are not applicable because this rulemaking does not contain provisions which involve the use of technical standards.

Paperwork Reduction Act: This notice of proposed rulemaking involves information collection requirements which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). Collection of information activities involved in this notice of proposed rulemaking have been reviewed and previously approved by OMB under OMB control number 0651–0017.

The title, description, and respondent description of the currently approved information collection 0651–0017 are shown below with an estimate of the annual reporting burdens. Included in this estimate is the time for gathering and maintaining the data needed, and completing and reviewing the collection of information. The principal impact of the changes in this notice of proposed rulemaking is to registered practitioners and attorneys practicing before the Office in trademark and other non-patent matters.

OMB Number: 0651–0017.

Title: Practitioner Records Maintenance and Disclosure Before the Patent and Trademark Office.

Form Numbers: None.

Affected Public: Individuals or households, businesses or other for-profit, not-for-profit institutions, Federal Government, and state, local, or tribal governments.

Estimated Number of Likely Respondents: 10,726.

Estimated Total Annual Burden Hours: 11,126 hours.

Needs and Uses: The information in this collection is necessary for the United States Patent and Trademark Office to implement Federal statutes and regulations. *See* 35 U.S.C. 2(b)(2)(D) and 35 U.S.C. 32. These rules will require that registered practitioners and attorneys who appear before the Office maintain complete records of clients, including all funds, securities and other properties of clients coming into his/her possession, and render appropriate accounts to the client regarding such records, as well as report violations of the rules to the Office. Practitioners are mandated by the rules to maintain proper documentation so that they can fully cooperate with an investigation in the event of a report of an alleged violation and that violations are prosecuted as appropriate. The Office has determined that the record keeping and maintenance of such records are excluded from any associated PRA burden as these activities are usual and customary for practitioners representing clients. 5 CFR 1320.3(b)(2). Additionally, in the case of most attorney practitioners, any requirements for collection of information are not presumed to impose a Federal burden as these requirements are also required by a unit of State or local government, namely State bar(s), and would be required even in the absence of any Federal requirement.

5 CFR 1320.3(b)(3). These rules also require, in certain instances, that written consents or certifications be provided. Such consents or certifications have been determined not to constitute information under 5 CFR 1320.3(h)(1).

First, the Office estimates that it will take an individual or organization approximately three hours, on average, to gather, prepare and submit an initial grievance alleging and supporting a violation of professional conduct. The Office estimates that approximately 200 grievances will be received annually

from such respondents. The requirements of 5 CFR Part 1320 do not apply to collections of information by the Office during the conduct of an investigation involving a potential violation of Office professional conduct rules. 5 CFR 1320.4(a)(2). Second, the Office estimates that non-attorney practitioners may, on average, incur a total of thirty minutes of annual burden to notify senders of documents relating to the representation of a client that were inadvertently sent. Proposed 37 CFR 11.404(b). Third, the Office estimates that non-attorney practitioners, may, on average, incur a total of thirty minutes of annual burden to comply with the proposed § 11.703(c) disclosure requirements relating to soliciting professional employment. Of the approximately 41,000 registered practitioners, 10,526 are non-attorneys and therefore considered likely respondents under the PRA for purposes of this information collection.

Comments are invited on: (1) Whether the collection of information is necessary for proper performance of the functions of the agency; (2) the accuracy of the agency's estimate of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information to respondents.

Interested persons are requested to send comments regarding these information collections, including suggestions for reducing this burden, to William R. Covey, Deputy General Counsel for Enrollment and Discipline and Director of the Office of Enrollment and Discipline, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, Virginia 22313–1450, or to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, 725 17th Street, NW., Room 10235, Washington, DC 20503, Attention: Desk Officer for the United States Patent and Trademark Office.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB control number.

List of Subjects

37 CFR Part 1

Administrative practice and procedure, Courts, Freedom of information, Inventions and patents, Reporting and recordkeeping requirements, Small businesses.

37 CFR Parts 2 and 7

Administrative practice and procedure, Trademarks.

37 CFR Part 10

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

37 CFR Part 11

Administrative practice and procedure, Inventions and patents, Lawyers, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, under the authority of 35 U.S.C. 2(b)(2)(A) and (D), 35 U.S.C. 32, the United States Patent and Trademark Office proposes to amend 37 CFR Parts 1, 2, 7, 10, 11, and 41 as follows:

PART 1—RULES OF PRACTICE IN PATENT CASES

1. The authority citation for 37 CFR Part 1 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), unless otherwise noted.

2. Section 1.4 is amended to revise paragraph (d)(4)(i) to read as follows:

§ 1.4 Nature of correspondence and signature requirements.

* * * * *

(d) * * *

(4) *Certifications.* (i) *Section 11.18 certifications:* The presentation to the Office (whether by signing, filing, submitting, or later advocating) of any paper by a party, whether a practitioner or non-practitioner, constitutes a certification under § 11.18(b) of this subchapter. Violations of § 11.18(b)(2) of this subchapter by a party, whether a practitioner or non-practitioner, may result in the imposition of sanctions under § 11.18(c) of this subchapter. Any practitioner violating § 11.18(b) of this subchapter may also be subject to disciplinary action. *See* § 11.18(d) of this subchapter.

* * * * *

3. Section 1.21 is amended to remove and reserve paragraphs (a)(7) and (a)(8) to read as follows:

§ 1.21 Miscellaneous fees and charges.

* * * * *

(a) * * *

(7)–(8) [Reserved]

* * * * *

PART 2—RULES OF PRACTICE IN TRADEMARK CASES

4. The authority citation for 37 CFR Part 2 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

5. Section 2.2 is amended to revise paragraph (c) to read as follows:

§ 2.2 Definitions.

* * * * *

(c) *Director* as used in this chapter, except for part 11, means the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

* * * * *

PART 7—RULES OF PRACTICE IN FILINGS PURSUANT TO THE PROTOCOL RELATING TO THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS

6. The authority citation for 37 CFR Part 7 continues to read as follows:

Authority: 15 U.S.C. 1123, 35 U.S.C. 2, unless otherwise noted.

7. Section 7.25 is amended to revise paragraph (a) to read as follows:

§ 7.25 Sections of part 2 applicable to extension of protection.

(a) Except for §§ 2.22–2.23, 2.130–2.131, 2.160–2.166, 2.168, 2.173, 2.175, 2.181–2.186 and 2.197, all sections in part 2 and all sections in part 11 of this chapter shall apply to an extension of protection of an international registration to the United States, including sections related to proceedings before the Trademark Trial and Appeal Board, unless otherwise stated.

* * * * *

PART 10 [Removed and reserved]

8. Part 10 is removed and reserved.

PART 11—REPRESENTATION OF OTHERS BEFORE THE UNITED STATES PATENT AND TRADEMARK OFFICE

9. The authority citation for 37 CFR Part 11 continues to read as follows:

Authority: 5 U.S.C. 500, 15 U.S.C. 1123, 35 U.S.C. 2(b)(2), 32, 41.

10. Amend § 11.1 to remove the definitions of ''mandatory disciplinary rule'' and ''matter;'' revise the definitions of ''fraud or fraudulent'' and ''practitioner;'' and add in alphabetical order the definitions of ''confirmed in writing,'' ''firm or law firm,'' ''informed consent,'' ''law related services,'' ''partner,'' ''person,'' ''reasonable belief or reasonably believes,'' ''reasonably should know,'' ''screened,'' ''tribunal'' and ''writing or written'' as follows:

§ 11.1 Definitions.

* * * * *

Confirmed in writing, when used in reference to the informed consent of a person, means informed consent that is given in writing by the person or a writing that a practitioner promptly transmits to the person confirming an oral informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the practitioner must obtain or transmit it within a reasonable time thereafter.

* * * * *

Firm or *law firm* means a practitioner or practitioners in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or practitioners employed in a legal services organization or the legal department of a corporation or other organization.

* * * * *

Fraud or *fraudulent* means conduct that involves a misrepresentation of material fact made with intent to deceive or a state of mind so reckless respecting consequences as to be the equivalent of intent, where there is justifiable reliance on the misrepresentation by the party deceived, inducing the party to act thereon, and where there is injury to the party deceived resulting from reliance on the misrepresentation. Fraud also may be established by a purposeful omission or failure to state a material fact, which omission or failure to state makes other statements misleading, and where the other elements of justifiable reliance and injury are established.

* * * * *

Informed consent means the agreement by a person to a proposed course of conduct after the practitioner has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

* * * * *

Law-related services means services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a non-lawyer.

* * * * *

Partner means a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

Person means an individual, a corporation, an association, a trust, a partnership, and any other organization or legal entity.

Practitioner means:

(1) An attorney or agent registered to practice before the Office in patent matters,

(2) An individual authorized under 5 U.S.C. 500(b) or otherwise as provided by § 11.14(a), (b), and (c) of this subchapter, to practice before the Office in trademark matters or other non-patent matters, or

(3) An individual authorized to practice before the Office in a patent case or matters under § 11.9(a) or (b).

* * * * *

Reasonable belief or *reasonably believes* when used in reference to a practitioner means that the practitioner believes the matter in question and that the circumstances are such that the belief is reasonable.

Reasonably should know when used in reference to a practitioner means that a practitioner of reasonable prudence and competence would ascertain the matter in question.

* * * * *

Screened means the isolation of a practitioner from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated practitioner is obligated to protect under these USPTO Rules of Professional Conduct or other law.

* * * * *

Tribunal means the Office, a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

* * * * *

Writing or *written* means a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and email. A ''signed'' writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

11. Revise § 11.2(c), (d) and (e) to read as follows:

§ 11.2 Director of the Office of Enrollment and Discipline.

* * * * *

(c) *Petition to OED Director regarding enrollment or recognition.* Any petition from any action or requirement of the staff of OED reporting to the OED Director shall be taken to the OED Director accompanied by payment of the fee set forth in § 1.21(a)(5)(i) of this chapter. Any such petition not filed within sixty days from the mailing date of the action or notice from which relief is requested will be dismissed as untimely. The filing of a petition will neither stay the period for taking other action which may be running, nor stay other proceedings. The petitioner may file a single request for reconsideration of a decision within thirty days of the date of the decision. Filing a request for reconsideration stays the period for seeking review of the OED Director's decision until a final decision on the request for reconsideration is issued.

(d) *Review of OED Director's decision regarding enrollment or recognition.* A party dissatisfied with a final decision of the OED Director regarding enrollment or recognition shall seek review of the decision upon petition to the USPTO Director accompanied by payment of the fee set forth in § 1.21(a)(5)(ii) of this chapter. By filing such petition to the USPTO Director, the party waives any right to seek reconsideration from the OED Director. Any petition not filed within thirty days after the final decision of the OED Director may be dismissed as untimely. Briefs or memoranda, if any, in support of the petition shall accompany the petition. The petition will be decided on the basis of the record made before the OED Director. The USPTO Director in deciding the petition will consider no new evidence. Copies of documents already of record before the OED Director shall not be submitted with the petition. An oral hearing will not be granted except when considered necessary by the USPTO Director. Any request for reconsideration of the decision of the USPTO Director may be dismissed as untimely if not filed within thirty days after the date of said decision. Only a decision of the USPTO Director regarding denial of a petition constitutes a final decision for the purpose of judicial review.

(e) *Petition to USPTO Director in disciplinary matters.* A party dissatisfied with any action or notice of any employee of the Office of Enrollment and Discipline during or at the conclusion of a disciplinary investigation shall seek review of the action or notice upon petition to the OED Director. A petition from any action or notice of the staff reporting to the OED Director shall be taken to the OED Director. A party dissatisfied with

the OED Director's final decision shall seek review of the final decision upon petition to the USPTO Director to invoke the supervisory authority of the USPTO Director in appropriate circumstances in disciplinary matters. Any petition under this paragraph must contain a statement of the facts involved and the point or points to be reviewed and the action requested. Briefs or memoranda, if any, in support of the petition must accompany the petition. Where facts are to be proven, the proof in the form of affidavits or declarations (and exhibits, if any) must accompany the petition. The OED Director may be directed by the USPTO Director to file a reply to the petition to the USPTO Director, supplying a copy to the petitioner. An oral hearing on petition taken to the USPTO Director will not be granted except when considered necessary by the USPTO Director. The filing of a petition under this paragraph will not stay an investigation, disciplinary proceeding, or other proceedings. Any petition under this part not filed within thirty days of the mailing date of the action or notice from which relief is requested may be dismissed as untimely. Any request for reconsideration of the decision of the OED Director or the USPTO Director may be dismissed as untimely if not filed within thirty days after the date of said decision. Only a decision of the USPTO Director regarding denial of a petition constitutes a final decision for the purpose of judicial review.

12. Remove and reserve § 11.8(d) to read as follows:

§ 11.8 Oath and registration fee.

* * * * *

(d) [Reserved]

13. Revise § 11.11(a), (b), and (c), remove and reserve paragraphs (d)(2) and (d)(4), and revise paragraphs (d)(5), (d)(6), and (e) to read as follows:

§ 11.11 Administrative suspension, inactivation, resignation, and readmission.

(a) *Contact information.* (1) A registered practitioner must notify the OED Director of his or her postal address for his or her office, up to three email addresses where he or she receives email, and business telephone number, as well as every change to any of said addresses or telephone numbers within thirty days of the date of the change. A registered practitioner shall, in addition to any notice of change of address and telephone number filed in individual patent applications, separately file written notice of the change of address or telephone number to the OED Director. A registered practitioner who is an attorney in good standing with the bar of the highest court of one or more States shall provide the OED Director with the State bar identification number associated with each membership. The OED Director shall publish from the roster a list containing the name, postal business addresses, business telephone number, registration number, and registration status as an attorney or agent of each registered practitioner recognized to practice before the Office in patent cases.

(2) A letter may be addressed to any registered practitioner, at the address of which separate notice was last received by the OED Director, for the purpose of ascertaining whether such practitioner desires to remain on the register. Any registered practitioner failing to reply and give any information requested by the OED Director within a time limit specified will be subject to administrative suspension under paragraph (b) of this section.

(b) *Administrative suspension.* (1) Whenever it appears that a registered practitioner or a person granted limited recognition under § 11.9(b) has failed to comply with § 11.8(d) or paragraph (a)(2) of this section, the OED Director shall publish and send a notice to the registered practitioner or person granted limited recognition advising of the noncompliance, the consequence of being administratively suspended under paragraph (b)(5) of this section if noncompliance is not timely remedied, and the requirements for reinstatement under paragraph (f) of this section. The notice shall be published and sent to the registered practitioner or person granted limited recognition by mail to the last postal address furnished under paragraph (a) of this section or by email addressed to the last email addresses furnished under paragraph (a) of this section. The notice shall demand compliance and payment of a delinquency fee set forth in § 1.21(a)(9)(i) of this subchapter within sixty days after the date of such notice.

(2) In the event a registered practitioner or person granted limited recognition fails to comply with the notice of paragraph (b)(1) of this section within the time allowed, the OED Director shall publish and send in the manner provided for in paragraph (b)(1) of this section to the registered practitioner or person granted limited recognition a Rule to Show Cause why his or her registration or recognition should not be administratively suspended, and he or she no longer be permitted to practice before the Office in patent matters or in any way hold himself or herself out as being registered or authorized to practice before the Office in patent matters. The OED Director shall file a copy of the Rule to Show Cause with the USPTO Director.

(3) Within 30 days of the OED Director's sending the Rule to Show Cause identified in paragraph (b)(2) of this section, the registered practitioner or person granted limited recognition may file a response to the Rule to Show Cause with the USPTO Director. The response must set forth the factual and legal bases why the person should not be administratively suspended. The registered practitioner or person granted limited recognition shall serve the OED Director with a copy of the response at the time it is filed with the USPTO Director. Within ten days of receiving a copy of the response, the OED Director may file a reply with the USPTO Director that includes documents demonstrating that the notice identified in paragraph (b)(1) of this section was published and sent to the practitioner in accordance with paragraph (b)(1) of this section. A copy of the reply by the OED Director shall be served on the registered practitioner or person granted limited recognition. When acting on the Rule to Show Cause, if the USPTO Director determines that there are no genuine issues of material fact regarding the Office's compliance with the notice requirements under this section or the failure of the person to pay the requisite fees, the USPTO Director shall enter an order administratively suspending the registered practitioner or person granted limited recognition. Otherwise, the USPTO Director shall enter an appropriate order dismissing the Rule to Show Cause. Nothing herein shall permit an administratively suspended registered practitioner or person granted limited recognition to seek a stay of the administrative suspension during the pendency of any review of the USPTO Director's final decision.

(4) [Reserved]

(5) An administratively suspended registered practitioner or person granted limited recognition is subject to investigation and discipline for his or her conduct prior to, during, or after the period he or she was administratively suspended.

(6) An administratively suspended registered practitioner or person granted limited recognition is prohibited from practicing before the Office in patent cases while administratively suspended. A registered practitioner or person granted limited recognition who knows he or she has been administratively suspended under this section will be subject to discipline for failing to comply with the provisions of this paragraph (b).

(c) *Administrative inactivation.* (1) Any registered practitioner who shall become employed by the Office shall comply with § 11.116 for withdrawal from the applications, patents, and trademark matters wherein he or she represents an applicant or other person, and notify the OED Director in writing of said employment on the first day of said employment. The name of any registered practitioner employed by the Office shall be endorsed on the roster as administratively inactive. Upon separation from the Office, the administratively inactive practitioner may request reactivation by completing and filing an application, Data Sheet, signing a written undertaking required by § 11.10, and paying the fee set forth in § 1.21(a)(1)(i) of this subchapter. An administratively inactive practitioner remains subject to the provisions of the USPTO Rules of Professional Conduct and to proceedings and sanctions under §§ 11.19 through 11.58 for conduct that violates a provision of the USPTO Rules of Professional Conduct prior to or during employment at the Office. If, within 30 days after separation from the Office, the registered practitioner does not request active status or another status, the registered practitioner will be endorsed on the roster as voluntarily inactive and be subject to the provisions of paragraph (d) of this section.

(2) Any registered practitioner who is a judge of a court of record, full-time court commissioner, U.S. bankruptcy judge, U.S. magistrate judge, or a retired judge who is eligible for temporary judicial assignment and is not engaged in the practice of law may request, in writing, that his or her name be endorsed on the roster as administratively inactive. Upon acceptance of the request, the OED Director shall endorse the name of the practitioner as administratively inactive. Following separation from the bench, the practitioner may request restoration to active status by completing and filing an application, Data Sheet, and signing a written undertaking required by § 11.10.

(d) * * *

(2) [Reserved]

* * * * *

(4) [Reserved]

(5) A registered practitioner in voluntary inactive status is prohibited from practicing before the Office in patent cases while in voluntary inactive status. A registered practitioner in voluntary inactive status will be subject to discipline for failing to comply with the provisions of this paragraph. Upon acceptance of the request for voluntary inactive status, the practitioner must comply with the provisions of § 11.116.

(6) Any registered practitioner whose name has been endorsed as voluntarily inactive pursuant to paragraph (d)(1) of this section and is not under investigation and not subject to a disciplinary proceeding may be restored to active status on the register as may be appropriate provided that the practitioner files a written request for restoration, a completed application for registration on a form supplied by the OED Director furnishing all requested information and material, including information and material pertaining to the practitioner's moral character and reputation under § 11.7(a)(2)(i) during the period of inactivation, a declaration or affidavit attesting to the fact that the practitioner has read the most recent revisions of the patent laws and the rules of practice before the Office, and pays the fees set forth in §§ 1.21(a)(7)(iii) and (iv) of this subchapter.

(e) *Resignation.* A registered practitioner or a practitioner recognized under § 11.14(c), who is not under investigation under § 11.22 for a possible violation of the USPTO Rules of Professional Conduct, subject to discipline under §§ 11.24 or 11.25, or a practitioner against whom probable cause has been found by a panel of the Committee on Discipline under § 11.23(b), may resign by notifying the OED Director in writing that he or she desires to resign. Upon acceptance in writing by the OED Director of such notice, that registered practitioner or practitioner under § 11.14 shall no longer be eligible to practice before the Office in patent matters but shall continue to file a change of address for five years thereafter in order that he or she may be located in the event information regarding the practitioner's conduct comes to the attention of the OED Director or any grievance is made about his or her conduct while he or she engaged in practice before the Office. The name of any registered practitioner whose resignation is accepted shall be removed from the register, endorsed as resigned, and notice thereof published in the Official Gazette. Upon acceptance of the resignation by the OED Director, the registered practitioner must comply with the provisions of § 11.116.

* * * * *

14. Revise § 11.19(a) and (b)(1)(iv) to read as follows:

§ 11.19 Disciplinary jurisdiction; Jurisdiction to transfer to disability inactive status.

(a) All practitioners engaged in practice before the Office; all practitioners administratively suspended; all practitioners registered to practice before the Office in patent cases; all practitioners inactivated; all practitioners authorized under § 11.6(d) to take testimony; and all practitioners transferred to disability inactive status, reprimanded, suspended, or excluded from the practice of law by a duly constituted authority, including by the USPTO Director, are subject to the disciplinary jurisdiction of the Office. Practitioners who have resigned shall also be subject to such jurisdiction with respect to conduct undertaken prior to the resignation and conduct in regard to any practice before the Office following the resignation. A person not registered or recognized to practice before the Office is also subject to the disciplinary authority of the Office if the person provides or offers to provide any legal services before the Office.

(b) * * *

(1) * * *

(iv) Violation of any USPTO Rule of Professional Conduct; or

* * * * *

15. Revise § 11.20(a)(4) and (b) to read as follows:

§ 11.20 Disciplinary sanctions; Transfer to disability inactive status.

(a) * * *

(4) *Probation.* Probation may be imposed *in lieu* of or in addition to any other disciplinary sanction. Any conditions of probation shall be stated in writing in the order imposing probation. The order shall also state whether, and to what extent, the practitioner shall be required to notify clients of the probation. Violation of any condition of probation shall be cause for imposition of the disciplinary sanction. Imposition of the disciplinary sanction predicated upon violation of probation shall occur only after an order to show cause why the disciplinary sanction should not be imposed is resolved adversely to the practitioner.

(b) *Conditions imposed with discipline.* When imposing discipline, the USPTO Director may condition reinstatement upon the practitioner making restitution, successfully completing a professional responsibility course or examination, or any other condition deemed appropriate under the circumstances.

* * * * *

16. Revise § 11.21 to read as follows:

§ 11.21 Warnings.

A warning is neither public nor a disciplinary sanction. The OED Director may conclude an investigation with the issuance of a warning. The warning shall contain a brief statement of facts and USPTO Rules of Professional Conduct relevant to the facts.

17. In § 11.22 revise the section heading, paragraph (f)(2), and the introductory text of paragraph (i) to read as follows:

§ 11.22 Disciplinary investigations.

* * * * *

(f) * * *

(2) The OED Director may request information and evidence regarding possible grounds for discipline of a practitioner from a non-grieving client either after obtaining the consent of the practitioner or upon a finding by a Contact Member of the Committee on Discipline, appointed in accordance with § 11.23(d), that good cause exists to believe that the possible ground for discipline alleged has occurred with respect to non-grieving clients. Neither a request for, nor disclosure of, such information shall constitute a violation of any USPTO Rules of Professional Conduct.

* * * * *

(i) *Closing investigation.* The OED Director shall terminate an investigation and decline to refer a matter to the Committee on Discipline if the OED Director determines that:

* * * * *

18. Revise § 11.24(e) to read as follows:

§ 11.24 Reciprocal discipline.

* * * * *

(e) *Adjudication in another jurisdiction or Federal agency or program.* In all other respects, a final adjudication in another jurisdiction or Federal agency or program that a practitioner, whether or not admitted in that jurisdiction, has been guilty of misconduct shall establish a prima facie case by clear and convincing evidence that the practitioner has engaged in misconduct under § 11.804.

* * * * *

19. Revise § 11.25(a) to read as follows:

§ 11.25 Interim suspension and discipline based upon conviction of committing a serious crime.

(a) *Notification of OED Director.* Upon being convicted of a crime in a court of the United States, any State, or a foreign country, a practitioner subject to the disciplinary jurisdiction of the Office shall notify the OED Director in writing of the same within thirty days from the date of such conviction. Upon being advised or learning that a practitioner subject to the disciplinary jurisdiction of the Office has been convicted of a crime, the OED Director shall make a preliminary determination whether the crime constitutes a serious crime warranting interim suspension. If the crime is a serious crime, the OED Director shall file with the USPTO Director proof of the conviction and request the USPTO Director to issue a notice and order set forth in paragraph (b)(2) of this section. The OED Director shall in addition, without Committee on Discipline authorization, file with the USPTO Director a complaint against the practitioner complying with § 11.34 predicated upon the conviction of a serious crime. If the crime is not a serious crime, the OED Director shall process the matter in the same manner as any other information or evidence of a possible violation of any USPTO Rule of Professional Conduct coming to the attention of the OED Director.

* * * * *

20. Revise § 11.32 to read as follows:

§ 11.32 Instituting a disciplinary proceeding.

If after conducting an investigation under § 11.22(a), the OED Director is of the opinion that grounds exist for discipline under § 11.19(b), the OED Director, after complying where necessary with the provisions of 5 U.S.C. 558(c), may convene a meeting of a panel of the Committee on Discipline. If convened, the panel of the Committee on Discipline shall then determine as specified in § 11.23(b) whether there is probable cause to bring disciplinary charges. If the panel of the Committee on Discipline determines that probable cause exists to bring charges, the OED Director may institute a disciplinary proceeding by filing a complaint under § 11.34.

21. In § 11.34 revise the introductory text of paragraph (a), and paragraphs (a)(1) and (b) to read as follows:

§ 11.34 Complaint.

(a) A complaint instituting a disciplinary proceeding shall:

(1) Name the person who is the subject of the complaint who may then be referred to as the ''respondent'';

* * * * *

(b) A complaint will be deemed sufficient if it fairly informs the respondent of any grounds for discipline, and where applicable, the USPTO Rules of Professional Conduct that form the basis for the disciplinary proceeding so that the respondent is able to adequately prepare a defense.

* * * * *

22. Revise § 11.35(a)(2)(ii) and (a)(4)(ii) to read as follows:

§ 11.35 Service of complaint.

(a) * * *

(2) * * *

(ii) A respondent who is not registered at the last address for the respondent known to the OED Director.

* * * * *

(4) * * *

(ii) A respondent who is not registered at the last address for the respondent known to the OED Director.

* * * * *

23. In § 11.54 revise paragraph (a)(2) and the introductory text of paragraph (b) to read as follows:

§ 11.54 Initial decision of hearing officer.

(a) * * *

(2) An order of default judgment, of suspension or exclusion from practice, of reprimand, of probation or an order dismissing the complaint. The order also may impose any conditions deemed appropriate under the circumstances. The hearing officer shall transmit a copy of the decision to the OED Director and to the respondent. After issuing the decision, the hearing officer shall transmit the entire record to the OED Director. In the absence of an appeal to the USPTO Director, the decision of the hearing officer, including a default judgment, will, without further proceedings, become the decision of the USPTO Director thirty days from the date of the decision of the hearing officer.

(b) The initial decision of the hearing officer shall explain the reason for any default judgment, reprimand, suspension, exclusion, or probation, and shall explain any conditions imposed with discipline. In determining any sanction, the following four factors must be considered if they are applicable:

* * * * *

24. In § 11.58 revise the introductory text of paragraph (b)(2) and paragraph (f)(1)(ii) to read as follows:

§ 11.58 Duties of disciplined or resigned practitioner, or practitioner on disability inactive status.

* * * * *

(b) * * *

(2) Within forty-five days after entry of the order of suspension, exclusion, or of acceptance of resignation, the practitioner shall file with the OED Director an affidavit of compliance certifying that the practitioner has fully complied with the provisions of the order, this section, and with § 11.116 for withdrawal from representation. Appended to the affidavit of compliance shall be:

* * * * *

(f) * * *

(1) * * *

(ii) Shows by clear and convincing evidence that the excluded, suspended

or resigned practitioner, or practitioner transferred to disability inactive status has complied with the provisions of this section and all USPTO Rules of Professional Conduct; and

* * * * *

§ 11.61 [Removed and reserved]

25. Section 11.61 is removed and reserved.

26. Part 11 is amended to add Subpart D to read as follows:

Subpart D—USPTO Rules of Professional Conduct

11.100 [Reserved]

Client-Practitioner Relationship

11.101 Competence.
11.102 Scope of representation and allocation of authority between client and practitioner.
11.103 Diligence.
11.104 Communication.
11.105 Fees.
11.106 Confidentiality of information.
11.107 Conflict of interest: Current clients.
11.108 Conflict of interest: Current clients: Specific rules.
11.109 Duties to former clients.
11.110 Imputation of conflicts of interest: General rule.
11.111 Former or current Federal Government employees.
11.112 Former judge, arbitrator, mediator or other third-party neutral.
11.113 Organization as client.
11.114 Client with diminished capacity.
11.115 Safekeeping property.
11.116 Declining or terminating representation.
11.117 Sale of law practice.
11.118 Duties to prospective client.
11.119–11.200 [Reserved]

Counselor

11.201 Advisor.
11.202 [Reserved]
11.203 Evaluation for use by third persons.
11.204 Practitioner serving as third-party neutral.
11.205–11.300 [Reserved]

Advocate

11.301 Meritorious claims and contentions.
11.302 Expediting proceedings.
11.303 Candor toward the tribunal.
11.304 Fairness to opposing party and counsel.
11.305 Impartiality and decorum of the tribunal.
11.306 [Reserved]
11.307 Practitioner as witness.
11.308 [Reserved]
11.309 Advocate in nonadjudicative proceedings.
11.310–11.400 [Reserved]

Transactions With Persons Other Than Clients

11.401 Truthfulness in statements to others.
11.402 Communication with person represented by a practitioner.
11.403 Dealing with unrepresented person.
11.404 Respect for rights of third persons.
11.405–11.500 [Reserved]

Law Firms and Associations

11.501 Responsibilities of partners, managers, and supervisory practitioners.
11.502 Responsibilities of a subordinate practitioner.
11.503 Responsibilities regarding non-practitioner assistants.
11.504 Professional independence of a practitioner.
11.505 Unauthorized practice of law.
11.506 Restrictions on right to practice.
11.507 Responsibilities regarding law-related services.
11.508–11.700 [Reserved]

Information About Legal Services

11.701 Communications concerning a practitioner's services.
11.702 Advertising.
11.703 Direct contact with prospective clients.
11.704 Communication of fields of practice and specialization.
11.705 Firm names and letterheads.
11.706–11.800 [Reserved]

Maintaining the Integrity of the Profession

11.801 Registration, recognition and disciplinary matters.
11.802 Judicial and legal officials.
11.803 Reporting professional misconduct.
11.804 Misconduct.
11.805–11.900 [Reserved]
11.901 Savings clause.

Subpart D—USPTO Rules of Professional Conduct

§ 11.100 [Reserved]

Client-Practitioner Relationship

§ 11.101 Competence.

A practitioner shall provide competent representation to a client. Competent representation requires the legal, scientific, and technical knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

§ 11.102 Scope of representation and allocation of authority between client and practitioner.

(a) Subject to paragraphs (c) and (d) of this section, a practitioner shall abide by a client's decisions concerning the objectives of representation and, as required by § 11.104, shall consult with the client as to the means by which they are to be pursued. A practitioner may take such action on behalf of the client as is impliedly authorized to carry out the representation. A practitioner shall abide by a client's decision whether to settle a matter.

(b) [Reserved].

(c) A practitioner may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A practitioner shall not counsel a client to engage, or assist a client, in conduct that the practitioner knows is criminal or fraudulent, but a practitioner may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law.

§ 11.103 Diligence.

A practitioner shall act with reasonable diligence and promptness in representing a client.

§ 11.104 Communication.

(a) A practitioner shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the USPTO Rules of Professional Conduct;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) Keep the client reasonably informed about the status of the matter;

(4) Promptly comply with reasonable requests for information from the client; and

(5) Consult with the client about any relevant limitation on the practitioner's conduct when the practitioner knows that the client expects assistance not permitted by the USPTO Rules of Professional Conduct or other law.

(b) A practitioner shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

§ 11.105 Fees.

(a) A practitioner shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the practitioner;

(3) The fee customarily charged in the locality for similar legal services;

(4) The amount involved and the results obtained;

(5) The time limitations imposed by the client or by the circumstances;

(6) The nature and length of the professional relationship with the client;

(7) The experience, reputation, and ability of the practitioner or practitioners performing the services; and

(8) Whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the practitioner will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the practitioner in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the practitioner shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) [Reserved].

(e) A division of a fee between practitioners who are not in the same firm may be made only if:

(1) The division is in proportion to the services performed by each practitioner or each practitioner assumes joint responsibility for the representation;

(2) The client agrees to the arrangement, including the share each practitioner will receive, and the agreement is confirmed in writing; and

(3) The total fee is reasonable.

§ 11.106 Confidentiality of information.

(a) A practitioner shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, the disclosure is permitted by paragraph (b) of this section, or the disclosure is required by paragraph (c) of this section.

(b) A practitioner may reveal information relating to the representation of a client to the extent the practitioner reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a crime, fraud, or inequitable conduct before the Office that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the practitioner's services;

(3) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime, fraud, or inequitable conduct before the Office in furtherance of which the client has used the practitioner's services;

(4) To secure legal advice about the practitioner's compliance with the USPTO Rules of Professional Conduct;

(5) To establish a claim or defense on behalf of the practitioner in a controversy between the practitioner and the client, to establish a defense to a criminal charge or civil claim against the practitioner based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the practitioner's representation of the client; or

(6) To comply with other law or a court order.

(c) A practitioner shall disclose to the Office information necessary to comply with applicable duty of disclosure provisions.

§ 11.107 Conflict of interest: Current clients.

(a) Except as provided in paragraph (b) of this section, a practitioner shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person or by a personal interest of the practitioner.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a) of this section, a practitioner may represent a client if:

(1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) The representation does not involve the assertion of a claim by one client against another client represented by the practitioner in the same litigation or other proceeding before a tribunal; and

(4) Each affected client gives informed consent, confirmed in writing.

§ 11.108 Conflict of interest: Current clients: Specific rules.

(a) A practitioner shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) The transaction and terms on which the practitioner acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) The client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction; and

(3) The client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the practitioner's role in the transaction, including whether the practitioner is representing the client in the transaction.

(b) A practitioner shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by the USPTO Rules of Professional Conduct.

(c) A practitioner shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the practitioner or a person related to the practitioner any substantial gift unless the practitioner or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the practitioner or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a practitioner shall not make or negotiate an agreement giving the practitioner literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A practitioner shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) A practitioner may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) A practitioner representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A practitioner shall not accept compensation for representing a client from one other than the client unless:

(1) The client gives informed consent;

(2) There is no interference with the practitioner's independence of professional judgment or with the client-practitioner relationship; and

(3) Information relating to representation of a client is protected as required by § 11.106.

(g) A practitioner who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, unless each client gives informed consent, in writing signed by the client. The practitioner's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A practitioner shall not:

(1) Make an agreement prospectively limiting the practitioner's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) Settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A practitioner shall not acquire a proprietary interest in the cause of action, subject matter of litigation, or a proceeding before the Office which the practitioner is conducting for a client, except that the practitioner may:

(1) Acquire a lien authorized by law to secure the practitioner's fee or expenses;

(2) Contract with a client for a reasonable contingent fee in a civil case; and

(3) In a patent case or a proceeding before the Office, take an interest in the patent as part or all of his or her fee.

(j) [Reserved].

(k) While practitioners are associated in a firm, a prohibition in paragraphs (a) through (i) of this section that applies to any one of them shall apply to all of them.

§ 11.109 Duties to former clients.

(a) A practitioner who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A practitioner shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the practitioner formerly was associated had previously represented a client

(1) Whose interests are materially adverse to that person; and

(2) About whom the practitioner had acquired information protected by §§ 11.106 and 11.109(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A practitioner who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) Use information relating to the representation to the disadvantage of the former client except as the USPTO Rules of Professional Conduct would permit or require with respect to a client, or when the information has become generally known; or

(2) Reveal information relating to the representation except as the USPTO Rules of Professional Conduct would permit or require with respect to a client.

§ 11.110 Imputation of conflicts of interest: General rule.

(a) While practitioners are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by §§ 11.107 or 11.109, unless

(1) The prohibition is based on a personal interest of the disqualified practitioner and does not present a significant risk of materially limiting the representation of the client by the remaining practitioners in the firm; or

(2) The prohibition is based upon § 11.109(a) or (b), and arises out of the disqualified practitioner's association with a prior firm, and

(i) The disqualified practitioner is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) Written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this section, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened practitioner's compliance with the USPTO Rules of Professional Conduct; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) Certifications of compliance with the USPTO Rules of Professional Conduct and with the screening procedures are provided to the former client by the screened practitioner and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

(b) When a practitioner has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated practitioner and not currently represented by the firm, unless:

(1) The matter is the same or substantially related to that in which the formerly associated practitioner represented the client; and

(2) Any practitioner remaining in the firm has information protected by §§ 11.106 and 11.109(c) that is material to the matter.

(c) A disqualification prescribed by this section may be waived by the affected client under the conditions stated in § 11.107.

(d) The disqualification of practitioners associated in a firm with former or current Federal Government lawyers is governed by § 11.111.

§ 11.111 Former or current Federal Government employees.

A practitioner who is a former or current Federal Government employee shall not engage in any conduct which is contrary to applicable Federal ethics law, including conflict of interest statutes and regulations of the department, agency or commission formerly or currently employing said practitioner.

§ 11.112 Former judge, arbitrator, mediator or other third-party neutral.

(a) Except as stated in paragraph (d) of this section, a practitioner shall not represent anyone in connection with a matter in which the practitioner participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A practitioner shall not negotiate for employment with any person who is involved as a party or as practitioner for

a party in a matter in which the practitioner is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A practitioner serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or practitioner involved in a matter in which the clerk is participating personally and substantially, but only after the practitioner has notified the judge, or other adjudicative officer.

(c) If a practitioner is disqualified by paragraph (a) of this section, no practitioner in a firm with which that practitioner is associated may knowingly undertake or continue representation in the matter unless:

(1) The disqualified practitioner is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) Written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this section.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

§ 11.113 Organization as client.

(a) A practitioner employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a practitioner for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the practitioner shall proceed as is reasonably necessary in the best interest of the organization. Unless the practitioner reasonably believes that it is not necessary in the best interest of the organization to do so, the practitioner shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d) of this section, if

(1) Despite the practitioner's efforts in accordance with paragraph (b) of this section the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) The practitioner reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the practitioner may reveal information relating to the representation whether or not § 11.106 permits such disclosure, but only if and to the extent the practitioner reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) of this section shall not apply with respect to information relating to a practitioner's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A practitioner who reasonably believes that he or she has been discharged because of the practitioner's actions taken pursuant to paragraphs (b) or (c) of this section, or who withdraws under circumstances that require or permit the practitioner to take action under either of those paragraphs, shall proceed as the practitioner reasonably believes necessary to assure that the organization's highest authority is informed of the practitioner's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a practitioner shall explain the identity of the client when the practitioner knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the practitioner is dealing.

(g) A practitioner representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of § 11.107. If the organization's consent to the dual representation is required by § 11.107, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

§ 11.114 Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the practitioner shall, as far as reasonably possible, maintain a normal client-practitioner relationship with the client.

(b) When the practitioner reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the practitioner may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected under § 11.106. When taking protective action pursuant to paragraph (b) of this section, the practitioner is impliedly authorized under § 11.106(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

§ 11.115 Safekeeping property.

(a) A practitioner shall hold property of clients or third persons that is in a practitioner's possession in connection with a representation separate from the practitioner's own property. Funds shall be kept in a separate account maintained in the state where the practitioner's office is situated, or elsewhere with the consent of the client or third person. Where the practitioner's office is situated in a foreign country, funds shall be kept in a separate account maintained in that foreign country or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the practitioner and shall be preserved for a period of five years after termination of the representation.

(b) A practitioner may deposit the practitioner's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A practitioner shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the practitioner only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a practitioner shall promptly notify the client or third person. Except as stated in this section or otherwise permitted by law or by agreement with the client, a practitioner shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly

render a full accounting regarding such property.

(e) When in the course of representation a practitioner is in possession of property in which two or more persons (one of whom may be the practitioner) claim interests, the property shall be kept separate by the practitioner until the dispute is resolved. The practitioner shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) All separate accounts for clients or third persons kept by a practitioner must also comply with the following provisions:

(1) *Required records.* The records to be kept include:

(i) Receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee and purpose of each disbursement;

(ii) Ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(iii) Copies of retainer and compensation agreements with clients;

(iv) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(v) Copies of bills for legal fees and expenses rendered to clients;

(vi) Copies of records showing disbursements on behalf of clients;

(vii) The physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(viii) Records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn and the date and the time the transfer was completed;

(ix) Copies of monthly trial balances and quarterly reconciliations of the client trust accounts maintained by the practitioner; and

(x) Copies of those portions of client files that are reasonably related to client trust account transactions.

(2) *Client trust account safeguards.* With respect to client trust accounts required by paragraphs (a) through (e) of this section:

(i) Only a practitioner or a person under the direct supervision of the practitioner shall be an authorized signatory or authorize transfers from a client trust account;

(ii) Receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and

(iii) Withdrawals shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.

(3) *Availability of records.* Records required by paragraph (f)(1) of this section may be maintained by electronic, photographic, or other media provided that they otherwise comply with paragraphs (f)(1) and (f)(2) of this section and that printed copies can be produced. These records shall be readily accessible to the practitioner.

(4) *Lawyers.* The records kept by a lawyer are deemed to be in compliance with this section if the types of records that are maintained meet the recordkeeping requirements of a state in which the lawyer is licensed and in good standing, the recordkeeping requirements of the state where the lawyer's principal place of business is located, or the recordkeeping requirements of this section.

(5) *Patent agents and persons granted limited recognition who are employed in the United States by a law firm.* The records kept by a law firm employing one or more registered patent agents or persons granted limited recognition under § 11.9 are deemed to be in compliance with this section if the types of records that are maintained meet the recordkeeping requirements of the state where at least one practitioner of the law firm is licensed and in good standing, the recordkeeping requirements of the state where the law firm's principal place of business is located, or the recordkeeping requirements of this section.

§ 11.116 Declining or terminating representation.

(a) Except as stated in paragraph (c) of this section, a practitioner shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the USPTO Rules of Professional Conduct or other law;

(2) The practitioner's physical or mental condition materially impairs the practitioner's ability to represent the client; or

(3) The practitioner is discharged.

(b) Except as stated in paragraph (c) of this section, a practitioner may withdraw from representing a client if:

(1) Withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) The client persists in a course of action involving the practitioner's services that the practitioner reasonably believes is criminal or fraudulent;

(3) The client has used the practitioner's services to perpetrate a crime or fraud;

(4) A client insists upon taking action that the practitioner considers repugnant or with which the practitioner has a fundamental disagreement;

(5) The client fails substantially to fulfill an obligation to the practitioner regarding the practitioner's services and has been given reasonable warning that the practitioner will withdraw unless the obligation is fulfilled;

(6) The representation will result in an unreasonable financial burden on the practitioner or has been rendered unreasonably difficult by the client; or

(7) Other good cause for withdrawal exists.

(c) A practitioner must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a practitioner shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a practitioner shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The practitioner may retain papers relating to the client to the extent permitted by other law.

§ 11.117 Sale of law practice.

A practitioner or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in a geographic area in which the practice has been conducted;

(b)(1) Except as provided in paragraph (b)(2) of this section, the entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(2) To the extent the practice or the area of practice involves patent proceedings before the Office, that practice or area of practice may be sold only to one or more registered practitioners or law firms that include at least one registered practitioner;

(c)(1) The seller gives written notice to each of the seller's clients regarding:

(i) The proposed sale;

(ii) The client's right to retain other counsel or to take possession of the file; and

(iii) The fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days after receipt of the notice.

(2) If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file; and

(d) The fees charged clients shall not be increased by reason of the sale.

§ 11.118 Duties to prospective client.

(a) A person who discusses with a practitioner the possibility of forming a client-practitioner relationship with respect to a matter is a prospective client.

(b) Even when no client-practitioner relationship ensues, a practitioner who has had discussions with the prospective client shall not use or reveal information learned in the consultation, except as § 11.109 would permit with respect to information of a former client.

(c) A practitioner subject to paragraph (b) of this section shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the practitioner received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d) of this section. If a practitioner is disqualified from representation under this paragraph, no practitioner in a firm with which that practitioner is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d) of this section.

(d) When the practitioner has received disqualifying information as defined in paragraph (c) of this section, representation is permissible if:

(1) Both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) The practitioner who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) The disqualified practitioner is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) Written notice is promptly given to the prospective client.

§§ 11.119–11.200 [Reserved]

Counselor

§ 11.201 Advisor.

In representing a client, a practitioner shall exercise independent professional judgment and render candid advice.

§ 11.202 [Reserved]

§ 11.203 Evaluation for use by third persons.

(a) A practitioner may provide an evaluation of a matter affecting a client for the use of someone other than the client if the practitioner reasonably believes that making the evaluation is compatible with other aspects of the practitioner's relationship with the client.

(b) When the practitioner knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the practitioner shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized or required in connection with a report of an evaluation regarding a patent, trademark or other non-patent law matter before the Office, information relating to the evaluation is otherwise protected by § 11.106.

§ 11.204 Practitioner serving as third-party neutral.

(a) A practitioner serves as a third-party neutral when the practitioner assists two or more persons who are not clients of the practitioner to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the practitioner to assist the parties to resolve the matter.

(b) A practitioner serving as a third-party neutral shall inform unrepresented parties that the practitioner is not representing them. When the practitioner knows or reasonably should know that a party does not understand the practitioner's role in the matter, the practitioner shall explain the difference between the practitioner's role as a third-party neutral and a practitioner's role as one who represents a client.

§§ 11.205–11.300 [Reserved]

Advocate

§ 11.301 Meritorious claims and contentions.

A practitioner shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification or reversal of existing law.

§ 11.302 Expediting proceedings.

A practitioner shall make reasonable efforts to expedite proceedings before a tribunal consistent with the interests of the client.

§ 11.303 Candor toward the tribunal.

(a) A practitioner shall not knowingly:

(1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the practitioner;

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel in an *inter partes* proceeding, or fail to disclose such authority in an *ex parte* proceeding before the Office if such authority is not otherwise disclosed; or

(3) Offer evidence that the practitioner knows to be false. If a practitioner, the practitioner's client, or a witness called by the practitioner, has offered material evidence and the practitioner comes to know of its falsity, the practitioner shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A practitioner may refuse to offer evidence that the practitioner reasonably believes is false.

(b) A practitioner who represents a client in a proceeding before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) of this section continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by § 11.106.

(d) In an *ex parte* proceeding, a practitioner shall inform the tribunal of

all material facts known to the practitioner that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(e) In a proceeding before the Office, a practitioner shall disclose to the Office information necessary to comply with applicable duty of disclosure provisions.

§ 11.304 Fairness to opposing party and counsel.

A practitioner shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A practitioner shall not counsel or assist another person to do any such act;

(b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) Make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) In a proceeding before a tribunal, allude to any matter that the practitioner does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) The person is a relative or an employee or other agent of a client; and

(2) The practitioner reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

§ 11.305 Impartiality and decorum of the tribunal.

A practitioner shall not:

(a) Seek to influence a judge, hearing officer, administrative law judge, administrative patent judge, administrative trademark judge, juror, prospective juror, employee or officer of the Office, or other official by means prohibited by law;

(b) Communicate *ex parte* with such a person during the proceeding unless authorized to do so by law, rule or court order; or

(c) [Reserved]

(d) Engage in conduct intended to disrupt any proceeding before a tribunal.

§ 11.306 [Reserved]

§ 11.307 Practitioner as witness.

(a) A practitioner shall not act as advocate at a proceeding before a tribunal in which the practitioner is likely to be a necessary witness unless:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case;

(3) Disqualification of the practitioner would work substantial hardship on the client; or

(4) The testimony relates to a duty of disclosure.

(b) A practitioner may act as advocate in a proceeding before a tribunal in which another practitioner in the practitioner's firm is likely to be called as a witness unless precluded from doing so by §§ 11.107 or 11.109.

§ 11.308 [Reserved]

§ 11.309 Advocate in nonadjudicative proceedings.

A practitioner representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of §§ 11.303(a) through (c), 11.304 (a) through (c), and 11.305.

§§ 11.310–11.400 [Reserved]

Transactions With Persons Other Than Clients

§ 11.401 Truthfulness in statements to others.

In the course of representing a client, a practitioner shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by § 11.106.

§ 11.402 Communication with person represented by a practitioner.

(a) In representing a client, a practitioner shall not communicate about the subject of the representation with a person the practitioner knows to be represented by another practitioner in the matter, unless the practitioner has the consent of the other practitioner or is authorized to do so by law, rule, or a court order.

(b) This section does not prohibit communication by a practitioner with government officials who are otherwise represented by counsel and who have the authority to redress the grievances of the practitioner's client, provided that, if the communication relates to a matter for which the government official is represented, then prior to the communication the practitioner must disclose to such government official both the practitioner's identity and the fact that the practitioner represents a party with a claim against the government.

§ 11.403 Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by a practitioner, a practitioner shall not state or imply that the practitioner is disinterested. When the practitioner knows or reasonably should know that the unrepresented person misunderstands the practitioner's role in the matter, the practitioner shall make reasonable efforts to correct the misunderstanding. The practitioner shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the practitioner knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

§ 11.404 Respect for rights of third persons.

(a) In representing a client, a practitioner shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A practitioner who receives a document relating to the representation of the practitioner's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

§§ 11.405–11.500 [Reserved]

Law Firms and Associations

§ 11.501 Responsibilities of partners, managers, and supervisory practitioners.

(a) A practitioner who is a partner in a law firm, and a practitioner who individually or together with other practitioners possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all practitioners in the firm conform to the USPTO Rules of Professional Conduct.

(b) A practitioner having direct supervisory authority over another

practitioner shall make reasonable efforts to ensure that the other practitioner conforms to the USPTO Rules of Professional Conduct.

(c) A practitioner shall be responsible for another practitioner's violation of the USPTO Rules of Professional Conduct if:

(1) The practitioner orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The practitioner is a partner or has comparable managerial authority in the law firm in which the other practitioner practices, or has direct supervisory authority over the other practitioner, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

§ 11.502 Responsibilities of a subordinate practitioner.

(a) A practitioner is bound by the USPTO Rules of Professional Conduct notwithstanding that the practitioner acted at the direction of another person.

(b) A subordinate practitioner does not violate the USPTO Rules of Professional Conduct if that practitioner acts in accordance with a supervisory practitioner's reasonable resolution of an arguable question of professional duty.

§ 11.503 Responsibilities regarding non-practitioner assistants.

With respect to a non-practitioner assistant employed or retained by or associated with a practitioner:

(a) A practitioner who is a partner, and a practitioner who individually or together with other practitioners possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the practitioner;

(b) A practitioner having direct supervisory authority over the non-practitioner assistant shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the practitioner; and

(c) A practitioner shall be responsible for conduct of such a person that would be a violation of the USPTO Rules of Professional Conduct if engaged in by a practitioner if:

(1) The practitioner orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) The practitioner is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

§ 11.504 Professional independence of a practitioner.

(a) A practitioner or law firm shall not share legal fees with a non-practitioner, except that:

(1) An agreement by a practitioner with the practitioner's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the practitioner's death, to the practitioner's estate or to one or more specified persons;

(2) A practitioner who purchases the practice of a deceased, disabled, or disappeared practitioner may, pursuant to the provisions of § 11.117, pay to the estate or other representative of that practitioner the agreed-upon purchase price;

(3) A practitioner or law firm may include non-practitioner employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) A practitioner may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained or recommended employment of the practitioner in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.

(b) A practitioner shall not form a partnership with a non-practitioner if any of the activities of the partnership consist of the practice of law.

(c) A practitioner shall not permit a person who recommends, employs, or pays the practitioner to render legal services for another to direct or regulate the practitioner's professional judgment in rendering such legal services.

(d) A practitioner shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-practitioner owns any interest therein, except that a fiduciary representative of the estate of a practitioner may hold the stock or interest of the practitioner for a reasonable time during administration;

(2) A non-practitioner is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) A non-practitioner has the right to direct or control the professional judgment of a practitioner.

§ 11.505 Unauthorized practice of law.

A practitioner shall not:

(a) Practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction;

(b) Practice before the Office in patent, trademark, or other non-patent law in violation of this subchapter;

(c) Assist a person who is not a member of the bar of a jurisdiction in the performance of an activity that constitutes the unauthorized practice of law, or assist a person who is not a registered patent practitioner in the performance of an activity that constitutes unauthorized patent practice before the Office;

(d) Aid a suspended, disbarred or excluded practitioner in the unauthorized practice of patent, trademark, or other non-patent law before the Office;

(e) Aid a suspended, disbarred or excluded attorney in the unauthorized practice of law in any other jurisdiction; or

(f) Practice before the Office in trademark matters if the practitioner was registered as a patent agent after January 1, 1957, and is not an attorney.

§ 11.506 Restrictions on right to practice.

A practitioner shall not participate in offering or making:

(a) A partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a practitioner to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) An agreement in which a restriction on the practitioner's right to practice is part of the settlement of a client controversy.

§ 11.507 Responsibilities regarding law-related services.

A practitioner shall be subject to the USPTO Rules of Professional Conduct with respect to the provision of law-related services if the law-related services are provided:

(a) By the practitioner in circumstances that are not distinct from the practitioner's provision of legal services to clients; or

(b) In other circumstances by an entity controlled by the practitioner individually or with others if the practitioner fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-practitioner relationship do not exist.

§§ 11.508–11.700 [Reserved]

Information About Legal Services

§ 11.701 Communications concerning a practitioner's services.

A practitioner shall not make a false or misleading communication about the practitioner or the practitioner's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

§ 11.702 Advertising.

(a) Subject to the requirements of §§ 11.701 and 11.703, a practitioner may advertise services through written, recorded or electronic communication, including public media.

(b) A practitioner shall not give anything of value to a person for recommending the practitioner's services except that a practitioner may:

(1) Pay the reasonable costs of advertisements or communications permitted by this section;

(2) [Reserved];

(3) Pay for a law practice in accordance with § 11.117; and

(4) Refer clients to another practitioner or a non-practitioner professional pursuant to an agreement not otherwise prohibited under the USPTO Rules of Professional Conduct that provides for the other person to refer clients or customers to the practitioner, if:

(i) The reciprocal referral agreement is not exclusive, and

(ii) The client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this section shall include the name and office address of at least one practitioner or law firm responsible for its content.

§ 11.703 Direct contact with prospective clients.

(a) A practitioner shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the practitioner's doing so is the practitioner's pecuniary gain, unless the person contacted:

(1) Is a practitioner; or

(2) Has a family, close personal, or prior professional relationship with the practitioner.

(b) A practitioner shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a) of this section, if:

(1) The prospective client has made known to the practitioner a desire not to be solicited by the practitioner; or

(2) The solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a practitioner soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words ''Advertising Material'' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2) of this section.

(d) Notwithstanding the prohibitions in paragraph (a) of this section, a practitioner may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the practitioner that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

§ 11.704 Communication of fields of practice and specialization.

(a) A practitioner may communicate the fact that the practitioner does or does not practice in particular fields of law.

(b) A registered practitioner who is an attorney may use the designation ''Patents,'' ''Patent Attorney,'' ''Patent Lawyer,'' ''Registered Patent Attorney,'' or a substantially similar designation. A registered practitioner who is not an attorney may use the designation ''Patents,'' ''Patent Agent,'' ''Registered Patent Agent,'' or a substantially similar designation. Unless authorized by § 11.14(b), a registered patent agent shall not hold himself or herself out as being qualified or authorized to practice before the Office in trademark matters or before a court.

(c) [Reserved].

(d) A practitioner shall not state or imply that a practitioner is certified as a specialist in a particular field of law, unless:

(1) The practitioner has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) The name of the certifying organization is clearly identified in the communication.

(e) An individual granted limited recognition under § 11.9 may use the designation ''Limited Recognition.''

§ 11.705 Firm names and letterheads.

(a) A practitioner shall not use a firm name, letterhead or other professional designation that violates § 11.701. A trade name may be used by a practitioner in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of § 11.701.

(b) [Reserved].

(c) The name of a practitioner holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the practitioner is not actively and regularly practicing with the firm.

§ 11.706–11.800 [Reserved]

Maintaining the Integrity of the Profession

§ 11.801 Registration, recognition and disciplinary matters.

An applicant for registration or recognition to practice before the Office, or a practitioner in connection with an application for registration or recognition, or a practitioner in connection with a disciplinary or reinstatement matter, shall not:

(a) Knowingly make a false statement of material fact, or

(b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or

(c) Knowingly fail to respond to a lawful demand or request for information from an admissions or disciplinary authority, except that the provisions of this section do not require disclosure of information otherwise protected by § 11.106, or

(d) Fail to cooperate with the Office of Enrollment and Discipline in an investigation of any matter before it.

§ 11.802 Judicial and legal officials.

(a) A practitioner shall not make a statement that the practitioner knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A practitioner who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

§ 11.803 Reporting professional misconduct.

(a) A practitioner who knows that another practitioner has committed a violation of the USPTO Rules of Professional Conduct that raises a substantial question as to that practitioner's honesty, trustworthiness or fitness as a practitioner in other respects, shall inform the OED Director and any other appropriate professional authority.

(b) A practitioner who knows that a judge, hearing officer, administrative law judge, administrative patent judge, or administrative trademark judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the individual's fitness for office shall inform the appropriate authority.

(c) The provisions of this section do not require disclosure of information otherwise protected by § 11.106 or information gained while participating in an approved lawyers assistance program.

§ 11.804 Misconduct.

It is professional misconduct for a practitioner to:

(a) Violate or attempt to violate the USPTO Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) Commit a criminal act that reflects adversely on the practitioner's honesty, trustworthiness or fitness as a practitioner in other respects;

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) Engage in conduct that is prejudicial to the administration of justice;

(e) State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the USPTO Rules of Professional Conduct or other law;

(f) Knowingly assist a judge, hearing officer, administrative law judge, administrative patent judge, administrative trademark judge, or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) Knowingly assist an officer or employee of the Office in conduct that is a violation of applicable rules of conduct or other law;

(h) Be publicly disciplined on ethical or professional misconduct grounds by any duly constituted authority of:

(1) A State,

(2) The United States, or

(3) The country in which the practitioner resides; or

(i) Engage in other conduct that adversely reflects on the practitioner's fitness to practice before the Office.

§ 11.805–11.900 [Reserved]

§ 11.901 Savings clause.

(a) A disciplinary proceeding based on conduct engaged in prior to the effective date of these regulations may be instituted subsequent to such effective date, if such conduct would continue to justify disciplinary sanctions under the provisions of this part.

(b) No practitioner shall be subject to a disciplinary proceeding under this part based on conduct engaged in before the effective date hereof if such conduct would not have been subject to disciplinary action before such effective date.

PART 41—PRACTICE BEFORE THE PATENT TRIAL AND APPEAL BOARD

27. The authority citation for 37 CFR part 41 continues to read as follows:

Authority: 35 U.S.C. 2(b)(2), 3(a)(2)(A), 21, 23, 32, 41, 134, and 135.

28. Revise § 41.5(c) to read as follows:

§ 41.5 Counsel.

* * * * *

(c) *Withdrawal.* Counsel may not withdraw from a proceeding before the Board unless the Board authorizes such withdrawal. See § 11.116 of this subchapter regarding conditions for withdrawal.

* * * * *

Dated: October 10, 2012.

David J. Kappos,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2012–25355 Filed 10–17–12; 8:45 am]

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FEDERAL REGISTER

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Part III

The President

Proclamation 8889—Blind Americans Equality Day, 2012

Federal Register
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Thursday, October 18, 2012

Presidential Documents

Title 3—

The President

Proclamation 8889 of October 15, 2012

Blind Americans Equality Day, 2012

By the President of the United States of America

A Proclamation

As business leaders and public advocates, teachers and scientists, musicians and athletes, and in countless other ways, blind and visually impaired Americans have profoundly enriched every part of our national life. Today, we celebrate their innumerable contributions, and we recommit to guaranteeing equal access, equal opportunity, and equal respect for all Americans.

My Administration is working to ensure people with disabilities have full access to the education, information, and job training they need. Over the past year, we have continued to implement the 21st Century Communications and Video Accessibility Act, which makes it easier for people who are deaf, blind, or visually impaired to take advantage of today's cutting-edge technologies—including home and mobile broadband. As part of that implementation, the Federal Communications Commission has established video description standards for television stations that help ensure programming is accessible for blind and visually impaired Americans. And in keeping with the promise of equal access to technology under Section 508 of the Rehabilitation Act, the Department of Justice reported last month on our progress toward making Federal resources fully accessible and offered new recommendations to further improve compliance throughout the Federal Government.

We are also striving to open new pathways for blind and visually impaired Americans to pursue careers in all fields, including science, technology, engineering, and mathematics (STEM). To provide more opportunities for students to achieve in math and science classes, the Department of Education is promoting effective learning materials for blind and visually impaired students. This year, the White House honored 14 individuals, including several who are blind, as Champions of Change for their work to expand educational and employment opportunities for people with disabilities in STEM fields. Their example affirms that when the playing field is level, people with disabilities are equally capable of excelling in these economically vital professions.

When the American people have the chance to succeed, we can achieve extraordinary things. Today, we renew our commitment to innovative projects and initiatives that will propel us further toward full access, inclusion, and opportunity for blind and visually impaired Americans.

By joint resolution approved on October 6, 1964 (Public Law 88–628, as amended), the Congress designated October 15 of each year as ''White Cane Safety Day'' to recognize the contributions of Americans who are blind or have low vision. Today, let us recommit to strengthening our Union and ensuring we remain a Nation where all our people, including those living with disabilities, have every opportunity to achieve their dreams.

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 15, 2012, as Blind Americans Equality Day. I call upon public officials, business and community leaders, educators, librarians, and Americans across the

country to observe this day with appropriate ceremonies, activities, and programs.

IN WITNESS WHEREOF, I have hereunto set my hand this fifteenth 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. 2012–25867
Filed 10–17–12; 11:15 am]
Billing code 3295–F3

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H.R. 1272/P.L. 112–179
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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Billfish Conservation Act of 2012 (Oct. 5, 2012; 126 Stat. 1422)

H.R. 3556/P.L. 112–184
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
Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012 (Oct. 5, 2012; 126 Stat. 1427)

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)

H.R. 5512/P.L. 112–188
Divisional Realignment Act of 2012 (Oct. 5, 2012; 126 Stat. 1433)

H.R. 6189/P.L. 112–189
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H.R. 6215/P.L. 112–190
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)

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